

GRETCHEN WHITMER
GOVERNOR

STATE OF MICHIGAN
DEPARTMENT OF LICENSING AND REGULATORY AFFAIRS
MICHIGAN OFFICE OF ADMINISTRATIVE HEARINGS AND RULES

ORLENE HAWKS
DIRECTOR

[REDACTED]
[REDACTED]
[REDACTED] MI [REDACTED]

Date Mailed: February 3, 2020
MOAHR Docket No.: 19-011879
Agency No.: [REDACTED]
Petitioner: [REDACTED]

ADMINISTRATIVE LAW JUDGE: Colleen Lack

DECISION AND ORDER

Following Petitioner's request for a hearing, this matter is before the undersigned Administrative Law Judge pursuant to MCL 400.9 and 400.37; 7 CFR 273.15 to 273.18; 42 CFR 431.200 *et seq*; 42 CFR 438.400 *et seq*; and Mich Admin Code, R 792.11002.

After due notice, a hearing was held on December 18, 2019. [REDACTED] the Petitioner appeared on her own behalf. [REDACTED], A&D Homecare, and [REDACTED] [REDACTED], daughter, appeared as witnesses for Petitioner. Florence Scott-Emuakpor, Appeals Review Officer (ARO), represented the Department of Health and Human Services (Department). Alisyn Crawford, Level of Care Determination (LOCD) Policy Specialist, appeared as a witness for the Department. From the skilled nursing facility, Cynthia Weller, Minimum Data Set (MDS) Coordinator, and Marissa Cox, Social Work (SW) Director, appeared as witnesses for the Department.

During the hearing proceeding, the Department's Hearing Summary packet was admitted as Exhibit A, pp. i-56.

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]-year-old Medicaid beneficiary, date of birth [REDACTED] 1950, and resident of [REDACTED], a nursing facility. (Exhibit A, p. 24)

2. Medicaid policy requires nursing facility residents to meet the medical/functional criteria initially and on an ongoing basis. The Michigan Medicaid Nursing Facility Level of Care Determination (LOCD) medical/functional criteria include seven domains of need: Activities of Daily Living, Cognitive Performance, Physician Involvement, Treatments and Conditions, Skilled Rehabilitation Therapies, Behavior, and Service Dependency. There are also Frailty Criteria. *Medicaid Provider Manual, Nursing Facility, Coverages, July 1,2019, pp. 7-9* and *Medicaid Provider Manual, Nursing Facility Nursing Facility Level of Care Determination, July 1,2019, pp. 1-14*.
3. A subsequent LOCD must be completed when there has been a significant change in condition that may affect the resident's current medical/functional eligibility status. *Medicaid Provider Manual, Nursing Facility Nursing Facility Level of Care Determination Chapter, July 1,2019, p. 5*.
4. Petitioner was admitted to [REDACTED] on January 8, 2019. (MDS Coordinator Testimony)
5. On January 9, 2019, Petitioner was assessed under the LOCD evaluation tool and was found to be eligible for nursing facility placement based upon qualifying through Door 1. (Exhibit A, pp. 16-23)
6. On August 15, 2019, Petitioner was re-assessed under the LOCD evaluation tool and was found to be ineligible for nursing facility placement based on her failure to qualify through one of the seven doors. (Exhibit A, pp. 24-31)
7. On August 22, 2019, an Advance Action Notice was issued to Petitioner of the determination that she was no longer eligible for nursing facility level services based on the LOCD. (Attachment to Hearing Request)
8. On November 12, 2019, the Michigan Office of Administrative Hearings and Rules (MOAHR) received Petitioner's hearing request. (Hearing Request)

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.

