

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: March 12, 2020
MOAHR Docket No.: 19-012830
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 January 30, 2020. [REDACTED], the Petitioner, appeared on his own behalf. [REDACTED], Sister, appeared as a witness for Petitioner. Alison Pool, Appeals Review Officer (ARO), represented the Department of Health and Human Services (Department). Michael Daeschlein, Manager Long Term Care Policy Section, appeared as a witness for the Department. From Michigan Peer Review Organization (MPRO), Melody Petrul, Director Medical Review Services; and Earlean Greenfield, Long Term Care Nurse Reviewer, appeared as witnesses for the Department. From the skilled nursing facility, Paris Everett, Social Worker (SW); Diana Dixon, Minimum Data Set (MDS) Nurse; and Mary Jill Weinger, Administrator, appeared as witnesses for the Department.

During the hearing proceeding, the Department's Hearing Summary packet was admitted as Exhibit A, pp. i-65; and Petitioner's Hearing Request was admitted as Exhibit 1, pp. 1-3.

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] 1959, 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 or about February 28, 2019. (MDS Nurse Testimony)
5. On February 28, 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 September 12, 2019, Petitioner was re-assessed under the LOCD evaluation tool and was found to be ineligible for nursing facility placement based on his failure to qualify through one of the seven doors. (Exhibit A, pp. 24-31)
7. On September 13, 2019, Petitioner contacted MPRO and requested a secondary review. (Director Medical Review Services Testimony)
8. On September 19, 2019, MPRO re-assessed Petitioner under the LOCD evaluation tool and Frailty criteria. Petitioner was found to be ineligible for nursing facility placement based on his failure to qualify through one of the seven doors and he did not meet Frailty Criteria. (Exhibit A, pp. 32-39)

9. On September 19, 2019, an Advance Action Notice was issued to Petitioner of the determination that he was no longer eligible for nursing facility level services based on the LOCD. (Exhibit 1, p. 3)
10. On December 13, 2019, the Michigan Office of Administrative Hearings and Rules (MOAHR) received Petitioner's hearing request. (Exhibit 1, pp. 1-3)

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. 43-47), 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 September 12, 2019, LOCD, Petitioner was scored as supervision with bed mobility and toilet use; and independent with transfers and eating. Petitioner scored a total of 4 points, which is not sufficient to qualify through Door 1. (Exhibit A, pp. 25-27; MDS Nurse Testimony)

Door 2
Cognitive Performance

The LOCD Field Definition Guidelines (Exhibit A, pp. 48-51), 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, independent with cognitive skills for daily decision making, and able to make himself understood. Therefore, Petitioner did not meet the criteria to qualify through Door 2. (Exhibit A, p. 27; MDS Nurse Testimony)

Door 3 **Physician Involvement**

The LOCD Field Definition Guidelines (Exhibit A, pp. 51-52), 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 5 days 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 Nurse Testimony)

Door 4 **Treatments and Conditions**

The LOCD Field Definition Guidelines (Exhibit A, pp. 52-53) 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 Nurse Testimony)

Door 5 Skilled Rehabilitation Therapies

The LOCD Field Definition Guidelines (Exhibit A, pp. pp. 53-54), 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 Nurse Testimony)

Door 6 Behavior

The LOCD Field Definition Guidelines (Exhibit A, pp. 54-56), 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 Nurse Testimony)

Door 7
Service Dependency

The LOCD Field Definition Guidelines (Exhibit A, p. 57), 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 Nurse testified that Petitioner had not been a participant for one consecutive year at the time of the September 12, 2019, LOCD. Petitioner was admitted to the facility on or about February 29, 2019. Petitioner was not a resident of a Medicaid Certified Nursing Facility or participant of MI Choice, PACE or MI Health Link immediately prior to his admission to this facility. (MDS Nurse Testimony) Accordingly, Petitioner could not meet the criteria to qualify through Door 7 at the time of the September 12, 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

On September 13, 2019, Petitioner contacted MPRO and requested a secondary review. MPRO then obtained Petitioner's records from the facility. (Director Medical Review Services Testimony)

On September 19, 2019, MPRO re-assessed Petitioner under the LOCD evaluation tool and Frailty criteria. There were some differences in the scoring for Doors 1 and 3. Specifically Petitioner was scored as Independent for all four of the ADLs considered under Door 1; and was scored as having 1 day with physician order changes under Door 3. However, these changes did not affect the outcome, Petitioner did not meet the criteria to qualify through any of the seven Doors of the LOCD. Regarding Door 8, the Director Medical Review Services went through the review of the Frailty criteria for Petitioner. Overall, MPRO found that Petitioner did not meet the LOCD or Frailty criteria. (Exhibit A, pp. 32-39; Director Medical Review Services Testimony)

Petitioner's testimony indicated there have been changes since the September 2019 determinations. For example, Petitioner fell twice in the two weeks prior to this hearing. Petitioner is also no longer self-catheterizing. Petitioner explained that he has a severe diabetic ulcer on his left foot that would need to be situated before he could move. They are also talking about amputating another toe on Petitioner's left foot. Petitioner would need to be in an area where he can have the care he needs to heal. Petitioner is homeless and has no assistance whatsoever. (Petitioner Testimony)

Petitioner's sister testified that Petitioner previously had a partial foot amputation and his diabetes has been out of control. Petitioner does not have any social security benefits, but they are trying to get that in place. Petitioner's sister is not in a position to be able to help Petitioner. Petitioner's sister is afraid Petitioner will lose his whole foot or end up dying if he gets an infection. Petitioner needs to be in an environment that looks after his wounds, takes him to doctor appointments, and gives him the medications he needs. Their mother just died in December and they are both very depressed about that. (Sister 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 September 12, 2019, LOCD and did not meet the Frailty criteria. Accordingly, the Department properly determined that Petitioner was not eligible for Medicaid to cover nursing facility services at that time.

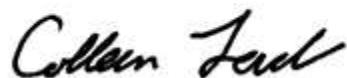
As discussed, if there has been a significant change in condition that may affect Petitioner's current medical/functional eligibility status, a new LOCD could be completed. (Manager Long Term Care Policy Section Testimony)

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 September 12, 2019, LOCd.

IT IS, THEREFORE, ORDERED that:

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



Colleen Lack
Administrative Law Judge
for Robert Gordon, Director
Department of Health and Human Services

CL/dh

TICE 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

Allison Pool
222 N Washington Square
Suite 100
Lansing, MI 48933

Petitioner

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

DHHS -Dept Contact

Jennifer Cornell
400 S. Pine, 6th Floor
Lansing, MI 48909