



State of West Virginia
DEPARTMENT OF HEALTH AND HUMAN RESOURCES
Office of Inspector General
Board of Review
4190 Washington Street, West
Charleston, WV 25313

Earl Ray Tomblin
Governor

Michael J. Lewis, M.D., PH.D.
Cabinet Secretary

May 24, 2012

Dear -----:

Attached is a copy of the Findings of Fact and Conclusions of Law on your client's hearing held May 23, 2012. Your hearing request was based on the Department of Health and Human Resources' action to deny your client's application for benefits and services through the Medicaid I/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 I/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 I/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 – Applicant Eligibility and Enrollment Process for I/DD Waiver Program]

Information provided during the hearing reveals that ----- does not meet the medical eligibility criteria required for participation in the Medicaid I/DD Waiver Program.

It is the decision of the State Hearing Officer to **uphold** the Department's action to deny ----- application for benefits and services through the Medicaid I/DD Waiver Program.

Sincerely,

Cheryl Henson
State Hearing Officer
Member, State Board of Review

cc: Chairman, Board of Review
Jennifer Eva, APS Healthcare / Melissa Myers

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

IN RE: -----,

Claimant,

v.

Action No.: 12-BOR-1037

**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 Chapter 700 of the West Virginia Department of Health and Human Resources' Common Chapters Manual. This fair hearing convened on May 23, 2012.

All persons giving testimony were placed under oath.

II. PROGRAM PURPOSE:

The Intellectual and Developmental Disabilities (I/DD) Waiver Program is West Virginia's home and community-based services program for individuals with intellectual and/or developmental disabilities. It is administered by the Bureau for Medical Services pursuant to a Medicaid waiver option approved by the Centers for Medicare and Medicaid (CMS). The I/DD Waiver Program reimburses for services to instruct, train, support, supervise, and assist individuals who have intellectual and/or developmental disabilities in achieving the highest level of independence and self-sufficiency as possible. The I/DD Waiver Program provides services in natural settings, homes and communities where the individual resides, works and shops.

III. PARTICIPANTS:

-----, Claimant's representative

-----, Claimant's witness

-----, Claimant's witness

Jennifer Eva, Department's representative
Richard Workman, Department's witness

Presiding at the hearing was Cheryl Henson, 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 benefits and services through the Medicaid I/DD Waiver Program.

V. APPLICABLE POLICY:

West Virginia Medicaid Regulations, Chapter 513 – Applicant Eligibility and Enrollment Process for I/DD Waiver Program

VI. LISTING OF DOCUMENTARY EVIDENCE ADMITTED:

Department's Exhibits:

- D-1 West Virginia Medicaid Regulations, Chapter 513.3.2 – Initial Medical Eligibility for I/DD Waiver Program
- D-2 Notice of Denial/Termination dated February 23, 2012
- D-3 Independent Psychological Evaluation dated February 15, 2012
- D-4 ██████████ County Schools dated April 12, 2011
- D-5 Child Accomplishments Summary dated December 16, 2011

Claimant's Exhibits:

- C-1 ICF/MR Level of Care Evaluation dated June 16, 2010
- D-2 Psychological Evaluation dated December 10, 2010

VII. FINDINGS OF FACT:

- 1) On or about February 23, 2012, the Department notified the Claimant via a Notice of Denial/Termination (D-2) that his application for Medicaid I/DD Waiver Program benefits had been denied. This notice states, in pertinent part:

Your Waiver Application is hereby denied.

Your application was denied/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, and Mobility.

It should be noted that the Claimant was awarded substantial adaptive deficits in the areas of Receptive or Expressive Language and Capacity for Independent Living. The Department relied on the submitted information which included the February 15, 2012 IPE; the April 7, 2009 Klingberg Center Report; the November 3, 2012 DD-2A; the December 10, 2010 DD-3; and the April 12, 2011 IEP in making its decision.

- 2) West Virginia Medicaid Regulations, Chapter 513 - Applicant Eligibility and Enrollment Process for I/DD Waiver Services (D-1), includes the following pertinent medical eligibility criteria:

513.3.2 Initial Medical Eligibility

To be medically eligible, the applicant must require the level of care and services provided in an ICF/MR as evidenced by required evaluations and other information requested by the IP or the MECA [Medical Eligibility Consulting Agent] and corroborated by narrative descriptions of functioning and reported history. An ICF/MR provides services in an institutional setting for persons with intellectual disability or a related condition. An ICF/MR provides monitoring, supervision, training, and supports.

