State of West Virginia
DEPARTMENT OF HEALTH AND HUMAN RESOURCES
Office of Inspector General
Board of Review
P.O. Box 6165
Wheeling, WV 26003

Joe Manchin III
Governor

Martha Yeager Walker
Secretary

August 22, 2006

_____
_____
_____

Dear Ms. _____:

Attached is a copy of the findings of fact and conclusions of law on your hearing held August 8, 2006. Your hearing request was based on the Department of Health and Human Resources' proposal to discontinue services under the Aged Disabled Waiver, A/DW, 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 A/DW program is based on current policy and regulations. Some of these regulations state as follows: The Aged/Disabled (HCB) Title XIX Waiver Services Program is granted to those individuals who meet all eligibility requirements. One of these requirements is that the individual must qualify medically. Eligible individuals are those who qualify medically for nursing facility level of care but have chosen the waiver program as a means to remain in their home, where services can be provided. (Aged/Disabled (HCB) Services Manual 570- 570.1b (11/1/03).

The information which was submitted at your hearing revealed that at the time of the December 30, 2005 Pre-Admission Screening Assessment, you did meet the medical eligibility criteria for services under the Aged/Disabled Waiver Program.

It is the decision of the State Hearings Officer to reverse the proposed action of the Department to discontinue services under the A/DW program.

Sincerely,

Melissa Hastings
State Hearing Officer
Member, State Board of Review

cc: Erika H. Young, Chairman, Board of Review
BOSS
CCS
Brown, Legal Aid of WV
Kalwar, Attorney General Office BMS
WVMI

WEST VIRGINIA DEPARTMENT OF HEALTH & HUMAN RESOURCES
BOARD OF REVIEW

_____, Claimant,

v. **Action Number: 06-BOR-1006**

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 concluded on August 8, 2006 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 August 8, 2006 on a timely appeal filed March 6, 2006.

It should be noted here that the claimant's benefits have been continued pending a hearing decision.

II. PROGRAM PURPOSE:

The Program entitled Aged Disabled Waiver is set up cooperatively between the Federal and State governments and administered by the West Virginia Department of Health & 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 an intermediate or skilled nursing facility (if not for the waiver services). Services offered under the Waiver Program will include: (1) chore, (2) homemaker and (3) case management services. West Virginia has been offering the Waiver Services Program since July 1982 to those financially eligible individuals who have been determined to need ICF level care but who have chosen the Waiver Program Services as opposed to being institutionalized.

III. PARTICIPANTS:

Claimant's Witnesses:
_____ _____ - Claimant

Nan Brown – Legal Aid of WV Attorney
[redacted] – Catholic Community Services Case Manager
[redacted] – Catholic Community Services Homemaker
[redacted] – Nurse Catholic Community Services

Department's Witnesses:
Kay Ikerd – Nurse Bureau of Senior Services by phone
[redacted] – Nurse WVMI by phone
Nisar Kalwar – Attorney with Attorney General's office for Bureau of Medical Services

Presiding at the Hearing was Melissa Hastings, State Hearing Officer and a member of the State Board of Review.

IV. QUESTIONS TO BE DECIDED:

The question(s) to be decided is whether the Department was correct in their decision to discontinue services under the Aged/Disabled Waiver (HCB) program.

V. APPLICABLE POLICY:

Aged/Disabled Home and Community Based Service **Manual §570**

VI. LISTING OF DOCUMENTARY EVIDENCE ADMITTED:

Department's Exhibits:
D-1 Aged/Disabled Home and Community based Services Manual §570, 570.1 a,b.
D-2 Pre-Admission Screening, PAS, completed December 30, 2005
D-3 Notice of potential denial dated January 5, 2006
D-4 Notice of termination dated January 23, 2006

Claimant's Exhibits:
*__C__-1 Medical Assessment dated December 11, 2006 (should be 2005) signed by Dr. [redacted]
C-2 RN Assessment Form dated August 10, 2005 signed by [redacted] RN
C-3 ADW Patient Contact Form dated February 14, 2006 signed by [redacted] RN
*C-4 Letter dated December 13, 2005 from [redacted], MD unsigned.
* Rejected Exhibits

Documentary rejected exhibits labeled as C1 and C4 were moved for admission into evidence by claimant's attorney during this hearing. Department's attorney objected to both documents being entered as claimant was given the opportunity to present additional medical information on January 5, 2006 and declined to do so. Department's attorney contends that the Cyrus order was followed and claimant's failure to submit this documentary evidence precludes it from being submitted now.

