



State of West Virginia
DEPARTMENT OF HEALTH AND HUMAN RESOURCES
Office of Inspector General
Board of Review
P. O. Box 2590
Fairmont, WV 26555

Joe Manchin III
Governor

Martha Yeager Walker
Secretary

August 23, 2006

Dear Mr. _____:

Attached is a copy of the findings of fact and conclusions of law on your hearing held June 29, 2006. Your hearing request was based on the Department of Health and Human Resources' proposal to terminate your benefits and services under the Aged/Disabled (HCB) Title XIX Waiver Services Program.

In arriving at a decision, the State Hearing Officer is governed by the Public Welfare Laws of West Virginia and the rules and regulations established by the Department of Health and Human Resources. These same laws and regulations are used in all cases to assure that all persons are treated alike.

Eligibility for the Aged/Disabled Waiver Program is based on current policy and regulations. Some of these regulations state as follows: The Aged/Disabled (HCB) Title XIX Waiver Services Program is granted to those individuals who meet all eligibility requirements. One of these requirements is that the individual must qualify medically. Eligible individuals are those who qualify medically for a nursing facility level of care but have chosen the waiver program as a means to remain in their home where services can be provided. [Aged/Disabled (HCB) Services Manual Section 570]

The information submitted at your hearing reveals that your medical condition continues to require a sufficient number of services and the degree of care required to medically qualify you for the Aged/Disabled Home & Community Based Services Waiver Program.

It is the decision of the State Hearing Officer to **reverse** the proposal of the Department to terminate your benefits under the Aged/Disabled Waiver Program.

Sincerely,

Thomas E. Arnett
State Hearing Officer
Member, State Board of Review

cc: Erika H. Young, Chairman, Board of Review
BoSS
WVMI
CWVAS
[REDACTED], Advocate, WV Advocates

**WEST VIRGINIA DEPARTMENT OF HEALTH & HUMAN RESOURCES
BOARD OF REVIEW**

_____ E. _____,

Claimant,

v. **Action Number: 06-BOR-854**

**West Virginia Department of
Health and Human Resources,**

Respondent.

DECISION OF STATE HEARING OFFICER

I. INTRODUCTION:

This is a report of the State Hearing Officer resulting from a fair hearing concluded on August 23, 2006 for _____ E. _____. This hearing was held in accordance with the provisions found in the Common Chapters Manual, Chapter 700 of the West Virginia Department of Health and Human Resources. This fair hearing was convened on June 29, 2006 on a timely appeal filed January 13, 2006.

II. PROGRAM PURPOSE:

The program entitled Aged/Disabled Waiver is set up cooperatively between the Federal and State governments and administered by the West Virginia Department of Health & Human Resources.

Under Section 2176 of the Omnibus Budget Reconciliation Act of 1981, states were allowed to request a waiver from the Health Care Financing Administration (HCFA) so that they could use Medicaid (Title XIX) funds for home and community-based services. The program's target population is individuals who would otherwise be placed in an intermediate or skilled nursing facility (if not for the waiver services). Services offered under the Waiver Program will include: (1) chore, (2) homemaker and (3) case management services. West Virginia has been offering the Waiver Services Program since July, 1982 to those financially eligible individuals who have been determined to need ICF level care but who have chosen the Waiver Program services as opposed to being institutionalized.

III. PARTICIPANTS:

E. _____, Claimant
_____, Advocate/Representative, WV Advocates
_____, Claimant's Daughter
_____, CM, CWVAS
_____, Homemaker, Care Inc.
_____, RN, Care Inc.
_____, RN, WVMI (participated telephonically)
Cathie Zusan, RN, BoSS (participated telephonically)

Presiding at the hearing was Thomas E. Arnett, State Hearing Officer and a member of the State Board of Review.

IV. QUESTIONS TO BE DECIDED:

The question(s) to be decided is whether the Agency is correct in its proposal to terminate benefits and services under the Aged/Disabled Waiver (HCB) Program.