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

The MECA determines the qualification for an ICF/MR level of care (medical eligibility) based on the IPE that verifies that the applicant has mental retardation with concurrent substantial deficits manifested prior to age 22 **or** a related condition which constitutes a severe and chronic disability with concurrent substantial deficits manifested prior to age 22. For the I/DD Waiver program, individuals must meet criteria for medical eligibility not only by test scores, but also narrative descriptions contained in the documentation.

In order to be eligible to receive I/DD Waiver Program Services, an applicant

must meet the medical eligibility criteria in each of the following categories:

- a. Diagnosis;
- b. Functionality
- c. Need for active treatment.

513.3.2.1 Diagnosis

The applicant must have a diagnosis of mental retardation with concurrent substantial deficits manifested prior to age 22 or a related condition which constitutes a severe and chronic disability with concurrent substantial deficits manifested prior to age 22.

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

- Autism
- Traumatic brain injury
- Cerebral Palsy
- Spina Bifida; and
- 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.

Additionally, the applicant who has a diagnosis of mental retardation and/or a severe related condition with associated concurrent adaptive deficits must meet the following requirements:

- Likely to continue indefinitely; and,
- Must have the presence of at least three substantial deficits out of the six identified major life areas listed in Section 513.3.2.2.

513.3.2.2 Functionality

The applicant must have substantial deficits in at least three of the six identified major life areas listed below:

- Self-care;

- Receptive or expressive language (communication);
- Learning (functional academics);
- Mobility;
- Self-direction; and,
- Capacity for independent living (home living, social skills, employment, health and safety, community and leisure activities).

Substantial deficits are defined as standardized scores of three standard deviations below the mean or less than one percentile when derived from a normative sample that represents the general population of the United States, or the average range or equal to or below the 75 percentile when derived from MR normative populations when mental retardation has been diagnosed and the scores are derived from a standardized measure of adaptive behavior. The scores submitted must be obtained from using an appropriate standardized test for measuring adaptive behavior that is administered and scored by an individual properly trained and credentialed to administer the test. 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 report, the IEP, Occupational Therapy evaluation, etc. if requested by the IP for review.

513.3.2.3 Active Treatment

Documentation must support that the applicant would benefit from continuous active treatment. Active treatment includes aggressive consistent implementation of a program of specialized and generic training, treatment, health services and related services. Active treatment does not include services to maintain generally independent individuals who are able to function with little supervision or in the absence of a continuous active treatment program.

- 3) Because policy specifies that an applicant must show a presence of substantial deficits with both relevant test scores and narrative descriptions, the narrative information will only be considered when relevant test scores are found to be present.
- 4) The Claimant contends that he meets the policy criteria to also be awarded substantial adaptive deficits in the major life areas of Learning, Self-Care, and Self-Direction.
- 5) Richard Workman is a Psychological Consultant for the Department. He testified that he is a licensed psychologist, and has been such since 1981. He stated that he began consulting for the Bureau for Medical Services during 1983 and that he has an extensive background of working with the Department. He stated that his “office” functions as the MECA, and that he has been involved with the evaluation of medical eligibility for Waiver applicants since 1985.

He stated that he reviewed all the information submitted for review for this Claimant several times and determined each time that he does not meet the medical eligibility guidelines set forth in policy for the I/DD Waiver Program. He explained that in making this decision, he first determined that the Claimant has a potentially eligible diagnosis of autism which was determined (D-3) to be in the “mildly – moderately autistic” range by the psychologist who completed his Independent Psychological Evaluation (IPE). The psychologist determined this based on the Claimant’s test score of 34.5 on the Childhood Autism Rating Scale (CARS) test; however, he added that he found from looking at the overall narrative and the test scores that the Claimant’s diagnosis was not severe enough to meet the policy criteria. Mr. Workman clarified that a severe score on the CARS test is in the range of thirty-seven (37) through sixty (60).

