

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: June 10, 2020
MOAHR Docket No.: 20-000178
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 March 10, 2020. [REDACTED], the Petitioner, appeared on her own behalf. Theresa Root, Appeals Review Officer (ARO), represented the Department of Health and Human Services (Department). Emily Frankman, MI Choice Policy Analyst, appeared as a witness for the Department. From the MI Choice Waiver Agency, Mike Tysick, Co-Director, A&D MI Choice Waiver; Lisa Tahash, Nursing Support Coordinator (NSC); and Amy Hakken, Social Work Supports Coordinator (SWSC), appeared as witnesses for the Department. Heather Hill, MI Choice Contract Compliance Specialist; and Emily Piggott, ARO, were present as observers.

During the hearing proceeding, the Department's Hearing Summary packet was admitted as Exhibit A, pp. i-57.

ISSUE

Did the Department properly determine that Petitioner was not eligible for MI Choice Waiver services because Petitioner no longer met the Nursing Facility Level of Care Determination (LOCD) criteria?

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], that participated in the MI Choice Waiver. (Exhibit A, p. 16)
2. Medicaid policy requires MI Choice Waiver participants 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 Level of Care Determination Chapter, October 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 Level of Care Determination Chapter, October 1, 2019, p. 5.*
4. On October 15, 2019, an LOCD was completed as part of the MI Choice Waiver program enrollment determination. Petitioner was found to be eligible for the MI Choice Waiver based upon qualifying through Door 1. (Exhibit A, pp. 16-23)
5. On December 31, 2019, Petitioner was re-assessed under the LOCD evaluation tool and was found to be ineligible for the MI Choice Waiver based on her failure to qualify through one of the seven doors. (Exhibit A, pp. 24-31)
6. On December 31, 2019, and January 16, 2020, a Notice of Adverse Benefit Determination was issued to Petitioner stating she was no longer eligible for MI Choice Waiver services based on the LOCD. (Hearing Request Attachment)
7. On January 16, 2020, 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. The Medicaid Provider Manual, *Nursing Facility Level of Care Determination Chapter* outlines functional/medical criteria requirements for Medicaid-funded long-term services and supports. *Medicaid Provider Manual, Nursing Facility Level of Care Determination Chapter, October 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 Level of Care Determination Chapter, October 1, 2019, p. 1.* The LOCD must be conducted prior to or on 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 Level of Care Determination Chapter, October 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 Level of Care Determination Chapter, October 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 the MI Choice Waiver program, 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. 35-39), 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 December 31, 2019, LOCD, Petitioner was scored as independent with bed mobility, toilet use, and eating; and supervision with transfers. These activities were discussed with Petitioner during the December 31, 2019 visit. The NSC also observed Petitioner getting up out of her chair on her own several times during the visit. The logs from Petitioner's caregivers were also reviewed. The caregivers are in Petitioner's home three days per week. Petitioner scored a total of 4 points, which is not sufficient to qualify through Door 1. (Exhibit A, pp. 25-27; NSC Testimony)

Petitioner testified that she was having a very good day for the December 31, 2019, visit. Petitioner does not have them very frequently. (Petitioner Testimony)

Overall, there was no specific evidence that Petitioner needed any additional assistance with bed mobility, transfers, toilet use, or eating during the relevant 7-day lookback period for Door 1 for the December 31, 2019, LOCD. Petitioner testified that December 31, 2019, was an unusually good day for her. However, the NSC testified that she also reviewed the caregiver's logs which did not show any additional assistance during the lookback period. Accordingly, Petitioner did not qualify through Door 1.

Door 2 **Cognitive Performance**

The LOCD Field Definition Guidelines (Exhibit A, pp. 39-43), 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 herself understood. Petitioner makes consistent and reasonable decisions and manages her own finances as well as medical decision making. Petitioner organizes her daily routine, such as when to perform certain activities of daily living and take medications. Petitioner scored in the normal range for all standardized testing administered. Petitioner's short-term memory was okay. Petitioner makes herself understood and is a good communicator.

The scoring was based on Petitioner's self-reports and standardized testing. Petitioner did not meet the criteria to qualify through Door 2. (Exhibit A, p. 27; SWSC Testimony)

Petitioner testified that she makes notes and keeps paperwork on the table so that she does not forget things. (Petitioner Testimony)

The evidence does not support that the Waiver Agency erred in scoring Petitioner as not having a short-term memory problem, independent with cognitive skills for daily decision making, and able to make herself understood at the time of the December 31, 2019, LOCD. For Door 2, only short-term memory is considered, meaning the ability to recall after 5 minutes. Making notes and leaving paperwork in a designated place so it is not forgotten are part of how Petitioner is appropriately managing her own decision making. There was no evidence that Petitioner was receiving assistance with her decision making from anyone during the relevant 7-day lookback period for Door 2 for the December 31, 2019, LOCD. Accordingly, Petitioner did not qualify through Door 2.