Federal regulations require that Medicaid pay for services only for those beneficiaries who meet specified level of care criteria. In accordance with the federal regulations the Michigan Department of Health and Human Services ("MDHHS") implemented functional/medical eligibility criteria for Medicaid-funded long-term services and

supports. This includes 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. Nursing facility residents must also meet Pre-Admission Screening/Annual Resident Review requirements. The Medicaid Provider Manual, Nursing Facilities Chapter, Coverages portion, Section 5 Beneficiary Eligibility and Admission Process, lists the policy for admission and continued eligibility process. *Medicaid Provider Manual, Nursing Facility, Coverages, July 1, 2019, pp. 7-11.* The Medicaid Provider Manual, Nursing Facility Nursing Facility Level of Care Determination Chapter outlines functional/medical criteria requirements for Medicaid-funded long-term services and supports. and *Medicaid Provider Manual, Nursing Facility Nursing Facility Level of Care Determination, July 1, 2019, pp. 1-14.*

The Michigan Medicaid Nursing Facility Level of Care Determination (LOCD) is a “point in time” assessment; that is, it determines the individual’s functional eligibility at the time of the assessment. *Medicaid Provider Manual, Nursing Facility Nursing Facility Level of Care Determination, July 1, 2019, p. 1.* The LOCD must be conducted prior to or the day of an individual’s admission to a nursing facility or enrollment in MI Choice Waiver Program, PACE, or MI Health Link Home and Community Based Services (HCBS) Waiver Program to ensure reimbursement for a Medicaid eligible beneficiary. *Medicaid Provider Manual, Nursing Facility Nursing Facility Level of Care Determination, July 1, 2019, p. 3.* The Medicaid long term care supports and services providers must ensure that individual meet the LOCD criteria on an ongoing basis and are responsible for conducting a new LOCD if there is a significant change in the beneficiary’s condition. *Medicaid Provider Manual, Nursing Facility Nursing Facility Level of Care Determination, July 1, 2019, p. 5.*

The LOCD Assessment Tool consists of seven-service entry Doors. The doors are: Activities of Daily Living, Cognitive Performance, Physician Involvement, Treatments and Conditions, Skilled Rehabilitative Therapies, Behavior, and Service Dependency. In order to be found eligible for Medicaid Nursing Facility placement, the Petitioner must meet the requirements of at least one Door.

Door 1 **Activities of Daily Living (ADLs)**

The LOCD Field Definition Guidelines (Exhibit A, pp. 34-38), provides that the Petitioner must score at least six points to qualify under Door 1. The criteria consider the type and level of assistance provided by others during the last seven days.

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

For the August 15, 2019, LOCD, Petitioner was scored as supervision with bed mobility, transfers, and toilet use; and independent with eating. Petitioner scored a total of 4 points, which is not sufficient to qualify through Door 1. (Exhibit A, pp. 25-27; MDS Coordinator Testimony)

Door 2
Cognitive Performance

The LOCD Field Definition Guidelines (Exhibit A, pp. 38-42), provides that to qualify under Door 2 Petitioner must:

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."

Regarding Door 2, Petitioner was scored as short-term memory okay, modified independent with cognitive skills for daily decision making, and able to make herself understood. Therefore, Petitioner did not meet the criteria to qualify through Door 2 for the August 15, 2019, LOCD. (Exhibit A, p. 27; MDS Coordinator Testimony)

Door 3
Physician Involvement

The LOCD Field Definition Guidelines (Exhibit A, pp. 42-43), indicates that to qualify under Door 3, Petitioner must:

Scoring Door 3: The applicant must meet either of the following to qualify under Door 3.

1. At least one Physician Visit for examination AND at least four Physician Order changes in the last 14 days, OR
2. At least two Physician Visits for examinations AND at least two Physician Order changes in the last 14 days.

Petitioner was scored as having no days with physician visit exam(s) and 1 day with physician order change(s) within the 14-day lookback period for this Door. Petitioner did not have sufficient days with physician visit examinations and physician order changes during the relevant review period. Accordingly, Petitioner did not meet the criteria to qualify through Door 3. (Exhibit A, pp. 27-28; MDS Coordinator Testimony)

Door 4 Treatments and Conditions

The LOCD Field Definition Guidelines (Exhibit A, pp. 43-44) indicates that in order to qualify under Door 4, the Petitioner must receive, within 14 days of the assessment date, any of the following health treatments or have demonstrated any of the following health conditions. Additionally, the Petitioner would no longer qualify when the condition(s) have been resolved, or no longer affect functioning or the need for care.

