



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

September 9, 2008

Dear Ms. _____:

Attached is a copy of the findings of fact and conclusions of law on your hearing held September 5, 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 no longer requires 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 **uphold** the Department's proposal to terminate your benefits and services 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-544

**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 September 9, 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 originally scheduled to convene on March 28, 2008 and again on May 6, 2008 but was continued when a Joint Motion for a new medical assessment (PAS) was granted. The hearing subsequently convened on September 5, 2008 on a timely appeal filed January 2, 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, Counsel for the Claimant
_____, Claimant
_____, Claimant's son
_____, Direct Care Worker, WV Choice

Mary McQuain, Esq., Assistant AG's Office, Counsel for the Department (Participated telephonically)

Kay Ikerd, RN, BoSS (Participated telephonically)

Debra LeMasters, RN, WVMI (Participated telephonically)

Michael Bevers, Esq, Assistant AG's Office (Observed 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 through the Medicaid Aged & Disabled Home and Community-Based Waiver Services Program.

V. APPLICABLE POLICY:

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

VI. LISTING OF DOCUMENTARY EVIDENCE ADMITTED:

Department's Exhibits:

- D-1 Order requiring the Bureau of Senior Services (BoSS) to Obtain a New Pre-Admission Screening entered May 7, 2008.
- D-2 Aged/Disabled Home and Community-Based Services Manual Section 503
- D-3 Notice of Potential Denial dated June 11, 2008
- D-4 Letter from ██████████ M.D., dated May 5, 2008
- D-5 Notice of Termination/Denial dated June 27, 2008
- D-6 Pre-Admission Screening (PAS) completed on May 27, 2008

VII. FINDINGS OF FACT:

- 1) The Claimant's appeal was filed on January 2, 2008 following a Pre-Admission Screening (PAS) medical assessment completed on December 3, 2007 that resulted in the determination the Claimant is no longer medically eligible to participate in the Medicaid Aged & Disabled Waiver Services Program. The Claimant's hearing, as noted in Section I, was scheduled to convene on March 28, 2008 but was rescheduled upon notice that the Claimant secured legal counsel. The Claimant's appeal was rescheduled to convene on May 6, 2008, however, by an ORDER REQUIRING THE BUREAU OF SENIOR SERVICES TO OBTAIN A NEW PRE-ADMISSION SCREENING, a Joint Motion was granted and the Claimant underwent a new medical assessment on May 27, 2008 (D-6). Because the May 27, 2008 PAS was determined to be unfavorable for the Claimant, the Hearing was rescheduled and convened on September 5, 2008. This decision will focus solely on the medical evidence from the May 27, 2008 PAS evaluation.
- 2) On or about June 11, 2008, the Claimant was notified of Potential Denial (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, Aged/Disabled Home and Community Based Services Waiver, Policy and Procedures Manual, Chapter 503.2. See attached criteria.

Based on your PAS you have deficiencies in only 3 areas – Bathing, Grooming and Continence.

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

This notice goes on to advise the Claimant that she can provide additional information regarding her medical condition within 2-weeks for consideration before a final decision is made. However, if no additional information is received within 2 weeks from the date of the notice, she will be sent a denial notice.

- 3) The Claimant was notified that continued medical eligibility could not be established via a Termination/Denial Noticed dated June 27, 2008 (D-5). This notice states, in pertinent part:

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, Grooming and Continence.

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

- 4) The Claimant contends that in addition to the three deficits awarded by the Department, she should have also been found deficient in Vacating, Dressing, Eating and Medication Administration.

The following will address the findings in each of the contested areas:

Vacating the building in the event of an emergency (mental ability only) – The Claimant was assessed (D-6) as being able to vacate her building with supervision. It was noted, however, that the Claimant recently failed to respond to a fire alarm in her apartment complex and was found lying in bed by her son who had to insist that she vacate during the emergency. When questioned about the incident, the Claimant testified that she was aware of the alarm and indicated that she simply did not want to get out of bed. While this is clearly a poor exercise in judgment, the Claimant was cognizant of the situation, knew that she should vacate but decided otherwise. Although the Claimant is being treated for depression, there is insufficient information to indicate she is mentally unable to vacate her building in the event of an emergency. Based on the evidence, the Claimant does not qualify for a deficit in vacating.

