



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

October 7, 2008

Dear _____:

Attached is a copy of the findings of fact and conclusions of law on your hearing held September 23, 2008. Your hearing request was based on the Department of Health and Human Resources' proposal to terminate your benefits and services through 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 503]

The information submitted at your hearing reveals that your medical condition continues to require a sufficient number of services and the degree of care necessary 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 and services provided through the Medicaid, Aged/Disabled Waiver Services Program.

Sincerely,

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

cc: Erika H. Young, Chairman, Board of Review
[REDACTED] Esq., Legal Aid of WV
Mary McQuain, Esq., Assistant AG's Office
BoSS
WVMI

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

_____,

Claimant,

v.

Action Number: 08-BOR-1443

**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 October 7, 2008 for _____. 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 September 23, 2008 on a timely appeal filed May 22, 2008.

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:

_____, Esq., Legal Aid of WV
_____, Claimant
_____, Claimant's daughter
_____, Claimant's friend
_____, Paralegal, Legal Aid of WV (observing)
_____, RN, Companion Care
_____, Case Manager, Catholic Community Services
_____, Homemaker, Companion Care
Mary McQuain, Esq., Assistant AG's Office (Participated telephonically)
Kay Ikerd, RN, BoSS (Participated telephonically)
Melody Lehosit, RN, WVMI (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 was correct in its decision to propose termination of the Claimant's benefits and services provided through the Aged & Disabled Home and Community-Based Waiver Services Program.

V. APPLICABLE POLICY:

Aged/Disabled Home and Community-Based Services Manual, Chapter 500, Sections 503, 503.1, 503.1.1 and 503.2

VI. LISTING OF DOCUMENTARY EVIDENCE ADMITTED:

Department's Exhibits:

1. Policy Criteria, Medicaid – Chapter 500 – Covered Services, Limitation, and Exclusions for Aged and Disabled Waiver Services
2. Request for Hearing dated May 22, 2008
3. Pre-Admission Screening for Aged/Disabled Waiver Services dated April 23, 2008, as supplemented April 25, 2008
4. Notice of Termination dated May 13, 2008
5. Additional information received April 24, 2008
 - a. Medical Necessity Evaluation Request dated March 19, 2007
 - b. Letter from _____ MD, Assistant Professor from WVU Department of Medicine, dated October 23, 2007
 - c. Letter from _____ MD, Assistant Professor from WVU Department of Medicine, dated May 2, 2007
 - d. Letter from _____ MD, Assistant Professor from WVU Department of Medicine, dated May 25, 2006

- e. Physician not faxed on April 24, 2008
- 6. Medial Necessity Evaluation Request dated February 28, 2008

Claimant's Exhibits:

- 1. Notice of Decision letter from WVMC dated May 13, 2008
- 2. April 23, 2008 PAS evaluation
- 3. Medical Necessity Evaluation Request dated February 28, 2008
- 4. Documentation of dyspnea and contractures from _____'s doctor, dated April 16, 2008
- 5. Not entered
- 6. Not entered
- 7. Not entered
- 8. Sample PAS evaluation form
- 9. Relevant section of DHHR Policy Manual pertaining to Aged/Disabled Waiver Services

VII. FINDINGS OF FACT:

- 1) On April 23, 2008, the Claimant was evaluated to determine continued medical eligibility for participation in the Aged & Disabled Waiver Services Program, hereinafter ADW Program (See Department's Exhibit 3 / Claimant's Exhibit 2).
- 2) The Claimant was notified that continued medical eligibility could not be established via a Termination/Denial Notice dated May 13, 2008 (Department's Exhibit 4 / Claimant's Exhibit 1). This notice states, in pertinent part:

NOTICE: 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 A/D Waiver Program. A decision has been made to terminate / deny your homemaker and case management services. You have a right to dispute this decision and ask for a hearing.

REASON FOR DECISION: 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 3 areas – Bathing, Dressing and Continence.

Because you have less than 5 deficits at the level required, your services are being terminated/denied.

- 3) As a matter of record, the Department stipulated that the Claimant demonstrates three (3) ADW Program qualifying deficits (as indicated in Department's Exhibit 4), however, the Department contends that the evidence fails to demonstrate any additional functional deficits.