- 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

Scoring Door 4: The applicant must score “yes” in at least one of the nine categories and have a continuing need to qualify under Door 4.

Petitioner was scored as no for each of the listed health conditions and treatments during the 14-day review period. Accordingly, Petitioner did not meet the criteria to qualify through Door 4. (Exhibit A, p. 28; MDS Coordinator Testimony)

Door 5 Skilled Rehabilitation Therapies

The LOCD Field Definition Guidelines (Exhibit A, pp. pp. 44-45), addresses skilled rehabilitation therapies (Speech Therapy (ST), Occupational Therapy (OT), and Physical Therapy (PT), and provides that to qualify under Door 5 Petitioner must:

Scoring Door 5: The individual must have required at least 45 minutes of active PT, OT, or ST (scheduled or delivered) in the last 7 days and continues to require skilled rehabilitation therapies to qualify under Door 5.

Petitioner was scored as not having any minutes of physical, occupational, or physical therapy (administered/delivered or scheduled) during the relevant time period. Accordingly, Petitioner did not meet the criteria to qualify through Door 5. (Exhibit A, p. 28; MDS Coordinator Testimony)

Door 6 **Behavior**

The LOCD Field Definition Guidelines (Exhibit A, pp. 45-47), provides a listing of behaviors recognized under Door 6 (Wandering, Verbally Abusive, Physically Abusive, Socially Inappropriate/Disruptive, and Resists Care) as well as problem conditions (Delusions and Hallucinations), and provides that to qualify under Door 6 Petitioner must:

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.

Petitioner was scored as not displaying any of the listed behavioral symptoms or problem conditions during the relevant time period. Accordingly, Petitioner did not meet the criteria to qualify through Door 6. (Exhibit A, pp. 28-29; MDS Coordinator Testimony)

Door 7 **Service Dependency**

The LOCD Field Definition Guidelines (Exhibit A, p. 48), addresses service dependency. This section refers to applicants who are currently residents of a Medicaid-certified nursing facility, or a current participant in MI Choice, PACE or MI Health Link. Door 7 consists of three criteria. All three criteria must be met to qualify under Door 7. The 'One Consecutive Year' requirement is defined as being a resident of a Medicaid Certified Nursing Facility or participant of MI Choice, PACE or MI Health Link for at least one year. You may combine time across these programs; however, there cannot be a break in coverage between, or during, the beneficiary's stay. The three criteria to qualify under Door 7 are:

1. Participant for at least one consecutive year (no break in coverage)

2. Requires ongoing services to maintain current functional status
3. No other community, residential, or informal services are available to meet the needs (i.e. only the current setting can provide service needs).

Scoring Door 7: The applicant must be a current participant, demonstrate service dependency and meet all three criteria to qualify under Door 7.

The MDS Coordinator testified that Petitioner had not been a participant for one consecutive year at the time of the August 15, 2019, LOCD. Petitioner was admitted to the facility on January 8, 2019. (Exhibit A, pp. 29-30; MDS Coordinator Testimony) The LOCD Policy Specialist confirmed that Petitioner does not have any prior LOCDs, which would have been required had Petitioner been a participant in MI Choice, PACE, MI Health Link, or any Medicaid-certified nursing facility. (LOCD Policy Specialist Testimony) Accordingly, Petitioner could not meet the criteria to qualify through Door 7 at the time of the August 15, 2019, LOCD assessment. As Petitioner did not meet the one consecutive year requirement, there is no need to address the remainder of the Door 7 criteria.

LOCD Secondary Review

Additionally, there is an LOCD secondary review process. Medicaid Provider Manual, Nursing Facility Level of Care Determination Chapter states:

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.

