



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 7, 2012

Dear -----:

Attached is a copy of the Findings of Fact and Conclusions of Law on your son's hearing held May 3, 2012. Your hearing request was based on the Department of Health and Human Resources' action to deny your son'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 your son 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 your son's 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

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

IN RE: -----,

Claimant,

v.

Action No.: 12-BOR-855

**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 3, 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

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

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 20, 2012
- D-3 Independent Psychological Evaluation dated February 7, 2012 and February 9, 2012
- D-4 ██████████ County Schools Psychological Services Evaluation Report dated January 24, 1989

Claimant's Exhibits:

None

VII. FINDINGS OF FACT:

- 1) On or about February 20, 2012, the Claimant was notified 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:

While -----'s condition of Trisomy 21 with associated intellectual disability is well established, documentation submitted for review does not

support the presence of substantial adaptive delays such as those which require an institutional level of care within the developmental period. In fact, history and functional status, as reported, is inconsistent with the need for active treatment and the need for ICF/MR level of care.

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, Self-Direction, Mobility and Capacity for Independent Living.

It should be noted that the Claimant was awarded substantial adaptive deficits in the areas of Learning, and Receptive or Expressive Language.

- 2) Richard Workman is a Psychological Consultant for the Department. He testified that he is a licensed psychologist, having been in practice since 1979. He stated that he began consulting for the Bureau for Medical Services in 1983 and has an extensive background with the Department. He added 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 and determined 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 an eligible diagnosis of mental retardation which was judged (D-3) to be moderate by the psychologist who completed the Claimant's February 2012 psychological assessment; however, he added that he found the diagnosis to be mild mental retardation based on the information he reviewed regarding the Claimant's adaptive behavior level. He added, however, that he considered the diagnosis to be an eligible one.
- 3) Mr. Workman reviewed a psychological evaluation (D-3) which was completed on February 7, 2012 and February 9, 2012, by the Claimant's psychologist. The psychologist notes that the Claimant received a regular diploma at the age of eighteen (18), and that he worked for eight (8) years independently in the laundry department at the ----- in -----, West Virginia, and that he rode the "KAT" bus home or to a second job as a dishwasher at ----- until the restaurant closed. The psychologist notes that his supervisors were pleased with the Claimant's work. After age twenty-one (21), the psychologist notes that the Claimant began living alone in an apartment near his mother, and received assistance with cooking and cleaning from an outside source. He notably later began living in his own house for eleven (11) years, with his mother assisting him at times. The psychologist notes that the Claimant's mother reported that he has lost some of his skills in the recent past.

Mr. Workman noted that the psychological report (D-3) notes a past "WISC-R" test conducted by ██████████ County Schools during April 1992 which yielded a Full Scale IQ of 52, Verbal IQ of 46, and Performance IQ of 68. Mr. Workman found these to be eligible scores which allowed him to continue to review the report.

Mr. Workman stated that policy dictates that an individual have both eligible test scores as well as supporting documentation in the narrative form in order to be eligible for the program. He added that in addition to the supporting narrative information, the individual would need test scores of at least three (3) standard deviations from the “norm,” or in other words, a score of one (1) or two (2).

Under Self-Care, Mr. Workman stated that he found in reviewing the psychological (D-3) that the Claimant is functioning at a higher level than individuals typically do in an institutional setting. The report notes that the Claimant manages many affairs on his own, attending to his hygiene independently, including cleaning and replacing the batteries in his hearing aids. The report further notes that he can cook, do laundry and housekeeping, as well as manage his own money. The Claimant received a score of four (4) on the Adaptive Behavior Assessment System – Second Edition (ABAS-2) test in this area which is above the required score of one (1) or two (2).

Under Self-Direction, Mr. Workman stated that he found in reviewing the psychological that the Claimant is functioning at a higher level than individuals typically do in an institutional setting. He added that the Claimant makes choices and is his own guardian. The report notes that the Claimant directs his small daily affairs – choosing his clothes, choosing and preparing food, and making small purchases, while his mother manages large sums of money, oversees his medical and legal needs, and assists him with transportation and obtaining employment. The Claimant received a score of three (3) on the ABAS-2 test in this area, which is above the required score of one (1) or two (2).