Claimant's attorney contends that the Cyrus order does not preclude the submission of additional documentary evidence at a fair hearing. Claimant's attorney cites the department's

Common Chapter 700 as well as Miller vs Ginsberg and Miller vs Lipscomb to support her argument.

The issue of admitting these two pieces of documentary evidence was taken under advisement to enable the hearing officer the opportunity to review the cases cited by both attorneys.

A review of item C4, a letter dated December 13, 2005 from [redacted], MC, was completed by the hearing officer. This letter is unsigned and is not on letterhead denoting it came from the physician's office. The validity of this document is highly questionable and is therefore excluded as evidence in this case.

Item C1, a medical assessment signed by Dr. [redacted] with a date of December 11, 2006 (sic) is a standardized form created by claimant's case management agency, Catholic Community Services. Catholic Community Services sent this form to claimant's attending physician at or around the same time that they sent the WVMI Evaluation Request form that initiated the medical review process for the claimant. The WVMI evaluation request was completed by Dr. [redacted] on December 8, 2005 and was received by the department's contracting agency, WVMI, on December 12, 2005. The disputed medical assessment form (C1) was completed by Dr. [redacted] on December 11, 2006 (sic) and sent to claimant's case management agency. Claimant's case manager [redacted] testified that this medical assessment was received by her and was available to her at the time the notice of potential denial was sent to the claimant. The case manager readily acknowledges that she was aware of the potential denial notice being sent to claimant but chose not to submit this additional medical information because she felt the same nurse would be reviewing this information and would not change her decision on claimant's eligibility.

WVDHHR Common Chapters Manual Chapter 700 indicates in section 760 item 6 "in ruling on the admissibility of evidence the State Hearings Officer **shall consider** evidence presented in the form of a doctor's report of examination."

The WVDHHR's appointment notice IGBR40 advises claimants that they have a right to "Bring any evidence you may have that would support your case" to a hearing.

A review of the Miller orders reveals nothing directly dispositive on this subject. Mention of medical evaluation and reports are noted in these orders for cases involving incapacity and/or disability but cannot be interpreted to apply to the Aged/Disabled Waiver Program.

A review of the Cyrus order however does reveal that his order was a direct result of actions taken in the Aged/Disabled Waiver Program and is therefore considered to have great weight in determining the admissibility of this disputed documentary evidence.

The mere fact that the department's Common Chapters hearing policy indicates a Hearing Officer **shall consider** a physician's report does not **require** the hearing officer to admit a physician's report. The fact that a claimant is advised on an appointment notice that they can bring evidence to a hearing does not mean that a hearing officer is required to admit that information into evidence.

The Cyrus order requires the department give Aged/Disabled Waiver recipients a notice of potential denial/closure. Within this notice of potential denial/closure the recipient must be

given a two week period to provide additional medical information for consideration by the evaluating nurse.

Information received during this hearing indicates that the case manager was aware of the issuance of this potential denial of Aged/Disabled Waiver services for her client. She had in her possession a medical assessment from Dr. [redacted] dated December 11, 2006 (sic). She made a decision to not submit this report within the two week time frame offered to the claimant because she felt that the same nurse would be reviewing the information and would not change her decision on the case. It is clear from the case manager's testimony that the decision not to submit the medical assessment was made for purposes of circumventing the policy and procedures and to give unfair advantage to the claimant at the hearing.

One of the essential issues in the Cyrus order was to offer Aged/Disabled Waiver recipients the opportunity to provide additional medical evidence of their condition so that a fair assessment could be done for them. By withholding this information from the agency it appears that the case management agency is attempting to bypass the WVMI nurse. Waiting until a fair hearing to present this evidence, places the agency in the position of defending their decision on the recipient's eligibility without having full benefit of all medical information that was available at the time of their decision.

It is the decision of the hearing officer to exclude item C1 as evidence in this case.

VII FINDINGS OF FACT:

1) Ms. _____ is an 88 year-old female. She is an active participant in the A/DW program. Her A/DW eligibility was undergoing an annual evaluation on December 30, 2005.

2) A WV Medical Institute (WVMI) Nurse completed a Pre-Admission Screening (PAS) in the claimant's home with the claimant and homemaker participating. The evaluating nurse determined that the claimant had two (2) qualifying deficits. She assigned a deficit for Ms._____'s need for physical assistance in bathing and grooming.

3) The primary diagnosis listed on the Pre-Admission Screening (D2) was Non Insulin Dependent Diabetes, High Blood Pressure, Hypothyroid, Congestive Heart Failure and Urinary Tract Infection. Other medical condition of dementia also noted.