- 4) The Claimant contends that she should have been awarded a deficit in the following areas: Grooming, Eating, Walking and Vacating [the building in the event of an emergency].
- 5) The evidence (Department's Exhibit 3 / Claimant's Exhibit 2) reveals that the Claimant was assessed at a level 1 (self/prompting) in the area of grooming. The specific area of grooming in question is the Claimant's functional ability to wash her hair. Documentation found on page 6 of 7 includes a review of the grooming areas assessed by the WVMI RN, and while the Claimant demonstrated grooming her hair with a pick, it was reported during the assessment that the homemaker washes the Claimant's hair. Documentation reveals that the Claimant has a limited range of motion in her left shoulder due to a previous fracture (noted on page 6 of 7), arthritis and a Dowager's hump resulting from osteoporosis. These conditions, in conjunction with the Claimant's unsteady gait, clearly indicate she cannot wash and rinse her hair independently. Based on the evidence, the Claimant requires physical assistance with washing her hair. A deficit in grooming (level 2) is therefore established.
- 6) The WVMI RN testified that she considered cutting up food as part of meal preparation as the Claimant was able to feed herself once the plate [of food] was presented to her. While policy does not clearly define these boundaries, once food is prepared and served – meal preparation is concluded. If the individual requires assistance with cutting food into manageable bites, this is identified as assistance with eating. It was noted that the Claimant has a diagnosis of dysphagia (difficulty swallowing) and arthritis which makes cutting food difficult. The WVMI RN testified that "the Claimant can cut soft food" and that "she can cut some of her own food." The statements of the WVMI RN clearly indicate that there are occasions when it is necessary for the Claimant's food to be cut. Testimony presented by the WVMI RN is consistent with the evidence presented on behalf of the Claimant and supporting medical documentation. Based on the evidence, a deficit (Level 2-physical assistance) in eating is established.
- 7) The Claimant was assessed at a Level 2 (supervised/assistive device) in walking on the PAS. It is noted on page 7 of 7 in Department's Exhibit 3 / Claimant's Exhibit 2 that the Claimant ambulated 25 feet with her walker independently. While the medical documentation indicates the Claimant is unstable and slow when ambulating, there was no evidence submitted to refute the Department's finding. The Claimant can walk with the use of an assistive device (cane/walker) while in her home and was correctly assessed at a level 2. A deficit cannot be awarded in walking.
- 8) As noted Finding of Fact #7, the Claimant can ambulate in her home with an assistive device (cane/walker) but she is noted to be unsteady and slow. The Claimant's ability to vacate her home in the event of an emergency, according to testimony presented at the hearing, is further complicated by a large step out of her front door that leads down to the front porch. The Claimant has had two hip fractures, two hip replacement surgeries (1994 and 1997), contractures in her toes, osteoporosis, and kyphosis (resulting in back curvature and a Dowager's hump). It is reasonable, based on the Claimant's medical condition, that she would require physical assistance to exit her home in the event of an emergency. The preponderance of evidence supports the finding of a deficit in the area of vacating.

9) Aged/Disabled Home and Community-Based Services Manual Section 503 (D-1) - 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.

10) Aged/Disabled Home and Community-Based Services Manual Section 503.1.1 – 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.

11) Aged/Disabled Home and Community-Based Services Waiver Policy Manual 503.2 (D-1): An individual must have five (5) deficits on the Pre Admission Screening (PAS) to qualify medically for the ADW Program. These deficits are derived from a combination of the following assessment elements on the PAS.

#24 Decubitus - Stage 3 or 4

#25 In the event of an emergency, the individual is c) mentally unable or d) physically unable to vacate a building. a) Independently and b) With Supervision are not considered deficits.

#26 Functional abilities of individual in the home
Eating----- Level 2 or higher (physical assistance to get nourishment, not preparation)
Bathing ----- Level 2 or higher (physical assistance or more)
Dressing ---- Level 2 or higher (physical assistance or more)
Grooming--- Level 2 or higher (physical assistance or more)
Continence (bowel, bladder) -- Level 3 or higher; must be incontinent
Orientation-- Level 3 or higher (totally disoriented, comatose)
Transfer----- Level 3 or higher (one-person or two-person assistance in the home)
Walking----- Level 3 or higher (one-person assistance 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)

#27 Individual has skilled needs in one or more of these areas:
(g) suctioning, (h) tracheostomy, (i) ventilator, (k) parenteral fluids,
(l) sterile dressings, or (m) irrigations.

#28 Individual is not capable of administering his/her own medications.

VIII. CONCLUSIONS OF LAW:

- 1) Policy states that an individual must receive five (5) deficits on the PAS assessment in order to qualify medically for the Aged/Disabled Waiver Program.
- 2) The evidence reveals that the Claimant was awarded three (3) deficits on a PAS completed by WVMI in April 2008 – Bathing, Dressing & Continence.
- 3) Evidence submitted at the hearing identifies three additional deficits – Grooming, Eating and Vacating.
- 4) Whereas the Claimant demonstrates six (6) program qualifying deficits, continued medical eligibility for the Aged/Disabled Waiver Program is therefore established.

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 through the Medicaid, Aged/Disabled, Title XIX (HCB) Waiver Program. The Claimant's Level of Care determination shall include the medical findings established in this decision.

X. RIGHT OF APPEAL:

See Attachment

XI. ATTACHMENTS:

The Claimant's Recourse to Hearing Decision

Form IG-BR-29

ENTERED this October 7th Day of October, 2008.

**Thomas E. Arnett
State Hearing Officer**