



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

Board of Review
P.O. Box 1736
Romney, WV 26757

Earl Ray Tomblin
Governor

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

February 24, 2012

-----for -----

Dear -----:

Attached is a copy of the Findings of Fact and Conclusions of Law on your daughter's hearing held February 23, 2012. Your hearing request was based on the Department of Health and Human Resources' decision to deny her application for benefits and services associated with the Medicaid 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 to be eligible for the Title XIX MR/DD Home & Community-Based Waiver Program, an individual must substantiate each of the following elements: 1) a diagnosis of mental retardation with concurrent substantial deficits which require the level of care and services provided in an Intermediate Care Facility for the Mentally Retarded (ICF/MR); 2) substantially limited functioning in three or more of the major life areas of self-care, receptive or expressive language, learning, mobility, self-direction, and capacity for independent living; 3) the requirement for and ability to derive benefit from continuous active treatment; and 4) the endorsement of the need for an ICF/MR level of care from both a physician and a psychologist. (MR/DD Waiver Manual, Chapter 513 – *Covered Services, Limitations, and Exclusions for MR/DD Waiver Services*, §513.3.1).

The information which was submitted at your hearing revealed that clinical information submitted for review did not meet the necessary medical eligibility requirements.

It is the decision of the State Hearing Officer to Uphold the action of the Department to deny your daughter's medical eligibility for the MR/DD Waiver program.

Sincerely,

Eric L. Phillips
State Hearing Officer
Member, State Board of Review

cc: Erika Young, 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.: 11-BOR-2526

**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 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 a timely appeal, filed December 6, 2011.

II. PROGRAM PURPOSE:

Medicaid Home and Community-Based MR/DD Waiver Program (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
Jennifer Eva, Lead Service Support Facilitator-APS Healthcare
Linda Workman, Psychologist Consultant-Bureau for Medical Services

Presiding at the hearing was Eric L. Phillips , 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 was correct in its decision to deny the Claimant's medical eligibility for the MR/DD Waiver program.

V. APPLICABLE POLICY:

Chapter 513-Covered Services, Limitations, and Exclusions for MR/DD Waiver Services

VI. LISTING OF DOCUMENTARY EVIDENCE ADMITTED:

Department's Exhibits:

- D-1 Chapter 513-Covered Services, Limitations, and Exclusions for MR/DD Waiver Services
- D-2 Notice of Denial dated November 21, 2011
- D-3 DD-2A-ICF/MR Level of Care Evaluation
- D-4 Psychological Evaluation completed by [REDACTED] ED.D.

VII. FINDINGS OF FACT:

- 1) On November 21, 2011, the Department issued the Claimant Exhibit D-2, Notice of Denial, in response to her application for benefits and services for the MR/DD Waiver program. This exhibit documents the reasons for the denial as:

Your Waiver Application is hereby denied.

Documentation submitted does not support the presence of substantial adaptive deficits in three or more of the six major life areas indentified for Waiver eligibility.

Specifically, the documentation failed to demonstrate substantial limitations in the following major life areas: Receptive or Expressive Language, Learning, Self-Direction, and Capacity for Independent Living

- 2) There are four components to establishing medical eligibility for the MR/DD Waiver Program. These areas include: diagnostic, functionality, level of care and the need for active treatment. Ms. Linda Workman, Bureau for Medical Services Psychologist Consultant offered testimony concerning her review of the Claimant's application for MR/DD services. The Department contends that the Claimant does not demonstrate functional deficits in three or more of the major life areas. Specifically, the Claimant did not achieve the appropriate test scores or exhibit narrative documentation to determine eligibility for the MR/DD Waiver Program.