4) Claimant's attorney Nan Brown contends that Ms. _____ should have been awarded deficits for dressing, continence, transferring, walking, and ability to vacate a building.

5) Claimant's homemaker provides services to Ms. _____ 5 days per week, 4 hours per day.

6) The Pre-Admission Screening form page 2 of 4 section 25c (D2) indicates that claimant was assessed as a level 1 Self/Prompting in the area of dressing. The evaluating nurse made this assessment based on claimant's statement that she puts on her own shirt, bra, pants and shoes. Nurse also noted on page 4 of 5 under Nurses Comments (D2) that claimant denied needing help in dressing. Testimony received during this hearing from

claimant's homemaker [redacted] indicates that Ms. [redacted] assists claimant with dressing every day that she provides services to the claimant. Ms. [redacted] also indicates that she prepares claimant's clothing for her for the days when she won't be providing services to the claimant. Claimant dresses herself on days that there are no homemaker services but usually wears a nightgown/mumu type dress which is easier for her to put on.

7) The Pre-Admission Screening form page 2 of 4 section25e (D2) indicates that claimant was assessed as a level 2 Less than Total Incontinence in the area of Continence/Bladder. The evaluating nurse made this assessment based on claimant's statement that she has incontinence of urine 2 or 3 times a day and gets up 3 or 4 times at night to void. Has leakage because she cannot get to the bathroom fast enough. The homemaker's testimony indicates claimant wears Depends at all times.

8) The Pre-Admission Screening form page 2 of 4 section 25h (D2) indicates that claimant was assessed as a level 2 Supervised/Assistive Device in the area of transferring. The evaluating nurse made this assessment based on claimant's demonstrated ability during the assessment to rise from a chair and ambulate across the room. Claimant's statements during the assessment were that she could transfer in and out of bed, on and off the toilet and in and out of chairs. The claimant's homemaker indicates that she regularly helps claimant get up and down when she is there providing services. The RN Homemaker [redacted] indicated that she gave claimant a physical assist in transferring on her RN Assessment Form dated 8/10/05 (C2) because claimant was utilizing a walker. Claimant's homemaker indicated that claimant recently fell in her apartment and emergency squad personnel were called and had to assist claimant up from floor.

9) The Pre-Admission Screening form page 2 of 4 section 25i (D2) indicates that claimant was assessed as a level 2 Supervised/Assistive Device in the area of walking. Evaluating nurse made this judgment based on claimant's demonstrated ability to walk utilizing a quad cane during the assessment. Evaluating nurse's comments on page 4 of 5 of the PAS (D2) indicates that claimant advised the nurse that she transfers and ambulates with support of canes, furniture or walls and does not require physical assistance of another person. Testimony received during this hearing from claimant's homemaker confirms that claimant does ambulate utilizing a walker, cane and furniture during the times that the homemaker is not present. When homemaker is present in the home, she assists claimant by placing her arm underneath claimant's arm as she walks. The testimony of RN Homemaker [redacted] indicated that she gave claimant a physical assist in walking on the assessment that she completed on 8/10/2005 (C2) because claimant had started utilizing a walker to assist her in ambulating. Further testimony from Ms. [redacted] indicates that claimant does require the use of a walker for walking and occasionally needs the assistance of one person.

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9) Aged/Disabled Home and Community-Based Services Manual Section 570 (D-1) - Program Eligibility for client:

Applicants for the ADW Program must meet the following criteria to be eligible for the Program:

C. Be approved as medically eligible for NF Level of Care.

10) Aged/Disabled Home and Community-Based Services Manual Section 570.1.a – Purpose: The purpose of the medical eligibility review is to ensure the following:

A. New applicants and existing clients are medically eligible based on current and accurate evaluations.

B. Each applicant/client determined to be medically eligible for A/DW services receives an appropriate LOC that reflects current/actual medical condition and short and long-term services needs.

C. The medical eligibility determination process is fair, equitable and consistently applied throughout the state.

11) Aged/Disabled Home and Community-Based Services Manual Section 570.1.b – Medical Criteria:

An individual must have five deficits on the PAS to qualify medically for the A/DW Program. These deficits are derived from a combination of the following assessment elements on the PAS:

A. Decubitus - Stage 3 or 4 (Item 24 on PAS 2005)

B. Unable to vacate a building- a person is physically unable at all times at Level 3 or higher in walking or mentally incapable of leaving the building at Level 3 or higher in orientation with a diagnosis of dementia, Alzheimers, or related condition. (Item 25, I and 33, on the PAS 2005).

