



State of West Virginia  
DEPARTMENT OF HEALTH AND HUMAN RESOURCES  
Office of Inspector General  
State Board of Review  
2699 Park Avenue, Suite 100  
Huntington, West Virginia 25704  
March 21, 2005

Joe Manchin III  
Governor

Martha Yeager Walker  
Secretary

Dear \_\_\_\_\_,

Attached is a copy of the findings of fact and conclusions of law on your hearing held March 17, 2005. Your hearing request was based on the Department of Health and Human Resources' (WVMI) action to determine level B for homemaker hours in the amount of three (3) hours per day or 93 hours per month in the Title XIX Aged/Disabled Home and Community Based Waiver Services Program case.

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 and benefit levels for the Aged/Disabled Home and Community Based Services Waiver Program are determined based on current regulations. One of these regulations is that there are four levels of care for clients of ADW Homemaker services determined from the PAS-2000 submitted to West Virginia Medical Institute (Aged/Disabled Home and Community-Based Waiver Services, Policy and Procedures Manual, 11-1-03).

The information which was submitted at the hearing revealed that you are eligible for Level of Care C which amounts to (4) hours per day or 124 hours per month.

It is the decision of the State Hearing Officer to reverse the action of the Department (WVMI) to determine Level B for homemaker hours in the amount of three (3) hours per day or 93 hours per month in the Title XIX Aged/Disabled Home and Community Based Waiver Services Program. You will receive Level C homemaker hours in the amount of four (4) hours per day or 124 hours per month.

Sincerely,

Thomas M. Smith  
State Hearing Officer  
Member, State Board of Review

cc: Board of Review  
Kay Ikerd, BOSS  
Kim Sang, WVMI  
\_\_\_\_\_, CCCSO  
\_\_\_\_\_, Claimant's Attorney  
Alva Page, III, Department's Attorney

NAME: \_\_\_\_\_

ADDRESS: \_\_\_\_\_  
\_\_\_\_\_

## SUMMARY AND DECISION OF THE STATE HEARING OFFICER

### I. INTRODUCTION

This is a report of the State Hearing Officer resulting from a fair hearing concluded on March 17, 2005 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 originally convened on March 17, 2005 on a timely appeal filed February 25, 2004. It should be noted that the hearing was originally scheduled for April 9, 2004, May 7, 2004, August 16, 2004, October 8, 2004, and January 25, 2005 but was rescheduled initially at claimant's request, then twice at claimant's attorney's request, then after an order for a new PAS-2000 was issued by the State Hearing Officer, and finally again at claimant's attorney's request.

It should be noted here that any benefits under the Aged/Disabled Home and Community Based Services Waiver Program have been continued pending the results of this hearing. It should also be noted that Kay Ikerd from the Bureau for Senior Services (BOSS), Kim Sang from West Virginia Medical Institute (WVMI), and Alva Page, III, Department's Attorney, all participated in the hearing by speaker phone upon agreement of the claimant.

All persons giving testimony were placed under oath.

### II. PROGRAM PURPOSE

The program entitled Aged/Disabled Home and Community Based Services Waiver is set up cooperatively between the Federal and State Government and administered by the West Virginia Department of Health and Human Resources.

Under Section 2176 of the Omnibus Budget Reconciliation Act of 1981, states were allowed to request a waiver from the Health Care Financing Administration (HCFA) so that they could use Medicaid (Title XIX) funds for home and community based services. The Program's target population is individuals who would otherwise be placed in a skilled nursing facility (if not for the waiver services).

### III. PARTICIPANTS

1. \_\_\_\_\_, Claimant.
2. \_\_\_\_\_, \_\_\_\_\_ Co. Community Services Org. R. N.
3. \_\_\_\_\_, \_\_\_\_\_ Co. Community Services Org. Homemaker.
4. \_\_\_\_\_, Claimant's Attorney.
5. Kay Ikerd, Bureau for Senior Services Waiver Nurse.
6. Kim Sang, WVMI R. N.
7. Alva Page, III, Department's Attorney.

Presiding at the hearing was Thomas M. Smith, State Hearing Officer and a member of the State Board of Review.

### IV. QUESTION TO BE DECIDED

The question to be decided is whether WVMI proposed the correct action to determine the claimant's level of care to be level B and number of homemaker hours to be three (3) hours per day or 93 hours per month.

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### V. APPLICABLE POLICY

Aged/Disabled Home and Community-Based Services Waiver, Policy and Procedures Manual, 11-1-03.

### VI. LISTING OF DOCUMENTARY EVIDENCE ADMITTED

Exhibit #HR-1 Copy of regulations (3 pages).

" #HR-2 Copy of PAS-2000 completed 11-17-04 (8 pages).

" #HR-3 Copy of notice of decision 11-30-04.

Exhibit #Cl-1 Copy of packet submitted on 9-30-04 (41 pages).

" #Cl-2 Copy of packet submitted on 3-2-05 (72 pages).

" #Cl-3 Copy of RN Assessment form 3-3-04 (3 pages).