- 3) Ms. Workman reviewed Exhibit D-3, DD 2-A ICF/MR Level of Care Evaluation, which documents the Claimant's diagnosis of a spinal cord stroke with quadriplegia. Ms. Workman testified that the Claimant met diagnostic criteria and the physician recommended that the Claimant requires the level of care and services provided in an "Intermediate Care Facility" for individuals with mental retardation and related conditions.
- 4) Ms. Workman reviewed Exhibit D-4, Psychological Evaluation completed on September 8, 2011 by Ronald Pearse, ED.D. This exhibit documents the Claimant's diagnosis and her requirement to "receive ongoing services in order to maintain or improve her current level of functioning". As part of the evaluation, the Claimant was administered an Adaptive Behavior Scale-School 2 as a measure of her adaptive behavior. Ms. Workman noted that Non-MR normative tables were used in the assessment and scores of less than one percentile were considered eligible scores.

In regards to self-care, the Claimant achieved a raw score of 62 and less than one percentile in the domain of independent functioning. This achieved score is considered an eligible score and the Claimant was awarded a deficit in the area of self-care.

In regards to mobility, the Claimant achieved a raw score of 10 and a percentile rank of 5 in the area of physical development, which is not considered an eligible score. However, Ms. Workman testified that narrative data submitted with the Claimant's application supported a deficit in the area of mobility because the Claimant lacks the ability to ambulate and transfer; therefore, a deficit was awarded in the life area.

In regards to language, the Claimant achieved a raw score of 36 and a percentile rank of 16 in the domain of language development, which is not considered an eligible score.

In regards to self-direction, the Claimant achieved a raw score of 23 and a percentile rank of 63, which is not considered an eligible score.

In regards to capacity for independent living, the Claimant achieved a raw score of 11 and a percentile rank of 1 in the domain of economic activity, a raw score of 7 and a percentile rank of 16 in the domain of prevocational activity, a raw score of 10 and a percentile rank of 75 in the domain of responsibility, and a raw score of 25 and a percentile rank of 50 in the domain of socialization. Ms. Workman testified that all of the domains are considered for capacity for independent living and the Claimant did not achieve an eligible score in any of the domain areas.

- 5) -----, Claimant's mother contended that an additional deficit should have been awarded in the area of capacity for independent living. -----testified that the Claimant does not presently have the capacity for independent living and believed her daughter would not have such capacity in the future. -----indicated that the Claimant is unable to independently transfer, cook, toilet, or vacate her home in the event of an emergency. -----indicated that the Claimant has the capacity to participate in leisure activities, but requires assistance to initiate participation in those types of activities. -----cited the psychologist's

documentation in Exhibit D-4, that her daughter was unable to take care of most of her personal care needs and that she could not be employed at a productive work level. -----agreed that the assessment of her daughter's adaptive behavior was "fairly accurate", but her daughter requires assistance in order to participate in the domains outlined under capacity for independent living.

- 6) West Virginia Medicaid Regulations, Chapter 513, – Covered Services, Limitations, And Exclusions, For MR/DD Waiver Services, effective 11/1/07, includes the following pertinent medical eligibility criteria:

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
- Tuberos 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 (5) 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) Policy and regulations that govern the MR/DD Waiver program require eligible individuals to have a diagnosis of Mental Retardation or a related condition which is severe and chronic. Additionally, the individual must present three (3) substantial deficits out of the major life areas. Substantially limited functioning in three (3) or more of the major life areas 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 equal to or below the seventy fifth percentile when derived from MR normative populations. Substantial deficits must be supported by relevant test scores, as well as narrative descriptions contained in the documentation submitted for review.
- 2) Policy states that the presence of substantial adaptive deficits must be supported not only by the relevant test scores, but by narrative descriptions contained in the documentation submitted for review. This policy is interpreted to mean that an eligible score, on administered tests, must first be identified and then supported by the narrative documentation. Based on a review of the Claimant's evaluations, the Claimant failed to meet the eligibility standard in three of the six major life areas concerning the functionality criteria. While deficits were awarded in the areas of self-care and mobility, the Claimant failed to meet the eligibility standard, an achieved score of less than one percentile, in the contested domain area of capacity for independent living. Whereas, the Claimant failed to meet the functionality criteria as set forth by governing policy, medical eligibility for participation in the Medicaid MR/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 application for benefits and services under the Medicaid 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 _____ day of February , 2012.

**Eric L. Phillips
State Hearing Officer**