



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

Earl Ray Tomblin
Governor

Rocco S. Fucillo
Cabinet Secretary

November 8, 2012

---- for

----.

Dear Ms. ----:

Attached is a copy of the Findings of Fact and Conclusions of Law on your hearing held November 1, 2012. Your hearing request was based on the Department of Health and Human Resources' action to deny your application for Medicaid Intermediate Care Facilities for the Mentally Retarded (ICF/MR).

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 Medicaid ICF/MR Program is based on current policy and regulations. Some of these regulations state that in order to be medically eligible, mental retardation or a related condition must be manifested (both diagnosis and substantial adaptive deficits) before the individual reaches twenty-two (22) years of age.

Information submitted at your hearing fails to demonstrate that mental retardation - diagnosis and substantial adaptive deficits - were manifested prior to the age of twenty-two (22).

It is the decision of the State Hearing Officer to **uphold** the Department's action in denying your application for Medicaid ICF/MR eligibility/certification.

Sincerely,

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

Pc: Chairman, Board of Review
Kelley Johnson, Long-Term Care Program Manager

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

Claimant,

vs.

Action Number: 12-BOR-1980

**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 telephonically on November 1, 2012, on a timely appeal filed August 13, 2012.

All persons giving testimony were placed under oath.

II. PROGRAM PURPOSE:

Intermediate Care Facilities for the Mentally Retarded (**ICFs/MR**) are part of the long term care continuum that provides care for individuals with mental retardation and/or developmental disabilities. The services provided are based on each member's needs, which vary according to age and level of mental retardation and developmental disabilities. In order for a facility to participate in the program, it must meet federal and state standards in the areas of client protection, facility staffing, active treatment, client behavior, health care services, physical environment, and dietetic services. ICF's /MR services in West Virginia are provided in small facilities throughout the state. Commonly, four (4) to eight (8) members reside in each of the ICF's/MR.

III. PARTICIPANTS:

----, Claimant's sister/conservator

----, Claimant's niece

Kelley Johnson, Program Manager, Bureau for Medical Services (BMS) Long Term Care

Program and ICF/MR
----, 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 the Department was correct in its action to deny the Claimant's application for Medicaid ICF/MR (LTC) based on medical eligibility.

V. APPLICABLE POLICY

Medicaid Policy Manual, Chapter 511-Covered Services, Limitations, and Exclusions for ICF/MR Services.

VI. LISTING OF DOCUMENTARY EVIDENCE ADMITTED

- Exhibit-1 West Virginia Bureau for Medical Services Provider Manual, Medicaid Policy, Chapter 511-Covered Services, Limitations, and Exclusions for ICF/MR Services: Pages 1-4.
- Exhibit-2 Notice of Denial Determination, June 27, 2012: Pages: 5-6
- Exhibit-3 WV DD 2-A-ICF/MR Level of Care Evaluation, May 4, 2012: Pages 7-9
- Exhibit-4 WV DD-2-A-ICF/MR Level of Care Evaluation, June 12, 2012: Pages: 10-12
- Exhibit-5 WVDHHR Psychological Evaluation, May 9, 2012: Pages 13-20
- Exhibit-6 WVDHHR Social History, May 29, 2012: Pages 21-24

VII. FINDINGS OF FACT:

- 1) The Claimant, an applicant for the Medicaid ICF/MR Program, was notified by the Respondent on June 27, 2012 (Exhibit-2), that medical eligibility could not be established.

This notice states, in pertinent part:

The documentation submitted to establish medical eligibility has been reviewed. Based on the information submitted, eligibility for an ICF/MR Level of Care is denied for the following reasons:

Documentation submitted does not support the presence of substantial delays prior to age 22.

This notice goes on to state:

Documentation submitted for review does not adequately address the developmental period nor [sic] Ms. ----'s ability to live without an ICF/MR

level of care throughout her adulthood. Persons requiring this level of care would likely have been evaluated at some point previously. Documentation to support the presence of substantial adaptive delays prior to 22 will be required for further consideration. The social history reflects that she has had a decrease in her level of functioning since treatment for cancer. She does not appear to require the active treatment typically provided in an ICF/MR institutional level of care.