" #Cl-4 Copy of Plan of Care/Homemaker worksheet 3-01-05 to 3-01-06.

" #Cl-5 Copy of Plan of Care/Homemaker worksheet 3-04 to 3-05.

(It should be noted that Ms. Whitman stated that she had not received a copy of the Department's evidence and that the evidence was not properly submitted two (2) weeks prior to the hearing as ordered by the State Hearing Officer in the appointment notice dated 1-25-05 and Ms. Whitman asked for a summary judgment against the Department. The State Hearing Officer denied the request for a summary judgment but offered to reschedule the hearing to give Ms. [REDACTED] an opportunity to review the Department's evidence or to provide her with a copy of the evidence which was submitted to the State Hearing Officer and Ms. Whitman agreed to accept the latter. However, Ms. [REDACTED] noted that since the Department had not complied with the State Hearing Officer's order in the submission of the evidence that she should be allowed to enter new evidence at the hearing also and the State Hearing Officer agreed. Ms. [REDACTED] did enter new evidence (Exhibits #Cl-3, #Cl-4, and #Cl-5) and Mr. Page accused Ms. [REDACTED] of being disingenuous as Mr. Page stated that Ms. [REDACTED] intended to attempt to enter the new evidence anyway and Mr. Page requested that his objection be made a part of the record and the State Hearing overruled his objection as the Department's failure to provide a copy of the evidence prior to the hearing opened the door for Ms. [REDACTED] to do the same.

## VII. FINDINGS OF FACT

1. The claimant was an active recipient of the Title XIX Aged/Disabled Wavier Services Program (ADW) when a reevaluation of medical eligibility determined Level of Care B for three (3) hours per day or 93 hours per month and the claimant requested a hearing on 2-25-04 and after several postponements, the State Hearing Officer ordered a new PAS-2000 on 10-8-04 as the R. N. from WVMI who originally completed the PAS-2000 assessment was no longer employed at WVMI and no longer available for the hearing.

2. A PAS-2000 completed by Kim Sang, R. N. from WVMI, on 11-17-04 determined the claimant to be eligible for Level of Care B which translated to three (3) hours per day or 93 hours per month (Exhibit #HR-2).

3. Ms. Ikerd testified about the regulations in Chapter 580.2, 570.1c and 570.1d and testified that she is a Nurse III with administrative nursing duties and that the regulations are promulgated by the Bureau for Medical Services (BMS) but that she works with the Bureau for Senior Services and Ms. [REDACTED] objected to Ms. Ikerd's testimony as irrelevant as she had nothing to do with the case and was not from the agency which promulgated the policy (BMS) and the objection was taken under advisement. The objection is overruled as the State Hearing Officer considered Ms. Ikerd to be a witness presented by the Department as a policy witness whether or not she was involved in the promulgation of the policy.

3. The findings of the PAS-2000 dated 11-17-04 were as follows: item #23 included Angina Rest (a), Angina Exertion (b), Dyspnea (c), Significant Arthritis (d), Dysphagia (f), Pain (h), Mental Disorder (k), and other (low blood pressure)(l) for a total of eight (8) points, that item #24 showed no decubitus present for zero (0) points, that item #25 showed that the claimant was physically unable to vacate the building in an emergency for (1) point, that item #26 showed physical assistance needed with eating (a) for one (1) point, physical

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assistance needed with bathing (b), dressing (c) and grooming (d) for one (1) point each, that the claimant was continent of bladder (e) and bowel (f) for zero (0) points, that there was no disorientation (g) for zero (0) points, that supervised/assistive device was needed for transferring (h) for one (1) point, that supervised/assistive device was needed with walking (i) for one (1) point, that the claimant wheels independently (j) for zero (0) points, that vision (k) was impaired but correctable for zero points and hearing (l) was not impaired for zero(0) points, that communication (m) was impaired but understandable for zero (0) points, that the only professional/technical needs (#27) was for continuous oxygen for one (1) point, that she is capable of administering medications with prompting/supervision for one (1) point, that there was no alzheimer's/dementia or related condition for zero (0) points (item #34), that prognosis was stable

for zero (0) points, and that the total number of points was 17 which qualified for Level B care or three (3) hours a day and 93 hours per month, that she reviewed the additional documents presented by Ms. [REDACTED] but her opinion was not changed, that she did not reports dated prior to her assessment, that the claimant was sitting on the couch the entire time of her visit.

4. Ms. [REDACTED] testified that she is a nurse with CCCSO and had been involved with [REDACTED]'s case for 1 and ½ years, that she is in charge of Plan of Cares (POC) and assessments and outlines the duties of the homemaker, that she determined that the claimant needed one-person assistance with transferring as she is on oxygen 24 hours a day, that the Plan of Care completed 3-3-04 (Exhibit #C1-4) and the one completed 3-1-05 (Exhibit #C1-5) had "assist" circled under Transfer, that the RN assessment completed 3-3-04 (Exhibit #C1-3) showed assist needed for transferring, that she marked independent for Eating, that [REDACTED] needs physical assistance with transferring, that [REDACTED] is not incontinent, that a reduction in hours would reduce funding for her agency.

