



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 23, 2012

-----for -----

Dear -----:

Attached is a copy of the Findings of Fact and Conclusions of Law on your son's hearing held February 22, 2012. Your hearing request was based on the Department of Health and Human Resources' decision to deny his 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 the 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 son'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.: 12-BOR-330

**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 22, 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

-----, Claimant's Attorney-In-Fact and Mother

-----, Claimant's Step-Father

Jennifer Eva, Lead Service Support Facilitator-APS Healthcare

Richard 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 June 13, 2011
- D-3 Notice of Denial dated October 5, 2011
- D-4 DD-2-A-ICF/MR Level of Care Evaluation dated May 4, 2011
- D-5 Mineral county Psychological Services Report dated January 13, 2011
- D-6 Psychological Evaluation dated May 3, 2011
- D-7 Letter from [REDACTED] M.D., M.S. P.T dated July 17, 2006
- D-8 Letter from [REDACTED] M.D., M.S. P.T dated August 18, 2006
- D-9 Letter from [REDACTED] M.D., M.S. P.T dated June 2, 2011
- D-10 Letter from [REDACTED] M.D., M.S. P.T dated July 7, 2011
- D-11 Individual Education Plan-[REDACTED] County Schools dated January 26, 2011

VII. FINDINGS OF FACT:

- 1) On October 5, 2011, the Department issued the Claimant Exhibit D-3, Notice of Denial, in response to his 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.

Your application was denied/terminated because documentation submitted for review indicates that ----- historically has not been diagnosed with mental retardation prior to his application for I/DD Waiver services. In fact, he was diagnosed by his physician and by the school system as having a learning disability which is mutually exclusive to mental retardation. His treating

neurologist has never included this diagnosis among the array of diagnoses for which she treats ----- . This indicates that if intellectual disability is present, it is mild in degree and has been overlooked by the school system and his neurologist and is not of the degree which typically results in the need for an institutional level of care. The other diagnoses which ----- carries are not considered to be related conditions.

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, Mobility, 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. Mr. Richard Workman, Bureau for Medical Services Psychologist Consultant offered testimony concerning his review of the Claimant's application for MR/DD services. The Department contends that medical documentation submitted for review failed to support the presence of an eligible diagnosis for medical eligibility. Additionally, 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 her medical eligibility for the MR/DD Waiver Program.
- 3) Mr. Workman reviewed Exhibit D-4, DD 2-A ICF/MR Level of Care Evaluation, which documents the Claimant's diagnoses of dysthemia, attention deficit disorder, learning disability and a movement disorder (tics). Mr. Workman testified that the Claimant's physician provided clarification to the Claimant's diagnosis of dysthemia as a form of depression. Mr. Workman stated that the diagnoses provided by the Claimant's physician are not considered eligible diagnosis for program purposes; however, the physician recommended a level of care and services provided in an "Intermediate Care Facility" for individuals with mental retardation and related conditions and the application was reviewed.
- 4) On January 13, 2011, Mineral County Psychological Services conducted an assessment of the Claimant. Mr. Workman reviewed Exhibit D-5, ██████████ County Psychological Services Report which was administered to the Claimant at 17 years of age and documents that the Claimant was found to demonstrate average "Broad Reading" and "Broad Written Language" scores, but was deficit in the component of "Broad Math" which is reflective of the Claimant's learning disability. Mr. Workman opined that information provided by the Claimant on the report was not compatible with an individual who requires an institutional level of care, because the Claimant demonstrated language, self-direction, and leisure skills during the assessment. Additionally, the exhibit documents that the Claimant, "put forth minimal efforts and this examiner feels that the results of this evaluation may be a low representation of his current level of cognitive functioning ability." The exhibit further documents that the Claimant fell in the borderline range of intellectual functioning on administered tests. As part of the assessment

the Claimant was administered a Wechsler Adult Intelligence Scale-Fourth Edition, Mr. Workman indicated that eligible scores for eligibility purposes are considered 55 or below. The exhibit documents that the Claimant achieved a score of 81 in verbal comprehension, 73 perceptual reasoning, 71 in working memory, 65 in processing speed, 69 in full scale, and a 75 in general ability index, all of which were ineligible scores for eligibility purposes.

