



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

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

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

Earl Ray Tomblin
Governor

May 10, 2012

Dear ----- :

Attached is a copy of the Findings of Fact and Conclusions of Law on your daughter's hearing held May 2, 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.: 12-BOR-864

**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 Chapter 700 of the West Virginia Department of Health and Human Resources' Common Chapters Manual. This fair hearing was convened on a timely appeal, filed February 23, 2012.

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 father
Jennifer Eva, Lead Service Support Facilitator-APS Healthcare
Richard Workman, Psychologist Consultant-Bureau of 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 Decision dated December 28, 2011
- D-3 DD-2A-ICF/MR Level of Care Evaluation dated May 13, 2011
- D-4 Psychological Evaluation dated October 5, 2011 and October 13, 2011

Claimant's Exhibits:

- C-1 Psychological Evaluation dated June 30, 2011

VII. FINDINGS OF FACT:

- 1) On December 28, 2011, the Department issued the Claimant Exhibit D-2, Notice of Decision, in response to her application for benefits and services under the MR/DD Waiver Services program. This exhibit documents the reason for denial as:

Your Waiver Application is hereby denied.

Your application was denied/terminated because the most current psychological evaluation submitted did not result in a diagnosis of mental retardation. If the basis for eligibility is to be the brain injury noted in the psychological evaluation, no medical records in support of this diagnosis have been submitted and this diagnosis is not included on the DD-2A. Thus, ----- does not meet diagnostic eligibility. The need for active treatment and the need for an ICF/MR level of care are not endorsed by the psychologist nor supported by the documents submitted for review.

- 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. Richard Workman, Bureau for Medical Services Psychologist Consultant offered testimony concerning his review of the Claimant's application for MR/DD services and contended that the medical documentation submitted for review failed to support the presence of an eligible diagnosis for medical eligibility.
- 3) Exhibit D-3, DD-2-A-ICF/MR Level of Care Evaluation completed on May 13, 2011, identifies an Axis I diagnosis of bipolar disorder and an Axis II diagnosis of mental retardation. The examining physician certified the Claimant's need for an ICF/MR Level of Care. Mr. Workman opined that he was not comfortable with the examining physician's diagnosis of bipolar disorder because the diagnosis was not identified in other documentation available for review. Mr. Workman indicated that the Claimant's diagnosis of mental retardation, "was important, but not enough for eligibility of the program."
- 4) Exhibit D-4, Psychological Evaluation completed on October 5, 2011 and October 13, 2011 by [REDACTED] M.S. of [REDACTED] Services, Inc. identifies an Axis I diagnosis of Adjustment Disorder with Depressed Mood and an Axis II diagnosis of Borderline Intellectual Functioning, but did not recommend the need for active treatment or certify the Claimant's need for an ICF/MR Level of Care. This exhibit documents that the Claimant suffered a stroke during birth which resulted in blindness in her left eye, the limited use of her left arm, and that the Claimant graduated from high school with a regular diploma. Mr. Workman indicated that the Department did not address the functionality criteria of the Claimant's application for services because the Claimant failed to meet the diagnostic eligibility criteria. Mr. Workman indicated that the Claimant's achieved scores in the functionality criteria are considered low, but narrative documentation did not support the presence of substantial delays.

As part of the evaluation, the Claimant was administered the Wechsler Adult Scales of Intelligence (WASI) and achieved scores of Verbal Comprehension 72, Perceptual Reasoning 52, Working Memory 71, Processing Speed 86 and a Full Scale score of 64. The evaluator documented in the assessment the following information:

These scores indicated that her ability to process simple or routine visual information without making errors is significantly better developed than her ability to sustain attention, concentrate and exert mental control. What can be extrapolated from these scores is that her most significantly better developed skill is her ability to process simple or routine visual information. However, her lowest index score was the Perceptual Reasoning Index and was most likely affected by her lack of binocular vision, due to blindness in her left eye, as well as her limited mobility in her left arm. Her Full Scale IQ was lowered because of the low score on this index; therefore, her Full Scale IQ is more accurately labeled in the Borderline range, when taking these deficits into account.