V. APPLICABLE POLICY:

Aged/Disabled Home and Community-Based Services Manual Section 500& 570

VI. LISTING OF DOCUMENTARY EVIDENCE ADMITTED:

Department's Exhibits:

- D-1 Aged/Disabled Home and Community-Based Services Manual Sections 500 and 570
- D-2 Pre-Admission Screening (PAS) 2005 assessment completed on November 10, 2005
- D-3 Notice of Potential Denial dated December 9, 2005
- D-3a Additional medical documentation – Correspondence from _____, M.D., dated December 16, 2005.
- D-4 Notice of Termination/Denial dated January 9, 2006

Claimant's Exhibits:

- C-1 Notice of Potential Denial dated December 9, 2005 (duplicate evidence, see exhibit D-3)
- C-2 Notice of Termination/Denial dated January 9, 2006 accompanied by PAS-2005 dated 11/10/05 (duplicate evidence, see exhibits D-4 and D-2 respectively)
- C-3 Aged/Disabled Home and Community-Based Services Manual, Section 570 (duplicate evidence, see exhibit D-1)
- C-4 Pre-Admission Screening (PAS-2000) completed on 12/16/04.
- C-5 Correspondence from _____, M.D. dated January 9, 2006.

- C-6 Correspondence from [REDACTED] M.D., dated December 16, 2005 (duplicate evidence, see exhibit D-3a)
- C-7 Correspondence from [REDACTED], M.D. dated 8/17/04
- C-8 Correspondence from Thomas E. Arnett, State Hearing Examiner, dated 1/3/05
- C-9 WV Code §16-5O-2(1) Self-administering of medications (defined)
- C-10 Code of State Regulations (CSR 64-60-2.14 & 2.19)
- C-11 Olmstead v. L.C., 527 U.S. 581 (1999) (the “Olmstead decision”)
- C-12 Executive Order – Community-based Alternatives for Individuals with Disabilities dated June 18, 2001.
- C-13 WV Medicaid Aged and Disabled Waiver Program - Service Coordination Plan dated 3/10/06 to 3/10/07.
- C-14 West Virginia Medicaid Aged and Disabled Wavier Program RN ASSESSMENT FORM, dated 2/15/06.
- C-15 Court Order from the Circuit Court of Kanawha County, West Virginia - E.H., Et al., Petitioners, v. Martin, et al., Respondents. Civil Action 81-MISC-585 entered by Louis H. Bloom, Judge on August 6, 2001.
- C-16 Agreed Order in the United States District Court for the Southern District of West Virginia Huntington Division, Cyrus v. Walker, Civil Action No. 04-0892, Entered by the Honorable Robert “Chuck” Chambers, United States District Judge.

VII. FINDINGS OF FACT:

- 1) On November 10, 2005, the Claimant was reevaluated (medically assessed) to verify continued medical eligibility for participation in the Aged & Disabled Waiver Services Program, hereinafter ADW Program, and to confirm the appropriate Level of Care.
- 2) The PAS 2005 medical assessment (Exhibit D-2) completed by WVMi determined that the Claimant is no longer medically eligible to participate in the ADW Program.
- 3) On or about December 9, 2005, the Claimant was notified of potential denial (Exhibit D-3). This notice states, in pertinent part:

To be eligible for benefits you must be deficient in at least 5 of 13 critical areas as mandated in the Medicaid Program Regulations. Based on your PAS you have deficiencies in only 4 areas – Eating, Bathing, Grooming and Dressing.

Since your PAS did not indicate the required deficits, your request for benefits cannot be approved.

The Claimant was advised that he could provide additional information regarding his medical condition within the next 2-weeks for consideration before a final decision was made. Additional medical information was received and has been identified as Exhibit D-3a.

- 4) On or about January 9, 2006, the Claimant was notified that eligibility could not be established via a Termination/Denial Notice (Exhibit D-4). This notice states:

Your request for benefits under the Home and Community Based Aged/Disabled Waiver Program has been terminated/denied.

An evaluation of your current medical condition indicates that you are not entitled to services under the AD Waiver Program. A decision has been made to terminate / deny your homemaker and case management services.

Eligibility for the Aged/Disabled Waiver program requires deficits in at least 5 of the health areas below. Your PAS (Pre-Admission Screening Form) indicated deficiencies in 4 areas – Eating, Bathing, Grooming and Dressing.