- 5) Mr. Workman reviewed Exhibit D-6, Psychological Evaluation dated May 3, 2011, which documents that the Claimant was administered a Wechsler Adult Intelligence Scale-Fourth Edition as a measure of his intellectual and cognitive abilities. Mr. Workman provided testimony concerning the eligibility standards of intellectual assessments for the program. Mr. Workman testified that individuals who achieve scores of 55 or below on administered intellectual assessments are considered eligible for program purposes. The Claimant achieved a score of 74 in verbal comprehension, 69 in perceptual reasoning, and 66 in working memory for a full scale I.Q. score of 65. As part of the evaluation, the Claimant was administered an Adaptive Behavior Assessment Systems-Second Edition as a measure of his adaptive behavior. Mr. Workman stated that scores of two or below are considered eligible scores (a score of one represents three standard deviations below the mean with a score of two representing less than one percentile) to meet functionality criteria. The Claimant achieved scores of 7 in communication, 4 in community use, 4 in functional academics, 6 in health and safety, and 6 in leisure, all which do not reflect an eligible score for the functionality criteria. Mr. Workman did note that the Claimant achieved eligible scores in self-care and self-direction and the Department conceded deficits in those areas; however, the Claimant failed to meet the functionality criteria in three of the six major life areas for the diagnostic criteria of the program. Mr. Workman indicated that the psychologist who completed the evaluation, diagnosed the Claimant with mild mental retardation, but medical documentation failed to support the diagnosis.
- 6) The Department presented letters from [REDACTED] M.D. Exhibit D-7 through D-10, which documents the physician's history with the Claimant, but fails to document a history of an eligible diagnosis of mental retardation or a related condition.
- 7) Mr. Workman presented Exhibit D-11, Claimant's Individual Education Plan-[REDACTED] County Schools which documents the Claimant's primary area of exceptionality was a specific learning disability and the plan was not instituted for any specific mental impairment. The exhibit documents the Claimant's intellectual ability of 79 in verbal and 85 in perceptual reasoning with a full scale score of 73. Mr. Workman testified that the achieved intellectual scores do not demonstrate an eligible score for program purposes.
- 8) The Claimant's representatives conceded that the Claimant does not require an institutional level of care, but demonstrated concerns with the Claimant's abilities in learning, language, self-care, and capacity for independent living. The Claimant's representatives stated that the Claimant lacks poor judgment, comprehension, and processing skills which affect his daily life and learning. In regards to language, the Claimant's mother indicated that the Claimant is outgoing in social environments, but can only engage in small talk and often utilizes other's opinions. In regards to self-care, the Claimant's mother indicated that the Claimant requires constant prompting with hygiene and medications which adversely affects his biological

functions. In regards to capacity for independent living, the Claimant's mother addressed the Claimant's difficulties with money management and his inability to count change. Additionally, the Claimant's mother indicated that he has some difficulties with dressing and his ability to sort laundry.

- 9) 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
- Tuberous 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) Testimony revealed that an eligible diagnosis must be accompanied with relevant intellectual scores that are consistent with the individual's diagnosis. Testimony revealed that intellectual scores of 55 or below are considered eligible scores for program purposes. While medical evidence documents several diagnoses for the Claimant, only mild mental retardation could be evaluated for diagnostic medical eligibility. However, the totality of evidence, including assessment scores and narrative documentation concerning the Claimant's intellectual and cognitive abilities, failed to support an eligible diagnosis for medical eligibility. Additionally, 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 to meet medical eligibility under the functionality criteria. This policy is interpreted to mean that an eligible score, on administered tests, must first be identified and then supported by the narrative documentation. While the Claimant achieved eligible scores in the area of self-care and self-direction, he failed to meet the criteria in three or more of the major life areas.
- 3) Based on the review of testimony and evidence, the Claimant failed to meet the diagnostic and functionality criteria as set forth by policy. Therefore, 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 medical eligibility 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