C. Functional abilities of individual in the home. (Item 25 on the PAS 2005).

Eating--------	Level 2 or higher (physical assistance to get nourishment, not preparation)
Bathing -----	Level 2 or higher (physical assistance or more)
Grooming---	Level 2 or higher (physical assistance or more)
Dressing ----	Level 2 or higher (physical assistance or more)
Continence--	Level 3 or higher (must be total incontinent- defined as when the recipient has no control of bowel or bladder functions at any time)
Orientation--	Level 3 or higher (totally disoriented, comatose)
Transfer------	Level 3 or higher (one person or two person assist in the home)
Walking------	Level 3 or higher (one person assist in the home)

Wheeling----- Level 3 or higher (must be Level 3 or 4 on walking in the home to use Level 3 or 4 for wheeling in the home. Do not count outside the home)

D. Individual has skilled needs in one or more of these areas B (g)suctioning, (h)tracheostomy, (i)ventilator, (k)parenteral fluids, (l)sterile dressings, or (m) irrigations. (Item 26 on the PAS 2005)

E. The individual is not capable of administering his/her own medications is defined as an individual not capable of administering his/her own medications if the prescription medication must be placed in the recipient's hand, mouth, tube or eye by someone other than the recipient at all times.

VII. CONCLUSIONS OF LAW:

1) The Aged Disabled Waiver policy provides that an individual must have five (5) qualifying deficits to be medically eligible for the Aged Disabled Waiver program. At the time of the PAS the WVMI nurse assigned the claimant two (2) qualifying deficits in the areas of bathing and grooming.

2) The issues raised at the hearing were in the areas of Dressing, Continence, Transferring, Walking, and Ability to Vacate the Building.

3) Evidence and testimony admitted during this hearing reveal that the Pre Admission Screening was appropriately completed on December 30, 2005.

4) Evidence and testimony admitted during this hearing reveal that in the contested area of Dressing that claimant does meet the level 2 definition requiring Physical Assistance and should be awarded a deficit and one point in determining Level of Care.. While Claimant's statements to the nurse did indicate that she could dress herself the fact that she does suffer from dementia must be taken into consideration. Claimant's homemaker provides services 5 days per week to claimant and indicates that she assists her in dressing every day that she is with her. It appears that the majority of the time claimant does receive assistance in dressing.

5) Evidence and testimony admitted during this hearing confirm that in the contested area of continence that the assessment of Level 2 Less than Total Incontinence was appropriately assigned by the evaluating nurse. There was no evidence presented during this hearing to indicate that claimant was totally incontinent.

6) Evidence and testimony admitted during this hearing reveal that in the contested area of Transferring that claimant does meet the Level 3 One Person Assist definition and should be awarded a deficit and two points in determining Level of Care. The fact that

she fell and required the assistance of emergency personnel to get up from the floor clearly indicates a need for assistance. Policy does not indicate that a one person assist is required at all times to receive a deficit in this area and testimony entered during this hearing clearly shows that the homemaker provides a one person assist **at times** to enable the claimant to transfer during the 5 days per week that she is in the home.

7) Evidence and testimony admitted during this hearing reveal that in the contested are of Walking that claimant does meet the definition of One Person Assist and should be awarded a deficit and two points in determining Level of Care. Policy does not indicate that a one person assist is required at all times to receive a deficit in this area. It is clear that the homemaker RN expects the homemaker to provide assistance to claimant in walking and that this assistance is given by the homemaker during the hours she is present in the home.

8) The Ability to vacate a building category was appropriately determined based on policy requiring a level 3 assessment in walking and/or a level 3 assessment in orientation at all times. As noted in items 7 above, claimant does require a one person assist to enable her to walk at times but there was no testimony offered to indicate that this assistance is required at all times.

IX. DECISION:

After reviewing the information presented during this hearing and the applicable policy and regulations, the Hearings Officer finds that the evaluating nurse assessed the claimant with two (2) deficits in the areas of Bathing and Grooming appropriately. In addition, evidence and testimony admitted during this hearing reveal that three additional deficits should be awarded for Dressing, Transferring and Walking. This results in a total deficit award of five (5) deficits. Policy requires five (5) deficits to be eligible for the Aged/Disabled Waiver Program therefore it is the decision of the Hearings Officer to REVERSE the agency's proposed action to terminate services. A total of 5 points are to be awarded to determine Level of Care.

X. The **RIGHT OF APPEAL:**

See Attachment

XI. ATTACHMENTS:

The Claimant's Recourse to Hearing Decision

Form IG-BR-29

ENTERED this 22nd

Day of August 2006.

_____

Melissa Hastings
State Hearing Officer