



State of West Virginia
DEPARTMENT OF HEALTH AND HUMAN RESOURCES
Office of Inspector General
Board of Review
9083 Middletown Mall
White Hall, WV 26554

Joe Manchin III
Governor

Patsy A. Hardy, FACHE, MSN, MBA
Cabinet Secretary

July 19, 2010

-----for

Dear -----:

Attached is a copy of the findings of fact and conclusions of law on your hearing held June 16, 2010. Your hearing request was based on the Department of Health and Human Resources' action to deny your application for benefits and services through the Medicaid MR/DD Waiver 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 MR/DD Home and Community-Based Waiver Program is based on current policy and regulations. Policy states that in order to be eligible for the Title XIX MR/DD Home & Community-Based Waiver Program, an individual must have a diagnosis of mental retardation and/or a related condition. The condition must be severe and chronic with concurrent substantial deficits that require the level of care and services provided in an Intermediate Care Facility for individuals with Mental Retardation and /or related conditions (ICF/MR Facility). (West Virginia Medicaid Regulations, Chapter 513 – Covered Services, Limitations, And Exclusions, For MR/DD Waiver Services).

Information submitted at your hearing fails to demonstrate that you meet the criteria necessary to establish medical eligibility for participation in the MR/DD Waiver Program.

It is the decision of the State Hearing Officer to **uphold** the Department's action in denying your application for benefits and services through the Medicaid, Title XIX, MR/DD Waiver Program.

Sincerely,

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

Pc: Chairman, Board of Review

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

Claimant,

vs.

Action Number: 10-BOR-1164

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

Respondent.

DECISION OF THE STATE HEARING OFFICER

I. INTRODUCTION

This is a report of the State Hearing Officer resulting from a fair hearing 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 June 16, 2010 on a timely appeal filed April 9, 2010.

This hearing was conducted via telephone conference call.

All persons giving testimony were placed under oath.

II. PROGRAM PURPOSE:

The *Medicaid Home and Community-Based MR/DD Waiver* (authorized under Title XIX, Section 1915(c) of the Social Security Act) provides an alternative to services available in Intermediate Care Facilities for individuals with Mental Retardation or related conditions (ICF/MR). The primary purpose of an ICF/MR facility is to provide health and rehabilitative services. An ICF/MR facility provides services to persons who are in need of and who are receiving active treatment.

West Virginia's MR/DD Waiver Program provides for individuals who require an ICF/MR level of care, and who are otherwise eligible for participation in the program, to receive certain services in a home and/or community-based setting for the purpose of attaining independence, personal growth, and community inclusion.

III. PARTICIPANTS

-----, Claimant's mother/representative
Carol Brawley, Hearings Coordinator, MR/DD Waiver Program

Richard Workman, Psychologist Consultant, BMS

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

IV. QUESTION TO BE DECIDED

The question to be decided is whether or not the Department was correct in its action to deny the Claimant's application for benefits and services through the MR/DD Waiver Program.

V. APPLICABLE POLICY

West Virginia Medicaid Regulations, Chapter 513 – Covered Services, Limitations, And Exclusions, For MR/DD Waiver Services.

VI. LISTING OF DOCUMENTARY EVIDENCE ADMITTED

Department's Exhibits:

- D -1 West Virginia Medicaid Regulations, Chapter 513 – Covered Services, Limitations, And Exclusions, For MR/DD Waiver Services
- D-2 Notice of Denial/Termination dated March 17, 2010
- D-3 DD-2-A-ICF/MR Level of Care Evaluation dated December 4, 2009
- D-4 DD-3, Psychological Evaluation dated January 22, 2010
- D-5 Physical Therapy Evaluation Report dated April 9, 2009
- D-6 Notice of Eligibility Committee and/or Individualized Education Program (IEP) dated May 8, 2009

VII. FINDINGS OF FACT:

- 1) In response to an application completed for benefits and services through the Medicaid MR/DD Waiver Program, on or about March 17, 2010 the Claimant was notified via a Notice of Denial/Termination (D-2) that Waiver services were denied. This notice states, in pertinent part:

Your Waiver Application is hereby denied.

Your application was Denied because:

Documentation submitted does not support the presence of substantial adaptive deficits in three or more of the six major life areas identified for Waiver eligibility. Specifically, the documentation failed to demonstrate substantial limitations in the following major life areas: Self-Care, Learning, Self-Direction, Receptive or Expressive Language, Mobility and Capacity for

Independent Living.