- 2) Respondent's representative, Kelley Johnson, an ICF/MR Program Manager for the Bureau for Medical Services (BMS), introduced applicable policy and called upon ----, a Psychologist Consultant employed by BMS, to review the clinical findings submitted for medical eligibility.
- 3) Testimony proffered by Mr. ---- indicates that the initial ICF/MR Level of Care Evaluation submitted for review reveals that the 78-year-old Claimant was provided a diagnosis of dementia (see Exhibit-3, Page 9), not Mental Retardation (MR). Mr. ---- further noted that while a diagnosis of MR was subsequently provided in Exhibit-4 and Exhibit-5, information submitted for review indicates that the Claimant's functional ability has diminished since being treated for cancer. Because there is limited information about the Claimant's functional ability throughout her adult life, it is unclear when substantial adaptive deficits were manifested. Moreover, Mr. ---- testified that individuals who require an ICF/MR level of care would have been identified, and received specialized services, prior to the age of 78 years. Mr. ---- noted in Exhibit-5 that the Claimant has no prior institutional placements and the only psychological evaluation completed previously was in 2011 for guardianship. While the current psychological evaluation indicates the Claimant is demonstrating substantial adaptive deficits, information to verify the presence of MR and substantial adaptive deficits prior to the age of 22 was not provided.
- 4) ---- spoke on behalf of the Claimant and reported that the Claimant is currently receiving in-home services through the Medicaid Aged and Disabled Waiver Program (ADW Program). Ms. ---- indicated, however, that they are pursuing ICF/MR facility placement because the family is having difficulty providing supervision and care on a 24-hour basis. Ms. ---- reported that she believed the Claimant would receive more individualized care in an ICF/MR facility, and that placing her in a "nursing home" is frowned upon by family. As a matter of record, Ms. ---- acknowledged that there is no evidence to verify a diagnosis of MR, with adaptive deficits manifested, prior to the age of 22. Ms. ---- indicated that the Claimant has always been cared for by family members.
- 5) Respondent's representative noted that the Claimant has demonstrated medical eligibility for a nursing facility (nursing home) level of care, as the medical eligibility requirements for the ADW Program and nursing facility placement are the same. Respondent noted that nursing facility placement is an alternative available for the Claimant.
- 6) Medicaid Policy Manual, Chapter 511-Covered Services, Limitations, and Exclusions for ICF/MR Services states as follows:

511.5 MEMBER ELIGIBILITY

Medical Eligibility is determined by submitting an application packet to the Bureau for Medical Services, Office of Behavioral and Alternative Health Care for member consideration.

511.5.1 DOCUMENTS REQUIRED FOR DETERMINING MEDICAL ELIGIBILITY

The DD-1 (Identification and Demographic Information Face Sheet), DD-2A (Medical Evaluation), DD-3 (Psychological Evaluation), DD-4 (Social History) and DD-5 (Individual Program Plan) need to be submitted to the Bureau for Medical Services, Division of Behavioral and Alternative Health Care, for approval for each member for whom payment is requested. The DD-1, DD-2A, DD-3, DD-4, and DD-5 must be current and received by the Bureau for Medical Services, Division of Behavioral and Alternative Health within ninety (90) days of admission to the ICF/MR or authorization of payment.

511.5.2 ELIGIBILITY DETERMINATION OF MEMBERS PRIOR TO ADMITTANCE

Individuals seeking ICF/MR services may have their eligibility determined prior to their admittance to an ICF/MR facility.

To establish prior eligibility, a complete packet of required information must be submitted within thirty (30) days prior to placement in the ICF/MR facility. Packets may be submitted to the eligibility determination section of the Bureau for Medical Services. All submitted information must be clinically current.

The prior eligibility packet of information includes the DD-2A, DD-3, and DD-4 and must be submitted to the Bureau for Medical Services, Office of Behavioral and Alternative Health, to establish eligibility for each member for whom payment is requested.

Current is defined as

- DD-2A (Medical Evaluation) must be current within the past six months. Any Medical Evaluation dated in excess of 180 days upon receipt by the Bureau for Medical Services shall be considered out of date.
- DD-3 (Psychological Report) must have been completed within 90 days of the placement date. Any date of a psychological report in excess of 90 days upon recipient by the Bureau for Medical Services shall be considered out of date.
- DD-4 (Social History) must have been completed within 180 days of the placement date. Any social history in excess of 180 days upon receipt by the Bureau for Medical Services shall be considered out of date,

When current information is received in its entirety an eligibility determination will be made as quickly as possible (maximum of 45 days) and the decision communicated to the recipient and to the provider that submitted the packet.

