



State of West Virginia
DEPARTMENT OF HEALTH AND HUMAN RESOURCES
Office of Inspector General

Joe Manchin III
Governor

Board of Review
1400 Virginia Street
Oak Hill, WV 25901

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

January 22, 2010

-----for -----

Dear -----:

Attached is a copy of the findings of fact and conclusions of law on your hearing held January 15, 2010. Your hearing request was based on the Department of Health and Human Resources' decision to deny ----- MR/DD Waiver services.

In arriving at a decision, the State Hearings 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 Waiver program is based on current policy and regulations. These regulations provide 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 (WV Medicaid Regulations § 513.3.1)

The information submitted at your hearing failed to establish at least three (3) deficits in the major life areas.

It is the decision of the State Hearings Officer to **Uphold** the action of the Department to deny --- -- services under the MR/DD Waiver program.

Sincerely,

Kristi Logan
State Hearings Officer
Member, State Board of Review

cc: Chairman, Board of Review
MR/DD Waiver Program

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

-----,

Claimant,

v.

Action Number: 09-BOR-2117

**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 January 15, 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 January 15, 2010 on a timely appeal, filed October 27, 2009.

II. PROGRAM PURPOSE:

The Program entitled MR/DD Waiver is administered by the West Virginia Department of Health & Human Resources.

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 Claimant
-----, Witness for Claimant

Carol Brawley, Hearing Coordinator, MR/DD Waiver Program
Linda Workman, Consulting Psychologist, Bureau of Medical Services

All participants testified by phone.

Presiding at the Hearing was Kristi Logan , State Hearing Officer and a member of the Board of Review.

IV. QUESTION TO BE DECIDED:

The question to be decided is whether or not the Department’s decision to deny Claimant services under the MR/DD Waiver program was correct.

V. APPLICABLE POLICY:

WV Medicaid Regulations § 513.3.1

VI. LISTING OF DOCUMENTARY EVIDENCE ADMITTED:

Department’s Exhibits:

- D-1 WV Medicaid Regulations § 513.3.1
- D-2 Denial Notification Letter dated September 30, 2009
- D-3 ICF/MR Level of Care Evaluation (DD-2A) dated February 25, 2009
- D-4 Psychological Evaluation (DD-3) dated August 5, 2009
- D-5 Individualized Education Program dated May 5, 2009
- D-6 ADOS Evaluation Report dated April 24, 2009
- D-7 ICF/MR Level of Care Evaluation (DD-2A) dated November 6, 2009
- D-8 Denial Notification Letter dated November 18, 2009

Claimants’ Exhibits:

None

VII. FINDINGS OF FACT:

- 1) Claimant was evaluated for medical eligibility for the MR/DD Waiver program. A denial notification letter dated September 30, 2009 was issued by the Department which read in pertinent parts (D-2):

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: learning, self-direction, receptive or expressive language, mobility and capacity for independent living.

- 2) The Department stipulated that Claimant meets the diagnostic criteria as set forth in policy with an eligible diagnosis of autism. Claimant also has the recommendation of ICF/MR services by his physician and psychologist (D-3 and D-4). However, the Department contends Claimant does not have at least three (3) substantial deficits in the major life areas, having only a deficit in the area of self-care.
- 3) Linda Workman, consulting psychologist with the Bureau of Medical Services, testified to the reason for the denial of services for Claimant based on the medical documentation submitted with his application. The Adaptive Behavior Scale – School Edition (ABS-S:2) was administered by Mareda Reynolds on August 5, 2009 as part of a psychological evaluation. According to Ms. Workman, an eligible score for the MR/DD Waiver program using non-MR norms from the ABS-S:2 is three (3) standard deviations below the mean or less than one (1) percentile. Claimant’s scores relating to the major life areas are (D-4):

Mobility [physical development] – 37%
Receptive/Expressive language [language development] – 5%
Self-direction – 1%
Independent functioning [self-care] - < 1%

Ms. Workman testified that there is no specific score for capacity for independent living, which is comprised of several areas: home living, social skills, employment, health and safety and community and leisure activities. Ms. Workman stated there was no information provided regarding Claimant’s home life and little information regarding his community activities. The narrative from the psychological evaluation revealed Claimant has an interest in video games and Blue’s Clues television show. Claimant received an eligible score in socialization of < 1% and the narrative indicated Claimant has a deficit in health and safety. His pre-vocational score was 2% (D-4). Deficits in two (2) out of the five (5) components for capacity for independent living does not constitute a deficit in this major life area.

- 4) Ms. Workman stated the area of learning was addressed by the Test of Nonverbal Intelligence (TONI3). Claimant had a TONI3 IQ score of 108 which falls in the upper average range. The Wide Range Achievement Test (WRAT4) was also administered with Claimant scoring a 92 in word reading, falling in the average range (D-4).

Ms. Workman stated there was no autism assessment for Claimant to determine the severity of his autism. Claimant’s ability to learn was not clearly addressed in the Individualized Education Program (IEP) report (D-5).

- 5) The Department holds Claimant does not meet the functional criteria to be eligible for services under the MR/DD Waiver program based on the information submitted for evaluation.
- 6) -----, Claimant's mother, testified that her son has limitations in his receptive language. He is able to make his wants and needs known but does not understand commands or directions. He is unable to process what is being said to him.

-----stated there are no household chores that Claimant is capable of doing. He has no concept of danger or what constitutes appropriate behavior. He needs continuous training for social and daily living skills. -----feels like Claimant will never be able to live independently.

- 7) WV Medicaid Regulations § 513.3.1 states:

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:
 - 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,
 - 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 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.
- 2) 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 other than self-care.
- 3) Whereas the Claimant fails to demonstrate substantial adaptive deficits in three of the six major life areas, medical eligibility 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 decision of the Department to deny Claimant services under 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 22nd day of January 2010.

**Kristi Logan
State Hearing Officer**