- 6) Mr. Workman reviewed the IPE (D-3) which was completed on February 15, 2012, and in considering the major life area of Learning, he stated that he found the test scores on the ABAS II (Adaptive Behavior Assessment System) met the severity criteria as is required by policy (Scores of 1 or 2); however, he added that he found the narrative information did not meet the policy criteria. He stated that the IPE report documents that the Claimant is able to count to five (5), identify letters, numbers, shapes, and colors; he cannot write his name legible, but can spell it orally. He stated that, for a child with autism and at age five (5), these abilities are more developed than he would expect and not supportive of a severe adaptive behavior deficit in this area. He also added that the Claimant’s test scores [Word Reading – 91, Spelling – 55, Math Computation – 75] on the Wide Range Achievement Test (WRAT4) test were not within the range needed [eligible scores on all three (3) tests at fifty-five (55) or below] and therefore not compatible with someone who has a severe adaptive behavior deficit. The Claimant scored a two (2) in the relevant area of “Functional Academics” on the ABAS II test. Mr. Workman also reviewed a ██████████ County Schools’ report (D-4) dated April 12, 2011, and found that the Claimant is noted to have progressed academically overall; he is noted to recognize letters, count to at least twenty (20) and to count objects. He is noted in the report (D-4) to have age appropriate visual and rote memory skills. Mr. Workman found this report (D-4) to be unsupportive of a severe adaptive behavior deficit in Learning. Mr. Workman stated he also reviewed a Child Accomplishments Summary Report (D-5) and found that the narrative in this document also is not supportive of a severe adaptive behavior deficit in Learning.
- 7) In considering the major life area of Self-Care, Mr. Workman found that the evaluating psychologist documented (D-3) that the Claimant’s test score on the ABAS II in this area was three (3). This score is above the required score of one (1) or two (2); therefore, since the Claimant has not met the severity criteria in score, the narrative will not be addressed. It is not possible for the Claimant to meet the specified policy criteria with just supporting narrative information.
- 8) In considering the major life area of Self-Direction, Mr. Workman found that the psychologist documented (D-3) that the Claimant’s score on the ABAS II test in this area was four (4). This is not within the range required [score of one (1) or two (2)] to support a severe adaptive behavior deficit in this area. The narrative will not be addressed in this area since it is not possible for the Claimant to meet the specified policy criteria with just supporting narrative

information.

VIII. CONCLUSIONS OF LAW:

- 1) Regulations that govern the I/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 which manifested prior to age 22. "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) Clinical evidence submitted at the hearing fails to confirm that the Claimant is demonstrating substantial adaptive deficits in three (3) or more of the major life areas. While the Department conceded that the Claimant is demonstrating substantial adaptive deficits in Receptive or Expressive Language and Capacity for Independent Living, 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 other functional areas reviewed for eligibility.
- 3) Testimony from the Department's witness, Richard Workman, a Psychological Consultant for the Department with a broad knowledge and history in determining I/DD Waiver medical eligibility, provides that for the ABAS II test, eligible scores consist of scores of one (1) or two (2); for the WRAT4 test, eligible scores are scores of fifty-five (55) or below on all three (3) tests; and for the CARS test, eligible scores are scores of thirty-seven (37) through sixty (60). Policy is clear in that an applicant must have *both* eligible test scores and supporting narrative documentation in order to meet the policy criteria to show a substantial adaptive deficit.
- 4) Of the three major life areas contested (Learning, Self-Care, Self-Direction) by the Claimant, he only had eligible test scores on the ABAS II in the major life area of Learning; supportive narrative documentation and other tests, however, did not support a substantial adaptive deficit in this area.
- 5) Whereas the Claimant does not meet the functionality requirements in the medical eligibility criterion, medical eligibility for participation in the Medicaid I/DD Waiver Program cannot be established.

IX. DECISION:

It is the decision of the State Hearing Officer to **uphold** the action of the Department to deny the

Claimant's benefits and services through the I/DD Waiver Program.

X. RIGHT OF APPEAL:

See Attachment.

XI. ATTACHMENTS:

The Claimant's Recourse to Hearing Decision.

Form IG-BR-29.

ENTERED this 24th Day of May 2012.

**Cheryl Henson
State Hearing Officer**