- 2) The Department stipulated that the Claimant presents a potentially eligible diagnosis of Pervasive Developmental Disorder Not Otherwise Specified (PDD NOS), however, the Department contends that the Claimant's condition is not severe, and therefore, does not require the same level of care and services that is provided in an Intermediate Care Facility for individuals with Mental Retardation (ICF/MR level of care). Specifically, the Department contends that the eligibility criteria in the area of Functionality has not been met – The Claimant is not demonstrating substantial adaptive deficits in three or more of the six major life areas. Consistent with Exhibit D-2, the Department indicated that the packet submitted for review failed to identify any substantial adaptive deficits in the major life areas as defined by policy.
- 3) -----, the Claimant's mother/representative, testified that her child is not as severe as some children but cited the ABS-S:2 results (D-4, page 5) that indicate her son is rated "poor" in several areas. She contends that being rated poor in several areas should be an indication of the need for assistance. The Claimant's representative did not contest the Department's findings specific to substantial adaptive deficits in any of the major life areas, however, ----- did indicate that her son has difficulty buttoning, snapping and zipping his clothes. While this would appear to be a concern specific to Self-Care, no other major life areas were contested. Information found in Exhibits D-3 (ICF/MR Level of Care Evaluation) and D-4 (Psychological Evaluation) indicate the Claimant requires some assistance in the area of Self-Care, however, a substantial adaptive finding is not supported by the ABS-S:2 results.
- 4) The Department's psychologist purported that pursuant to MR/DD Policy, an eligible ABS-S:2 score using the non-mental retardation norms (Non-MR) is less than one percentile (see the percentile rank in the second column). Specific to the testimony presented by the Claimant's representative, less than one percentile is rated "very poor" and would indicate eligibility in that category. Because none of the ABS-S:2 scores found in Exhibit D-4 indicate eligibility, and the narrative documentation reviewed in the psychological evaluation as well as D-3, D-5 and D-6 fail to identify substantial adaptive deficits in three (3) of the six (6) major life areas, the Claimant's condition is not severe. As a result, eligibility for participation in the MR/DD Waiver Program could not be established.
- 5) West Virginia Medicaid Regulations, Chapter 513, – Covered Services, Limitations, And Exclusions, For MR/DD Waiver Services, effective 11/1/07, includes the following pertinent medical eligibility criteria:

Medical Eligibility Criteria

The MR/DD State Waiver Office determines the medical eligibility for an applicant in the MR/DD Waiver Program. In order to be eligible to receive MR/DD Waiver Program Services, an applicant must meet the following medical eligibility criteria:

- Have a diagnosis of mental retardation and/or a related condition,
- Require the level of care and services provided in an ICF/MR (Intermediate Care Facility for the Mentally Retarded) as evidenced by required evaluations and corroborated by narrative descriptions of functioning and reported history. An ICF/MR provides services in an institutional setting for persons with mental retardation or related condition. An ICF/MR facility provides monitoring, supervision, training, and supports.

MR/DD State Waiver Office determines the level of care (medical eligibility) based on the Annual Medical Evaluation (DD-2A), the Psychological Evaluation (DD-3) and verification if not indicated in the DD-2A and DD-3, that documents that the mental retardation and/or related conditions with associated concurrent adaptive deficits were manifested prior to the age of 22, and are likely to continue indefinitely. Other documents, if applicable and available, that can be utilized include the Social History, IEP for school age children, Birth to Three assessments, and other related assessments.

The evaluations must demonstrate that an applicant has a diagnosis of mental retardation and/or a related developmental condition, which constitutes a severe and chronic disability. For this program individuals must meet the diagnostic criteria for medical eligibility not only by the relevant test scores, but also the narrative descriptions contained in the documentation. To be eligible, the member:

- Must have a diagnosis of mental retardation, with concurrent substantial deficits (substantial limitations associated with the presence of mental retardation), and/or
- Must have a related developmental condition which constitutes a severe and chronic disability with concurrent substantial deficits.

Examples of related conditions which may, if severe and chronic in nature, make an individual eligible for the MR/DD Waiver Program include but are not limited to, the following:

- Any condition, other than mental illness, found to be closely related to mental retardation because this condition results in impairment of general intellectual functioning or adaptive behavior similar to that of mentally retarded persons, and

requires services similar to those required for persons with mental retardation.