511.5.3 ELIGIBILITY DETERMINATION OF MEMBERS POST ADMISSION

Individuals seeking ICF's/MR services can have their eligibility determined after their admittance to an ICF/MR. To establish eligibility, a complete packet of required information must be submitted within thirty (30) days after placement in the ICF/MR facility. Packets must be submitted to the eligibility determination section of the Bureau for Medical Services. All submitted information must be clinically current. The post eligibility packet of information includes the DD-2A, DD-3, DD-4, and DD-5. Documents must be submitted to the Office of Behavior and Alternative Health Care of the WV Bureau for Medical Services.

Current is defined as

- DD-2A (Medical Evaluation) must be current within the past six months. Any Medical Evaluation dated in excess of 180 days upon receipt by the Bureau for Medical Services shall be considered out of date.
- DD-3 (Psychological Report) must have been completed within 90 days of the placement date. Any date of a psychological report in excess of 90 days upon receipt by the Bureau for Medical Services shall be considered out of date
- DD-4 (Social History) must have been completed within 180 days of the placement date. Any social history in excess of 180 days upon receipt by the Bureau for Medical Services shall be considered out of date,

When current information is received in its entirety an eligibility determination will be made as quickly as possible (maximum of 45 days) and the decision communicated to the recipient and to the provider that submitted the packet.

The initial DD-5 (IPP) must be developed within seven (7) days of intake (initial DD-5), and completed within thirty 30 days after the intake and submitted to the Bureau for Medical Services, Office of Behavioral and Alternative Health. Payment shall be delayed until the receipt of the DD- 5 (IPP).

The provider will assume the financial risk of providing services during the period that eligibility is being considered. In the event an individual is determined not to meet ICF's/MR eligibility there is no mechanism to reimburse the provider.

511.5.4 MEDICAL ELIGIBILITY CRITERIA

BMS through its contracted agent 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 have both a diagnosis of mental retardation or a related condition

and also manifest concurrent substantial adaptive deficits.

1. Persons with **related conditions** means individuals who have a severe, chronic disability which is attributable to:

- cerebral palsy or epilepsy: or
- any other 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 treatment or services similar to those required for these persons; and the severe chronic disability
- the mental retardation or related condition is manifested (both diagnosis and substantial deficits) before a person reaches twenty two (22) years of age and
- the mental retardation or related condition is likely to continue indefinitely

2. The applicant must have substantial limits in three (3) or more of the following major life areas:

- self care,
- receptive and/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)

- Substantial adaptive deficits is defined as scores on standardized measures of adaptive behavior 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 below the seventy fifth (75th) percentile when derived from MR normative populations.

- The presence of substantial deficits must be supported by the additional documentation submitted for review (e.g. IEP, OT evaluations, narrative descriptions, etc.).

3. The applicant must have a need for an ICF/MR level of care that:

- is certified by a physician (DD-2A) and,
- is recommended by the evaluating psychologist (DD-3) and,
- is identified by a licensed social worker (DD-4)

The applicant requires and would benefit from active treatment. 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 of daily living.

VIII. CONCLUSIONS OF LAW:

- 1) The regulations that govern the ICF/MR 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. Mental Retardation, or a related condition, must be manifested (both diagnosis and substantial deficits) before the individual reaches twenty-two (22) years of age.
- 2) Evidence submitted at the hearing fails to demonstrate a diagnosis of MR (or a related condition), with the onset of substantial adaptive deficits, prior to the age of 22.
- 3) The evidence demonstrates the Respondent was correct in its decision to deny the Claimant's application/certification for participation in the Medicaid ICF/MR Program.

IX. DECISION:

It is the decision of the State Hearing Officer to **uphold** the Department's action in denying the Claimant's application for Medicaid ICF/MR eligibility/certification.

X. RIGHT OF APPEAL:

See Attachment.

XI. ATTACHMENTS:

The Claimant's Recourse to Hearing Decision.

Form IG-BR-29.

ENTERED this ____ Day of November 2012

Thomas E. Arnett

State Hearing Officer