The evaluator documented his Developmental Findings and Conclusions of the Claimant as:

-----, a 21 years old Caucasian female was referred for a psychological evaluation by her father, ----. ----- functions in the borderline range of intellectual functioning. Some of her adaptive behaviors are commensurate with an individual functioning in the borderline range of functioning, whereas some of her adaptive skills are more consistent with someone functioning in the mild to moderate range of mental impairment. However, her performance on intelligence testing and achievement testing suggests she could learn these skills without aggressive and consistent training. ----- is most likely to experience difficulty with learning skills to manage money due to her limited math skills. There are deficits that may be the result of limited exposure to these tasks, such as the acquiring of responsibility, socialization, vocational and budgeting skills. Information was not provided during today's evaluation specifically stating that a diagnosis of mental retardation was made during her evaluation at the University of Virginia, aside from a verbal report from her father that the evaluator stated she would not progress past the mental age of 12 or 13 year old. Therefore, ----- appears to be more accurately diagnosed with Borderline Intellectual Functioning.

Mr. Workman concluded that the evaluating psychologist's diagnosis of Borderline Intellectual Functioning and the lack of documentation citing the Claimant's need for active treatment resulted in the denial of the Claimant's medical eligibility for program purposes.

- 5) ----, Claimant's father, provided a history of his daughter's educational background citing that, due to his daughter's condition, she did not receive the type of education that she should have because she was provided additional opportunities to pass school examinations. ---- purported that these additional opportunities included teacher's providing the Claimant with answers to school examinations which resulted in her achieving honor roll status. ---- believed that his daughter was not adequately prepared for "anything beyond high school" and the diploma she received was "worthless" because of the school's practices with "No Child Left Behind."

---- provided Exhibit C-1, Psychological Evaluation completed on June 30, 2011. The psychologist noted that the Claimant's recent and remote memory is within normal limits; however, ---- suggests that his daughter is unable to recall events, occurrences, and recent activities beyond 96 hours and believes that her memory is not within normal limits.

---- referred to Exhibit D-4, Psychological Evaluation completed on October 5, 2011 and October 13, 2011, in which the psychologist documented that his daughter "shows awareness of possible dangers." ---- cited his concerns for his daughter's safety, providing the example in which he observed his daughter looking at toaster that had caught fire and filled the kitchen with smoke. ---- indicated that his daughter's reaction to the incident was to walk away from the toaster. The psychologist documented that the Claimant "can cross the street safely by herself"; however, ---- indicated that his daughter has failed to look both ways before crossing the street on multiple occasions. ---- indicated that due to safety concerns, he could not allow his daughter to drive a vehicle because she does not have the mental capacity to make split-second decisions.

----- stated that he believed his daughter's condition is not as good as the scores and psychologist's observations indicate and that she would benefit from the services provided by the MR/DD Waiver program.

- 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 which govern the MR/DD Waiver program state that 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. Policy reveals that the individual must have a diagnosis of mental retardation, with concurrent substantial deficits (substantial limitations associated with the presence of mental retardation), and/or a related developmental condition which constitutes a severe and chronic disability with concurrent substantial deficits. Policy defines a related condition as 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 retard persons, and requires services similar to those required for persons with mental retardation. Additionally, the individual must require the level of care and services provided in an Intermediate Care Facility for the Mentally Retarded (ICF/MR).
- 2) The medical evidence submitted for review reveals that the Claimant has been diagnosed with Borderline Intellectual Functioning, which does not represent a severe condition. Additionally, the evaluating psychologist did not certify the Claimant's requirement for the level of care and service provided in an ICF/MR because her performance on intelligence and achievement testing indicates she could learn skills without aggressive and consistent training.
- 3) Based on the review of testimony and evidence, the Claimant failed to meet the diagnostic 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 May, 2012.

Eric L. Phillips
State Hearing Officer