[redacted]
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[redacted] MI [redacted]

Date Mailed: February 25, 2020
MOAHR Docket No.: 20-000069
Agency No.: [redacted]
Petitioner: [redacted]

ADMINISTRATIVE LAW JUDGE: Robert J. Meade

DECISION AND ORDER

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

After due notice, a hearing was held on February 25, 2020. [redacted], Petitioner's sister and Power of Attorney, appeared and testified on Petitioner's behalf.

Theresa Root, Appeals Review Officer, appeared and testified on behalf of Respondent, Michigan Department of Health and Human Services (MDHHS or Department). Michael Daeschlein, Manager, Long Term Care Policy Section; Amanda Castellano, RN, Director of Nursing; and Yvonne Kendall, RN, Nurse Reviewer, MPRO, appeared as witnesses for the Department.

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 [redacted]-year-old Medicaid beneficiary, born [redacted] 1946, and current resident of [redacted]. (Exhibit B; Testimony)

2. On April 6, 2016, Petitioner was assessed by T[redacted] under the Nursing Facility (NF) Level of Care Determination (LOCD) and found to be eligible to receive Medicaid reimbursed NF services under Door 1 – Activities of Daily Living. (Exhibit B, Testimony)

3. On December 6, 2019, Petitioner was again assessed under the Nursing Facility (NF) Level of Care Determination (LOCD) based on a significant change in

condition 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 she 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 C; Testimony)

4. On December 17, 2019, Petitioner requested a secondary review from the Michigan Peer Review Organization (MPRO). MPRO determined that Petitioner did not meet the secondary review criteria, including Door 8. (Exhibit D; Testimony)

5. On December 17, 2019, Petitioner was advised of the Department's action via Advance Action Notice. (Exhibit 1; Testimony)

6. On January 13, 2020, Petitioner's request for hearing was received by the Michigan Office of Administrative Hearings and Rules. (Exhibit 1 and D)

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) 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.
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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 Administrative Hearing System (MAHS)[1], 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, 2019, 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.

[1] Now Michigan Office of Administrative Hearings and Rules (MOAHR

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 required supervision with bed mobility, transfers, and toilet use, and was independent with 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 her cognitive skills for daily decision making were independent, and that she was able to make herself 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 1 physician visit 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 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. Petitioner scored 1 for being verbally abusive, meaning she was verbally abusive 1 to 3 days in the last 7 days. 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 she 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 because she was last admitted to the NF on June 25, 2019, so had not been a nursing home resident for at least one year at the time of the LOCD.

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.

Frailty

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.

MPRO's Nurse Reviewer testified that upon review of Petitioner's records, she did not meet any of the Exception requirements for frailty. *See Exhibit A, p 38*

Petitioner's sister testified that Petitioner has had two brain operations since her accident in 2003 and really cannot understand anything. Petitioner's sister indicated that Petitioner has been unsuccessful in the community before and she is worried that she will not survive if sent to the community again. Petitioner's sister testified that Petitioner tries to do things on her own, without asking anyone for help. Petitioner's sister indicated that when Petitioner was last released from the NF she went to an apartment and it did not work. Petitioner's sister testified that Petitioner cannot care for herself and it is hard for someone else to take care of her because she is not cooperative, and she does not have a filter on her mouth. Petitioner's sister testified that she has cancer herself and is unable to care for Petitioner. Petitioner's sister indicated that Petitioner does not understand finances and she has to take care of all Petitioner's financial needs. Petitioner's sister testified that Petitioner acts like she understands what is going on, but she really does not. Petitioner's sister indicated that she has not looked into getting a legal guardianship for Petitioner but may do so now.

Based on the evidence presented the Department adequately demonstrated that the Petitioner did not meet LOCD eligibility on the review conducted on December 6, 2019 or the immediate review conducted on December 17, 2019. Petitioner had previously met the LOCD criteria through Door 1, but on December 6, 2019 and December 17, 2019 Petitioner did not qualify through any Doors. This does not imply that Petitioner does not need any assistance, or that she does not have any medical problems, only that she was not eligible to receive ongoing services, paid for by Medicaid, through the NF at the time of the assessment. And while it is always possible that Petitioner's condition will worsen if she is removed from the NF, policy does not allow Petitioner to remain in the NF, paid for by Medicaid, in the interim. Petitioner's current needs can be met in a less restrictive environment in the community, such as an assisted living facility or group home. Given Petitioner's conditions, if she is placed in a group home, she may also be eligible for further services beyond those provided directly through the group home, such as Home Help Services through the Department.

The ALJ finds that Petitioner failed to prove, by a preponderance of the evidence that the Department erred in reviewing her medical/functional eligibility status. Petitioner did not require Medicaid reimbursed NF level of care on December 6, 2019 or December 17, 2019 as demonstrated by the application of the LOCD tool.

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 on December 6, 2019 and December 17, 2019.

IT IS THEREFORE ORDERED that:

The Department's decision is AFFIRMED.

RM/dh

Robert J. Meade
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
DHHS -Dept Contact	Jennifer Cornell 400 S. Pine, 6th Floor Lansing, MI 48909
Petitioner	[redacted] [redacted] [redacted] MI [redacted]
Authorized Hearing Rep.	[redacted] [redacted] [redacted] MI [redacted]
Agency Representative	Theresa Root 222 N Washington Sq Suite 100 Lansing , MI 48933