Dressing – The Claimant was assessed at a level 1 (self/prompting) in the area of dressing by the WVMI RN. A review of the evidence indicates that the Claimant reported during the assessment - (D-6, page 8 of 10) - that she cannot start on her pants herself for it “hurts her back too much.” Documentation found in the assessment further indicates that the Claimant can only reach to mid lower legs. While documentation goes on to state the Claimant can lift her legs to clear the rim tub for a bath or shower, there is no information to indicate both actions (bending back while lifting legs) were demonstrated simultaneously. Testimony received at the hearing is consistent with the information reported during the assessment. The Claimant purported that she can get her top on but she cannot get her bottoms [pants/underpants] on without physical assistance. She testified that she is not allowed to do anything that her back brace will not allow her to do. The Claimant presents a documented medical history of back pain as confirmed in Exhibit D-4 – “severe osteoporosis with back fractures” – for which the Claimant wears a back brace, albeit outside the home. Although the WVMI RN indicated that the Claimant can lift her legs high enough to place her pants on, the evidence received at the hearing supports a finding that the Claimant requires physical assistance (level-2) in dressing as she requires assistance to get her pants on. A deficit in dressing is therefore awarded.

Eating – In order to qualify for a deficit in eating, the individual must require physical assistance. The Claimant reported during the assessment that she is unable to cut her food sometimes because she has “tendonitis in her right elbow” (see D-6, page 7 of 10). In Exhibit D-4, Dr. [REDACTED] states – “Ms. _____ has problems with eating and swallowing due to partial paralysis of the throat following surgery.” The physician’s statement indicates “problems with eating and swallowing but does not indicate she is unable to feed herself. It was noted that the Claimant suffers from dysphagia (difficulty swallowing) her food must occasionally be put in a blender. The WVMi RN presented testimony consistent with the documentation found in the assessment and noted some of the following information regarding the Claimant’s ability to eat – The Claimant uses her sewing machine which involves movement and use of bilateral arms and hands, client draws up her own insulin, she is able to put on her back brace, grasp is good bilateral. The evidence is consistent with the findings in Exhibit D-4, there is insufficient evidence to demonstrate the Claimant requires physical assistance with eating.

Medication Administration – Documentation found on Exhibit D-6 reveals that the Claimant has a weekly pill planner for her medications and she keeps her pain pills separated from the pill planner. The Claimant’s daughter fills the pill planner in order to keep the Claimant from mixing her medications up, but the Claimant administers her medications independently. While it is noted that the Claimant must sometimes be reminded to take her insulin, the evidence indicates that she draws and administers her insulin independently. There was no evidence submitted to refute the findings of the WVMi RN and the Claimant’s ability to administer her medications, as confirmed by testimony received at the hearing, is consistent with the information documented on the PAS. Based on the evidence, the Claimant does not qualify for a deficit in the area of medication administration.

5) 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.

6) 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.

7) 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 can vacate the building:
a) Independently, b) with supervision, c) mentally unable or d) physically unable to vacate a building. Vacating Independently or with Supervision are not considered a deficit.

#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 B
(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 have 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 assessment completed by WVMi in May 2008 – Bathing, Grooming and Continence.
- 3) The evidence submitted at the hearing confirms that an additional deficit is demonstrated in dressing.
- 4) Whereas the Claimant demonstrates four (4) program qualifying deficits, continued medical eligibility for the Aged/Disabled Waiver Program cannot be established.

IX. DECISION:

It is the decision of the State Hearing Officer to **uphold** the Agency's proposal to terminate the Claimant's benefits and services through the Medicaid, 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 9th Day of September, 2008.

**Thomas E. Arnett
State Hearing Officer**