



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

January 12, 2010

-----for

Dear -----:

Attached is a copy of the findings of fact and conclusions of law on your hearing held November 12, 2009. Your hearing request was based on the Department of Health and Human Resources' proposal to terminate your benefits and services through the 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, effective 11/1/07).

Information submitted at your hearing fails to demonstrate that you continue to 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 proposal to terminate your 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
Carol Brawley, MR/DD Waiver

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

Claimant,

vs.

Action Number: 09-BOR-1574

**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 concluded on January 12, 2010 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 November 12, 2009 on a timely appeal filed July 24, 2009.

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

-----, Representative/witness for the Claimant

-----, Representative/witness for the Claimant
-----, Therapeutic Consultant, witness for the Claimant
-----, Service Coordinator, witness for the Claimant

Carol Brawley, MR/DD Waiver Program, Department representative (Participated telephonically)
Linda Workman, Psychologist Consultant, BMS (Participated telephonically)
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 proposal to terminate the Claimant's 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, effective 11/1/07.

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, effective 11/1/07
- D-2 Notice of Denial/Termination dated June 12, 2009
- D-3 DD-2-A-ICF/MR Level of Care Evaluation dated September 24, 2008
- D-4 Psychological Evaluation dated July 31, 2008

VII. FINDINGS OF FACT:

- 1) The Claimant was undergoing a redetermination for certification of continued benefits and services through the Medicaid MR/DD Waiver Program when he was notified on June 12, 2009 (D-2) that his Waiver services were being terminated. This notice states, in pertinent part:

Your Waiver services have been terminated.

Your application was Terminated 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 meets diagnostic criteria (eligible diagnosis of Mental Retardation, etc...), however, the Department contends that the Claimant 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 criterion in the area of Functionality has not been met. Consistent with the information contained in the June 2009 notice letter, the Department maintains that the Claimant is not demonstrating substantial adaptive deficits in three or more of the six major life areas.
- 3) The Claimant, through his representatives, contends that he remains medically eligible to participate in the MR/DD Waiver Program as he is demonstrating substantial adaptive deficits in the following areas: Self-Care, Self-Direction, Learning and Capacity for Independent Living.
- 4) Linda Workman, the Department's psychologist consultant, testified that while the psychologist who completed the psychological evaluation (D-4) recommended the Claimant for ICF/MR placement, the evaluating psychologist did not have the scores from the Adaptive Behavior Scale-RC: Second Addition (ABS-RC:2) available (see D-4, Page 7) when the recommendation was made. According to Ms. Workman, an eligible ABS Standard Score is three standard deviations below the mean. An eligible Standard Score using the MR Norms group, the standard applied to individuals diagnosed with Mental Retardation, is 12 and below.
- 5) The ABS-RC:2 scores for the MR Norms group are found in Exhibit D-4 (page 7). As noted in the previous finding, a Standard Score of 12 and below is indicative of a substantial adaptive deficit. The following Standard Scores are identified in the contested areas.

Self-Care – The Standard Score found on the ABS (Independent Functioning) is 16.

Self-Direction – The Claimant's self-direction ABS Standard score was recorded at 16.

Learning – There was no assessment completed in the area of learning by the psychologist. Ms. Workman testified that she reviewed the Claimant's file and was unable to determine if an assessment of learning has ever been completed.

Capacity for Independent Living – This area is made up of 5 smaller components - home living, social skills, employment, health and safety, community and leisure activities. Not all

of these areas are covered by ABS testing but applicable ABS scores indicate a score in Domestic Activity (home living) of 15, a Socialization (social skills) score of 13, and Responsibility (health and safety) provides a score of 13. Community and leisure activities scores can be found under the Factor Scores and while the Claimant received a score of 118, a score of 115 or below is considered eligible. In addition to the ineligible ABS score, the Claimant leisure skills include playing video games, listening to radio and riding his bike. Pre/vocational activity (employment) provides an eligible standard score of 10, however, this is the only component wherein the Claimant's capacity for independent living appears to be limited. This component alone does not constitute a functional deficit.

The clinical documentation fails to support a finding that the Claimant is demonstrating a substantial adaptive deficit in any of the four (4) areas contested.

- 6) ----- testified that she was not the Claimant's therapeutic consultant when the ABS scores were completed and that she recently completed a new ABS. Because it was unclear if the ABS test administered by -----was accurate, and these scores were not made available to the Department prior to the hearing, the Department's objection to the introduction of these scores was sustained.
- 7) -----, Claimant's mother, testified that she wanted additional testing completed, however, she never heard anything more about it. -----further testified that while her son can complete a task at one point in the day, he may not be able to do it later. She indicated that his abilities are inconsistent and that he has to be prompted to do most tasks. She believes he would continue to benefit from additional services from the Waiver Program.
- 8) ----- testified that the Claimant has made progress on the program but he continues to require, and could benefit from, additional Waiver services.
- 9) The Department noted that it is the responsibility of the parent/guardian and/or the service provider to initiate additional testing.
- 10) West Virginia Medicaid Regulations, Chapter 513, – Covered Services, Limitations, And Exclusions, For MR/DD Waiver Services, effective 11/1/07, include 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

- Tuberous 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 meet diagnostic criterion in conjunction with substantial deficits in three (3) or more of the major life. “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.
- 2) As a matter of record, the Department stipulated that the Claimant meets diagnostic criteria,

however, the area of “Functionality” must demonstrate substantial adaptive deficits in three of the six major life areas. A review of the clinical documentation, as well as the testimony presented at the hearing, fails to demonstrate that the Claimant is substantially limited in any of the major life areas.

- 3) Whereas the Claimant fails to demonstrate substantial adaptive deficits in three of the six major life areas, medical eligible for participation in the MR/DD Waiver Program cannot be established.

IX. DECISION:

It is the decision of the State Hearing Officer to **uphold** the proposal of the Department to terminate the Claimant’s 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 12th Day of January, 2010

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