- 5) Representatives speaking on behalf of the Claimant contend that he should have been awarded a deficit in the following areas: Medication Administration, Vacating a building in the event of an emergency, Orientation and Continence.
- 6) According to the evidence submitted at the hearing, the Claimant's medical history includes a Traumatic Brain Injury, hereinafter TBI, and he also suffers from a seizure disorder. While the Department acknowledged awareness of a past brain surgery, the Department's representatives indicated that they were not aware of any official diagnosis of TBI. A review of exhibit C-6 includes the statement from Dr. [REDACTED] - "major brain surgery" and in Exhibit C-7, Dr. [REDACTED] states - "He has also had traumatic brain injury." The Claimant's representatives contend that the Claimant's medical condition has not improved from the previous year and that the TBI causes deficits in disorientation and the ability to vacate the building. It should be noted that the contention for a deficit in vacating is based solely on the Claimant's mental capacity (orientation) and not ambulation.
- 7) Mr. [REDACTED] submitted Exhibit C-4 (PAS-2000 dated 12/16/04) to show that the Claimant's TBI and other medical conditions have not improved. He noted on the record that the Claimant was incontinent of both bowel and bladder in this assessment and he was found to be unable to vacate the building in the event of an emergency. The new medical assessment (Exhibit D-2) does not reflect a deficit in either of these areas (incontinence or vacating). Because Exhibit C-4 was submitted to confirm a historical diagnosis and the Claimant's medical condition (TBI) is unlikely to improve, it was accepted at the hearing as relevant.

The Department, however, presented evidence to indicate that the ADW Program eligibility criterion changed effective November 1, 2005, and because the Claimant's medical assessment (D-2) was completed on November 10, 2005, the new ADW policy must be applied. The assessment form, PAS-2000, has been changed to a PAS-2005 and the criteria used to determine a deficit in the areas of incontinence, vacating and medication administration has changed as well.

- 8) In order for an individual to qualify for a deficit in vacating the building in the event of an emergency, the individual must be physically unable at all times (Level 3 or higher in walking) or mentally incapable of leaving the building (Level 3 or higher in orientation with a diagnosis of dementia, Alzheimers, or related condition). [REDACTED], RN, testified that while the Claimant has some disorientation related to his TBI and long-term use of Haldol, she indicated that the Claimant is not totally disoriented. Ms. [REDACTED] testimony is consistent with the evidence found in Exhibit D-2 (page 2 of 6), which confirms that the Claimant's orientation has been appropriately assigned a level-2 (intermittent disorientation). Based on the evidence, the Claimant fails to qualify for a deficit in vacating the building in the event of an emergency (based on mental capacity / disorientation) or a deficit in orientation.
- 9) Credible testimony received at the hearing reveals that the Claimant wears incontinence briefs as he can not control his bladder long enough to make it to the toilet without an accident. Additional evidence appears to indicate that bowel incontinence occurs occasionally but "it is not full-time" according to RN [REDACTED]. While the Claimant may void some urine in the toilet, he is unable to make it to the restroom without wetting himself. The evidence clearly indicates that the Claimant is **incontinent of bladder at all times (level-3) and a deficit is therefore awarded.**
- 10) Evidence received in support of the Claimant being unable to self-administer his medications includes testimony from [REDACTED] RN, and [REDACTED], wherein they indicated that there have been several occasions when the Claimant's medications have been found on the floor. While Medication Administration found in Chapter 16 of the WV Code addresses the area of Public Health. Section 5 "O" of Chapter 16 is addresses medication administration by unlicensed personnel and the definition of self-administration contained therein only applies to those circumstances. That definition is not meant to be an all-encompassing definition to be used throughout the State or throughout regulations when determining the meaning of self-administration. Additionally, the beginning of Section 5O specifies "As used in this article, unless a different meaning appears form the context, the following definitions apply." However, testimony and documentation reveal that the Claimant has been hospitalized several times for not taking medications as prescribed and he has a history of medications being dropped on the floor (which could also be a result of Essential Tremors as documented in the PAS). If medications are being found on the floor, it is clear that the Claimant requires more assistance than prompting and supervision and medications should be placed in his hand or mouth. Based on the evidence, **a deficit in medication administration is awarded.**
- 11) Aged/Disabled Home and Community-Based Services Manual Section 570 - Program Eligibility for client:

Applicants for the ADW Program must meet the following criteria to be eligible for the Program:

- C. Be approved as medically eligible for NF Level of Care.