5. Ms. [REDACTED] testified that she has been [REDACTED]'s homemaker since June, 2004 and sees her five (5) days a week, that she has to help [REDACTED] get up whenever she needs to, that she has a hoverboard she can use in the home and she has seen her use it once, that [REDACTED] feeds herself but she has to cut up her meat because her hands shake.

6. [REDACTED] testified that she sees Dr. [REDACTED], a pulmonary specialist, that she had a stroke and fell, that she broke her left thumb, that she has broken the large bones in her left hand, that she had a slight heart attack on 11-27-04, that she has a compound fracture of her back and spine, that she has a terrible time getting out of a chair on her own, that she has to rock back and forth to try to get up to her walker, that the homemaker gets her out of bed, gives her a shower, dresses her, fixes her breakfast, and cuts up her food, that she was sitting the entire time that Ms. Sang was with her, that she is a severe asthmatic and has to stay in bed for two (2) days when she has an asthma attack, and that she has a potty chair by her bed and uses it when no one is with her so she does not have to go to the bathroom.

7. The only area of disagreement that the claimant had with the PAS-2000 involved transferring (item 26(h)). The claimant's witnesses testified that she needed physical assistance with transferring and the claimant testified that she had a difficult time getting out of her chair by herself as she has to rock back and forth to attempt to get to her walker. Ms. Sang testified that the claimant was sitting on the couch the entire time of her visit and therefore did not witness the claimant trying to transfer. In her notes, Ms. Sang noted that the claimant "use assistive device to transfer and ambulate" but also included in her health assessment the bone and spine fractures, arthritis, and shortness of breath which would affect the claimant's ability to transfer. While Ms. Sang's notes also say that the claimant and the homemaker agreed with the findings, the State Hearing Officer is convinced that the claimant is unable most of the time to transfer without at least one-person assistance and is awarding a Level III in that area which results in two (2) points for Item #26 (h) and an additional point overall. The claimant has 18 points which translates into Level of Care C and four (4) hours per day or 124 hours per month.

8. PAS-2000 approved 11-17-04 (Exhibit #HR-2) showed the following points: Item #23-8 points, item #24-0 points, item #25-1 point, item #26 a-1 point, b-1 point, c-1 point, d-1 point, e-0 points, f-0 points, g-0 points, h-1 point, i-1 point, j-0 points, k-0 points, l-0 points, m-0 points, #27-1 point, #28-1 point, #34-0

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points, #35-0 points. Total points-17 for Level B.

Item 23 8points  
" 24 0 point  
" 25 1 "  
" 26 6 "  
" 27 1 "  
" 28 1 "

#### CONCLUSIONS OF LAW

1. Policies and Procedures Manual, 11-1-03 states, in part, that applicants "must be approved as medically eligible for NF level of care".
2. Policies and Procedures Manual Section 570.1c states, in part

## "LEVEL OF CARE CRITERIA

There are four levels of care for clients of ADW Homemaker services. Points will be determined as follows, based on the following sections of the PAS.

- #23 - 1 point for each (can have total of 12 points)
- #24 - 1 point
- #25 - 1 point for B, C, or D
- #26 - Level I - 0 points
  - Level II - 1 point for each item A through I
  - Level III - 2 points for each item A through M; I (walking) must be equal to or greater than Level III before points given for J (wheeling)
  - Level IV - 1 point for A, 1 point for E, 1 point for F, 2 points for G through M
- #27 - 1 point for continuous oxygen
- #28 - 1 point for Level B or C
- #34 - 1 point if Alzheimer's or other dementia
- #35 - 1 point if terminal."

3. Policies and Procedures Manual Section 570.1d states, in part:  
"LEVELS OF CARE SERVICE LIMITS

Level	Points Required	Hours Per Day	Hours Per Month
A	5-9	2	62
B	10-17	3	93
C	18-25	4	124
D	26-44	5	155"

## VIII. DECISION

Based on the evidence and testimony presented, I must reverse the action of the Department (WVMI) to determine Level of Care B which results in three (3) hours per day or 93 hours per month of homemaker hours in the Aged/Disabled Home and Community Based Waiver Services case. WVMI reviewed a PAS-2000 on 11-17-04 and arrived at 17 total points which resulted in a Level of Care B determination which translates into three (3) hours per day or 93 hours per month. During the hearing, testimony on behalf of the claimant revealed that the claimant needed at least one-person assistance with transferring which awarded the claimant two (2) points on item #26 (h) and provided a total of 18 points which translates to Level of Care C (four (4) hours per day or 124 hours per month). Therefore, the State Hearing Officer must reverse the action of the Department (WVMI) to determine Level of Care B which results in three (3) hours per day or 93 hours per month. The claimant will receive Level of Care C for a total of four (4) hours per day or 124 hours per month.

## IX. RIGHT OF APPEAL

See Attachment.

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## X. ATTACHMENTS

The Claimant's Recourse to Hearing Decision.

Form IG-BR-29.