The LOCD Secondary Review Process is conducted as follows:

- A Secondary Review may be initiated by the provider, individual or their legal representative after the qualified and licensed health professional issues an adverse action notice based on a finding of ineligibility. The provider, individual or their legal representative may request a Secondary Review from

MDHHS or its designee. The individual will have three business days to make a request following written notice of the adverse action.

- In the action notice, the provider who conducted the ineligible LOCD must provide the individual with information on how to timely request a Secondary Review following an ineligible LOCD.
- Following the individual's request for review, the MDHHS designee will contact the provider who conducted the LOCD and inform them to upload documentation in CHAMPS for review.
- The provider who conducted the LOCD will upload the relevant documentation in CHAMPS within one business day of being notified to do so.
- The MDHHS designee will review the documentation, obtain information from the individual or their legal representative, if requested, and notify the provider and the individual or their legal representative of the decision.
- If the Secondary Review determines that the individual is eligible, MDHHS or its designee will contact the provider and the individual or their legal representative.
- If the Secondary Review determines that the individual is ineligible, MDHHS or its designee will issue an adverse action notice and inform the individual of their appeal rights.
- MDHHS or its designee will enter the appropriate LOCD in CHAMPS.

*Medicaid Provider Manual,
Nursing Facility Level of Care Determination,
July 1, 2019, pp. 13-14*

Door 8 addresses Frailty Criteria:

4.8 DOOR 8: FRAILTY

MDHHS or its designee determined that the beneficiary is eligible for Medicaid LTSS services based upon the Frailty Criteria. Individuals who exhibit certain behaviors and treatment characteristics that indicate frailty may be admitted or enrolled to LTSS programs requiring an LOCD. The individual needs to trigger one element of this criteria to be considered for Frailty. Refer to the Michigan Medicaid Nursing Facility Level of Care Determination Exception Process on the MDHHS website for more information. (Refer

to the Directory Appendix for website information.) For the MI Health Link program, the Frailty Criteria are applied by the Integrated Care Organization.

*Medicaid Provider Manual,
Nursing Facility Level of Care Determination,
July 1, 2019, p. 10*

There was no evidence of a request for an LOCD secondary review for the August 15, 2019, LOCD. The August 22, 2019, Advance Action Notice advised Petitioner of the opportunity to request a secondary review. (Attachment to Hearing Request)

Petitioner did not know if she disagreed with the scoring for any of the seven Doors for the August 15, 2019, LOCD. Petitioner's witnesses did not have any questions or anything to add. (Petitioner, A&D Homecare, and Daughter Testimony)

This Administrative Law Judge is limited to reviewing the Department's determination under the existing policy and cannot change or make exceptions to the policy. Medicaid policy requires nursing facility residents to meet the LOCD criteria initially and on an ongoing basis. Overall, the evidence does not establish that Petitioner met the criteria for any of the seven Doors at the time of the August 15, 2019, LOCD and no LOCD secondary review was requested. Accordingly, the Department properly determined that Petitioner was not eligible for Medicaid to cover nursing facility services at that time.

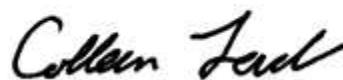
DECISION AND ORDER

The Administrative Law Judge, based on the above Findings of Fact and Conclusions of Law, decides that the Department correctly determined that the Petitioner did not require Medicaid Nursing Facility Level of Care at the time of the August 15, 2019, LOCD.

IT IS, THEREFORE, ORDERED that:

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

CL/dh



Colleen Lack
Administrative Law Judge
for Robert Gordon, 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 Office of Administrative Hearings and Rules (MOAHR).

A party may request a rehearing or reconsideration of this Order if the request is received by MOAHR 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. MOAHR will not review any response to a request for rehearing/reconsideration.

A written request may be mailed or faxed to MOAHR. If submitted by fax, the written request must be faxed to (517) 763-0155; Attention: MOAHR Rehearing/Reconsideration Request.

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

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

DHHS Department Rep.

M. Carrier
Appeals Section
PO Box 30807
Lansing, MI 48933

Agency Representative

Florence Scott-Emuakpor
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DHHS -Dept Contact

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