12) Aged/Disabled Home and Community-Based Services Manual Section 570.1.a – Purpose: The purpose of the medical eligibility review is to ensure the following:

- A. New applicants and existing clients are medically eligible based on current and accurate evaluations.
- B. Each applicant/client determined to be medically eligible for A/DW services receives an appropriate LOC that reflects current/actual medical condition and short and long-term services needs.
- C. The medical eligibility determination process is fair, equitable and consistently applied throughout the state.

13) Aged/Disabled Home and Community-Based Services Manual Section 570.1.b – Medical Criteria:

An individual must have five deficits on the PAS to qualify medically for the A/DW Program. These deficits are derived from a combination of the following assessment elements on the PAS:

- A. Decubitus - Stage 3 or 4 (Item 24 on PAS 2005)
- B. Unable to vacate a building- a person is physically unable at all times at Level 3 or higher in walking or mentally incapable of leaving the building at Level 3 or higher in orientation with a diagnosis of dementia, Alzheimers, or related condition. (Item 25, I and 33, on the PAS 2005).
- C. Functional abilities of individual in the home. (Item 25 on the PAS 2005).
 - Eating----- Level 2 or higher (physical assistance to get nourishment, not preparation)
 - Bathing ----- Level 2 or higher (physical assistance or more)
 - Grooming--- Level 2 or higher (physical assistance or more)
 - Dressing ---- Level 2 or higher (physical assistance or more)
 - Continence-- Level 3 or higher (must be total incontinent- defined as when the recipient has no control of bowel or bladder functions at any time)
 - Orientation-- Level 3 or higher (totally disoriented, comatose)
 - Transfer----- Level 3 or higher (one person or two person assist in the home)
 - Walking----- Level 3 or higher (one person assist in the home)
 - Wheeling----- Level 3 or higher (must be Level 3 or 4 on walking in the home to use Level 3 or 4 for wheeling in the home. Do not count outside the home)
- D. Individual has skilled needs in one or more of these areas B (g)suctioning, (h)tracheostomy, (i)ventilator, (k)parenteral fluids, (l)sterile dressings, or (m) irrigations. (Item 26 on the PAS 2005)

- E. The individual is not capable of administering his/her own medications is defined as an individual not capable of administering his/her own medications if the prescription medication must be placed in the recipient's hand, mouth, tube or eye by someone other than the recipient at all times.

VIII. CONCLUSIONS OF LAW:

- 1) A medical assessment was completed on the Claimant to determine continued medical eligibility for participation in the Aged/Disabled Waiver Program on November 10, 2005.
- 2) Medical eligibility for the Aged/Disabled Waiver program requires deficits in at least five (5) specific categories of nursing services.
- 3) The medical assessment completed by WVMI reveals that the Claimant demonstrates four (4) program qualifying deficits – Eating, Bathing, Grooming, and Dressing.
- 4) The evidence submitted at the hearing identifies two (2) additional deficits – The Claimant is incontinent of bladder and he is unable to self-administer medication.
- 5) Whereas the Claimant exhibits deficits in no fewer than five (5) of the specific categories of nursing services, the Claimant's continued medical eligibility for participation in the Aged & Disabled Waiver Services Program is therefore established. In accordance with ADW Program policy and the findings included in this decision, two additional points will be added to the Claimant's LOC determination.

IX. DECISION:

It is the decision of the State Hearing Officer to **reverse** the Agency's proposal to terminate the Claimant's benefits and services under the Aged/Disabled Title XIX (HCB) Waiver Program.

X. RIGHT OF APPEAL:

See Attachment

XI. ATTACHMENTS:

The Claimant's Recourse to Hearing Decision

Form IG-BR-29

ENTERED this 23rd day of August, 2006.

**Thomas E. Arnett
State Hearing Officer**