Under Mobility, Mr. Workman stated that the Claimant has no significant difficulty with mobility. The report provides that he is independently mobile, and, although his gait is slow and ponderous, he can also navigate stairs. The Claimant did not dispute this area.

Under Capacity for Independent Living, Mr. Workman stated that the Claimant has demonstrated an ability to live on his own with a support system which is inconsistent with someone who would need an institutional level of care. The psychological report (D-3) provides that he is independent with small daily tasks with the assistance from his mother, and that he requires assistance with money management, seeking employment, transportation, and meeting his health care needs. Mr. Workman testified that in addressing potentially eligible test scores for Capacity for Independent Living, he looks at the scores in the categories of Social, Leisure, Health and Safety, Home Living, and Community Use, because they all measure the applicant’s abilities in this area. He stated that he found the Claimant did not meet the eligibility criteria in scores because only two (2) out of five (5) of these test scores were in the required one (1) to two (2) score area. The Claimant scored seven (7) under Home Living, a three (3) under Leisure, and a three (3) under Social. He scored a one (1) under Health and Safety, and a two (2) under Community Use.

In the psychological report (D-3), the psychologist documents that the Claimant is a thirty-four (34) year old male with Down syndrome and mental retardation; that he wears hearing aids; that his Wide Range Achievement Test (WRAT5) test scores are at the early elementary

level. The psychologist concluded that the Claimant requires active treatment equivalent to that provided in an ICF/MR [Intermediate Care Facility/Mental Retardation] institutional setting, and that there are substantial delays. Mr. Workman testified that he found that the delays are not significant enough to meet the policy requirement of being less than one (1) percentile rank, or three standard deviations below the mean.

- 4) The Claimant's representative, -----, is his mother. She stated that she believes the Claimant meets the Department's policy requirements for the I/DD Waiver program in the areas of Self-Care, Self-Direction, and Capacity for Independent Living. She stated that in the area of Self-Care, the Claimant is unable to brush his teeth and complete other such tasks without extensive supervision, prompting, and guidance. She stated that the Claimant manages nothing in this area "on his own" as reported in the psychological evaluation (D-3).

In the area of Self-Direction, -----stated that the Claimant does not "choose his own clothes" as reported on the psychological (D-3). She stated that if allowed to do this he will wear the wrong types of clothing for the weather situation and does not choose appropriate clothing. She stated that the narrative in the report (D-3) does not completely show the real "picture" of the Claimant; however, she added that she does not disagree with some of the test scores, which she believes have been fairly similar throughout his life. She stated that he does not really direct anything in his daily affairs. She stated that she tells him when to go to bed, when to get up, and when to take his medication. She added that she plans his daily activities, and that he will not leave the house unless forced to do so. She stated that he never chooses or prepares his food to any extent. She stated that if he tries to cook an egg or beef pasta she must stand over him and watch him so that he doesn't hurt himself.

In the area of Capacity for Independent Living, -----stated that the Claimant requires extensive assistance, and that he is not able to accurately make small purchases; although he knows what a dollar bill is, he does not understand when he needs to produce two (2) dollar bills for a purchase and will simply hand the cashier a five (5) dollar bill. She added that he will not be able to determine if he receives the correct change. She stated he can decide what he wants at a restaurant, but then she has to explain to the waitress how to prepare the food to his liking. She stated that the Claimant requires constant oversight, and that she does the major cleaning at his home. She added that the Claimant can, "run the sweeper and put dishes in the dishwasher - but that is about it." She added, in referring to safety, that the Claimant never looks to see if traffic is nearby before crossing the street.

- 5) 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 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.

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 Learning and Receptive or Expressive Language, 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) 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 7th Day of May, 2012.

**Cheryl Henson
State Hearing Officer**