



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

March 22, 2010

-----for

Dear -----:

Attached is a copy of the findings of fact and conclusions of law on your hearing held March 8, 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 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 Title XIX MR/DD Waiver Home & Community-Based Policy Manual, Chapter 502.1).

Information submitted at the hearing reveals that you do not 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
Carol Brawley, MR/DD Waiver

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

Claimant,

vs.

Action Number: 09-BOR-2393

**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 March 22, 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 March 8, 2010 on a timely appeal filed December 16, 2009.

All persons giving testimony were placed under oath.

II. PROGRAM PURPOSE:

The program entitled MR/DD Home and Community-Based Waiver is set up cooperatively between the Federal and State Government and administered by the West Virginia Department of Health and 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

-----, Claimant's Mother/Representative
Carol Brawley, Hearings Coordinator, MR/DD Waiver Program
Linda 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(S) 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

Title XIX MR/DD Home and Community-Based Waiver Program Revised Operations Manual, Chapter 513

VI. LISTING OF DOCUMENTARY EVIDENCE ADMITTED

Departments Exhibits:

- D-1 Title XIX MR/DD Home and Community-Based Waiver Program Revised Operations Manual, Chapter 513
- D-2 Notice of Denial dated 10/30/09
- D-3 DD 2-A-ICF/MR Level of Care Evaluation (7/23/09)
- D-4 DD-3 New Waiver Psychological Evaluation (7/29/09)
- D-5 [REDACTED] Neurodevelopmental Center (5/11/09)
- D-6 Revision To Comprehensive Psychological Evaluation dated 7/29/2009
- D-7 Notice of Denial dated 2/17/2010

VII. FINDINGS OF FACT:

- 1) On or about October 30, 2009, the Claimant was notified via a Notice of Denial/Termination that his application for benefits through the Medicaid MR/DD Waiver Program was denied. This notice (D-2) indicates the Claimant's application was denied because he is not

demonstrating substantial adaptive deficits in three or more of the six major life areas. Substantial adaptive deficits were identified in two areas – Self-Care and Receptive or Expressive Language.

- 2) Additional documentation was submitted (D-6) and the and the Department of Health and Human Resources, hereinafter Department, issued a second denial notice (D-7) on February 17, 2010 that states – “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. This notice indicates that only Self-Care has been identified as a substantial adaptive deficit.
- 3) Linda Workman, a psychologist consultant and witness for the Department, testified that while there is some confusion regarding the Claimant’s diagnosis - Pervasive Developmental Disorder (PDD) or Autism - both considered eligible diagnosis. However, the evaluations submitted for review (D-4, D-5 and D-6) fail to confirm the Claimant’s condition is severe. Ms. Workman purported that the documentation indicates the Claimant is only demonstrating a substantial adaptive deficit in Self-Care, and as a result, eligibility for participation in the MR/DD Waiver Program could not be establish.
- 4) The Claimant’s representative contends that the Claimant’s Language skills continue to be a concern. Ms. Workman testified that Language (Receptive or Expressive Language) was not included as a substantial adaptive deficit in the second notice (D-7) as the Adaptive Behavior Scale-School Edition, Revised (ABS-S:2), identified as Exhibit D-6, provides a “Language Development” percentile score of 5. According to Ms. Workman, a percentile score of less than one (1) demonstrates eligibility. Ms. Workman testified that the results in Exhibit D-6 were not available when the original documentation was reviewed by the MR/DD Office, however, this score is consistent with the narrative information found in the psychological evaluation. While the evidence clearly indicates language skills are delayed, clinical documentation does not warrant the finding of a substantial adaptive deficit in Language.
- 5) The area of Self-Direction was questioned by the Claimant’s representative and Ms. Workman indicated that Self-Direction is the individual’s ability to initiate activities and/or chose an active lifestyle without assistance/direction. The Claimant questioned her son’s Self-Direction ability noting that he has locked her out of her home on three occasions and then watched her open the door by removing its hinges despite her repeated requests that he unlock the door. Ms. Workman testified that Self-Direction skills are not always demonstrated by good judgment or what we would like the individual to do. The fact that the Claimant locked the door and chose not to unlock it demonstrates Self-Direction skills. In addition, Ms. Workman noted that the ABS scores included with the original packet fail to support the finding of a substantial adaptive deficit in Self-Direction. Based on the evidence, a substantial adaptive deficit cannot be awarded in Self-Direction

- 6) Eligibility Criteria for the MR/DD Waiver Program are outlined in Chapter 500 of the Title XIX MR/DD Home and Community-Based Waiver Program Revised Operations Manual (Effective 7/1/05). The level of care criteria for medical eligibility is outlined in this chapter and reads as follows:

Diagnosis

- Must have a diagnosis of mental retardation, which must be severe and/or chronic, in conjunction with substantial deficits (substantial limitations associated with the presence of mental retardation), and o
 - Must have a related developmental condition, which constitutes a severe, 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
 - Autism
 - Traumatic brain injury
 - Cerebral Palsy
 - Spina Bifida
 - Tuberos Sclerosis
- Additionally, 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

Functionality

- Substantially limited functioning in three or more of the following major life areas: (Substantial limits is defined on standardized measures of adaptive behavior scores three (3) standard deviations below the mean or less than 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 by the documentation submitted for review, i.e., the IEP, Occupational Therapy evaluation, narrative

descriptions, etc.)

- 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 use, leisure).

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 and increase independence in activities daily living.
 - A need for the same level of care and services that is provided in an ICF/MR institutional setting.

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. Substantially limited functioning in three or more of the major life areas is required. Substantial limits is defined on standardized measures of adaptive behavior scores as three (3) standard deviations below the mean or less than 1 percentile when derived from non-MR normative populations. The presence of substantial deficits must be supported by the documentation submitted for review, i.e., the IEP, Occupational Therapy evaluation, narrative descriptions, etc.). The documentation must demonstrate that the individual needs the same level of care and services that is provided in an ICF/MR institutional setting.
- 2) The Claimant presents a program qualifying diagnosis, however, the standardized measures of adaptive behavior, and the supporting clinical documentation, fail to identify three or more substantial adaptive deficits in the major life areas.

- 3) Whereas the evidence fails to demonstrate the Claimant requires an ICF/MR level of care, 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 Department's action in denying your 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 22nd Day of March 2010

Thomas E. Arnett
State Hearing Officer