- Autism
- Traumatic brain injury
- Cerebral Palsy
- Spina Bifida
- Tuberos Sclerosis

Additionally, the member who has a diagnosis of mental retardation and/or related conditions and associated concurrent adaptive deficits must have the following:

- Manifested prior to the age of 22, and
- Likely to continue indefinitely.
- Must have the presence of a least three (3) substantial deficits out of five of the major life areas (term is defined in Title 42, Chapter IV, Part 435.1009 of the Code of Federal Regulations or CFR.
Refer to 503.1, Functionality section for a list of the major life areas.

Functionality

- Substantially limited functioning in three (3) or more of the following major life areas; (“substantially limited” is defined on standardized measures of adaptive behavior scores as three (3) standard deviations below the mean or less than one (1) percentile when derived from non MR normative populations or in the average range or equal to or below the seventy fifth (75) percentile when derived from MR normative populations. The presence of substantial deficits must be supported not only by the relevant test scores, but also the narrative descriptions contained in the documentation submitted for review, i.e., psychological, the IEP, Occupational Therapy evaluation, etc.). Applicable categories regarding general functioning include:
 - Self-care
 - Receptive or expressive language (communication)
 - Learning (functional academics)

- Mobility
- Self-direction
- Capacity for independent living (home living, social skills, employment, health and safety, community and leisure activities).

For applicable major life functioning areas, refer to Code of Federal Regulation (CFR): 42 CFR435.1009.

Active Treatment

- Requires and would benefit from continuous active treatment.

Medical Eligibility Criteria: Level of Care

- To qualify for ICF/MR level of care, evaluations of the applicant must demonstrate:
 - o A need for intensive instruction, services, assistance, and supervision in order to learn new skills, maintain current level of skills, and increase independence in activities of daily living,
 - o A need for the same level of care and services that is provided in an ICF/MR institutional setting.

The applicant or legal representative will be informed of the right to choose between ICF/MR services and home and community-based services under the MR/DD Waiver Program and informed of his/her right to a fair hearing at the time of application (Informed Consent, DD-7).

Conditions Ineligible

- Substantial deficits associated with a diagnosis other than mental retardation or a related diagnosis do not meet eligibility criteria.
- Additionally, any individual needing only personal care services does not meet the eligibility criteria.
- Individuals diagnosed with mental illness whose evaluations submitted for medical eligibility determination indicate no previous history of co-occurring mental retardation or developmental disability prior to age 22. The member's clinical evaluators must provide clinical verification through the appropriate eligibility documentation that their mental illness is not the primary cause of the substantial deficits and the mental retardation or developmental disability occurred prior to the age of twenty-two (22).

VIII. CONCLUSIONS OF LAW:

- 1) The regulations that govern the MR/DD Waiver Program require eligible individuals to have a diagnosis of Mental Retardation (and/or a related condition), which must be severe and chronic, in conjunction with substantial deficits in three (3) or more of the major life areas. “Substantially limited” is defined on standardized measures of adaptive behavior scores as three (3) standard deviations below the mean or less than one (1) percentile when derived from non MR normative populations (Emphasis added), or in the average range or equal to or below the seventy-fifth (75) percentile when derived from MR normative populations.

The presence of substantial deficits must be supported not only by the relevant test scores, but also the narrative descriptions contained in the documentation submitted for review.

- 2) The Claimant presents a potentially eligible diagnosis of PDD NOS, however, the clinical evidence fails to indicate the Claimant is demonstrating substantial adaptive deficits in three (3) or more of the major life areas. The standardized measures of adaptive behavior scores, as well as the clinical and narrative documentation found in the evaluations, fail to confirm substantial adaptive deficits in any of the major life areas.
- 3) Based on the evidence presented at the hearing, the Department was correct in denying the Claimant’s application for participation in the Medicaid MR/DD Waiver Program.

IX. DECISION:

It is the decision of the State Hearing Officer to **uphold** the action of the Department in denying the Claimant’s application for benefits and services through the MR/DD Waiver Program.

X. RIGHT OF APPEAL:

See Attachment.

XI. ATTACHMENTS:

The Claimant’s Recourse to Hearing Decision.

Form IG-BR-29.

ENTERED this ____ Day of July, 2010

Thomas E. Arnett
State Hearing Officer