Door 3
Physician Involvement

The LOCD Field Definition Guidelines (Exhibit A, pp. 43-44), 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 2 days with physician visit exam(s) and no days with physician order change(s) within the 14-day lookback period for this Door. This was based on the information Petitioner reported. 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; NSC Testimony)

Petitioner stated that no one ever contacted her physician to see if there were going to be any changes or if there had been any changes. However, Petitioner testified that during the December 31, 2019, assessment, she told them no because she could not remember. Petitioner did not ask them to contact the doctor to make sure. Petitioner acknowledged that she would have been aware of when she went to the doctor and if there had been any changes made to her medications. (Petitioner Testimony)

Overall, the evidence presented does not establish that Petitioner had sufficient days with physician visit examinations and physician order changes during the relevant 14

day review period for the December 31, 2019, LOCD. Accordingly, Petitioner did not meet the criteria to qualify through Door 3.

Door 4
Treatments and Conditions

The LOCD Field Definition Guidelines (Exhibit A, pp. 44-45) 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; NSC Testimony)

Petitioner did not contest the scoring for Door 4.

Door 5
Skilled Rehabilitation Therapies

The LOCD Field Definition Guidelines (Exhibit A, pp. pp. 45-46), 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 speech 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; NSC Testimony)

Petitioner testified that she has been under physical therapy and was just released the week prior to this hearing. Petitioner stated that she started after she was released from rehab at the end of September 2019. Physical therapy told Petitioner she was released because she had gotten her brace and there was nothing more they could help her with to strengthen her leg. Rather, Petitioner was to return to her doctor and see what was going to happen from there. Petitioner asserted that she was not asked about physical therapy during the December 31, 2019, visit. Petitioner testified that she told the NSC and SWSC she was receiving nursing services and other things from the home care provider when she first started with the program. At that time, they were trying to get Petitioner's physical therapy started and were awaiting approval from Petitioner's insurance. (Petitioner Testimony)

When asked specifically about the relevant week long lookback period for the December 31, 2019, LOCD, Petitioner testified that physical therapy was coming out to her home once per week and showing her how to do her exercises. It was left for Petitioner to do the exercises when they were not there. Petitioner had a packet of papers to follow and was to do the exercises twice per day every day. During the 30-45 minutes they were there, they would check vitals; show Petitioner any new exercises; check the exercises she was having difficulty with; and evaluate Petitioner and how she was doing. (Petitioner Testimony)

The Department noted that per the LOCD Field Definition Guidelines, evaluation minutes would not be included in the minutes of skilled physical therapy services for an LOCD. (Exhibit A, p. 46)

The NSC testified that before the December 31, 2019, visit she contacted Petitioner's in-home skilled services provider. They reported that Petitioner had not been receiving any skilled services during the relevant 7-day lookback period for Door 2 for the December 31, 2019, LOCD. They also sent the NSC documentation regarding the therapy services, which indicated there were no therapy. Rather, Petitioner was performing everything at an independent level as of the last time she was seen by them for an evaluation, which the NSC believes was December 10, 2019. (NSC Testimony)

Overall, the evidence presented does not establish that Petitioner had sufficient minutes of physical, occupational, or physical therapy (administered/delivered or scheduled) during the relevant 7-day review period for the December 31, 2019, LOCD. The NSC credibly testified that she spoke with and obtained documentation from the agency that had been providing in home skilled services to Petitioner, which did not show physical therapy, or any other therapy services during that week. Accordingly, Petitioner did not meet the criteria to qualify through Door 5.

Door 6 Behavior

The LOCD Field Definition Guidelines (Exhibit A, pp. 46-48), 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 based on a review of her chart. This was based on observation and discussion with Petitioner. Accordingly, Petitioner did not meet the criteria to qualify through Door 6. (Exhibit A, pp. 28-29; SWSC Testimony)

Petitioner did not dispute the scoring for Door 6.

Door 7 Service Dependency

The LOCD Field Definition Guidelines (Exhibit A, p. 49), 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 NSC testified that Petitioner had not been a participant for one consecutive year at the time of the December 31, 2019, LOCD. Petitioner had only been enrolled in the MI Choice Waiver for about three months. Petitioner was already at home when she was evaluated for the MI Choice Waiver, it was not directly following a stay at a nursing facility. (NSC Testimony) Petitioner confirmed that she was released from the rehab stay at the nursing facility on September 5, 2019. (Petitioner Testimony) Petitioner's initial LOCD for the MI Choice Waiver was completed on October 15, 2019. (Exhibit A, pp. 16-23) There was no other evidence that Petitioner was a resident of a Medicaid Certified Nursing Facility or participant of MI Choice, PACE or MI Health Link immediately prior to her enrollment with this MI Choice Waiver Agency. Accordingly, Petitioner could not meet the criteria to qualify through Door 7 at the time of the December 31, 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,
October 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,
October 1, 2019, p. 10

In this case, there was no evidence that a secondary review was requested.

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 MI Choice Waiver participants 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 December 31, 2019, LOCD. Accordingly, the Department properly determined that Petitioner was no longer eligible for Medicaid to cover MI Choice Waiver services at that time.

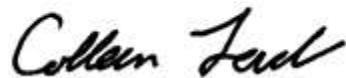
If there have been changes, or if the information reported regarding the criteria for the 7 Doors was inaccurate or incomplete, Petitioner may wish to start a new referral for the MI Choice Waiver program.

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 December 31, 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

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

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