



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

Joe Manchin III
Governor

Martha Yeager Walker
Secretary

July 17, 2006

Dear Mr. _____:

Attached is a copy of the findings of fact and conclusions of law on your hearing held July 13, 2006. 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 Waiver Services Program.

In arriving at a decision, the State Hearings 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 Waiver Services 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 PS-2005 submitted to West Virginia Medical Institute (Section 570 of Title XIX Aged/Disabled Home and Community Based Services Waiver, Policies 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 four (4) hours per day or 124 hours per month.

It is the decision of the State Hearings Officer to reverse the action of the Department (WVMI) to determine Level of Care B in the amount of three (3) hours per day or 93 hours per month in the Title XIX Aged/Disabled Waiver Services Program.

Sincerely,

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

cc: Erika H. Young, Chairman, Board of Review
Kay Ikerd, BOSS
[REDACTED], WVMI
Nisar Kalwar, Department's Attorney
Benita Whitman, Claimant's Attorney
[REDACTED], LCOC

**WEST VIRGINIA DEPARTMENT OF HEALTH & HUMAN RESOURCES
BOARD OF REVIEW**

_____,

Claimant,

v.

Action Number: 06-BOR-1094

**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 July 13, 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 July 13, 2006 on a timely appeal, filed February 10, 2006. It be noted that the hearing was originally scheduled for April 20, 2006 but was rescheduled at claimant's request.

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

II. PROGRAM PURPOSE:

The Program entitled Title XIX Aged/Disabled Wavier Services 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 a skilled nursing facility (if not for the waiver services).

III. PARTICIPANTS:

1. [REDACTED], Claimant.
2. [REDACTED], R.N., [REDACTED] County Opportunity Company (LCOC).
3. [REDACTED], R. N., LCOC.
4. [REDACTED], Claimant's homemaker.
5. Benita Whitman, Claimant's Attorney.
6. [REDACTED] Intern with Legal Aid (observing only).
7. Kay Ikerd, Bureau for Senior Services (BOSS) (testifying by speaker phone)
8. [REDACTED], WV Medical Institute (WVMI) R. N. (testifying by speaker phone).
9. Nisar Kalwar, Department's Attorney (participating by speaker phone).

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

IV. QUESTIONS TO BE DECIDED:

The question to be decided is whether WVMI took the correct action to determine that the claimant was eligible for Level of Care B in the amount of three (3) hours per day or 93 hours per month.

V. APPLICABLE POLICY:

Title XIX Aged/Disabled Home and Community-Based Services Waiver, Policy and Procedures Manual, 11-3-03.

VI. LISTING OF DOCUMENTARY EVIDENCE ADMITTED:

Department's Exhibits:

- D-1 Copy of regulations (13 pages).
- D-2 Copy of PAS-2005 1-20-06 (5 pages).
- D-3 Copy of notification letter 2-7-06.

Claimant's Exhibits:

- Cl-1 Copy of PAS-2005 1-31-05 (4 pages).
- Cl-2 Copy of R. N. Assessment 8-10-05 (3 pages).
- Cl-3 Copy of R. N. Assessment and Plan of Care 2-1-06 (5 pages).

(It should be noted that a document provided by the Department (Evaluation request) in the evidence packet was not entered as evidence by the Department and was not considered in the hearing decision. The document was marked at "not admitted".

VII. FINDINGS OF FACT:

- 1) The claimant was an active recipient of Title XIX Aged/Disabled Waiver Services when a new PAS-2005 was completed by [REDACTED] of WVMi on 1-20-06 which determined a Level of Care B.
- 2) The claimant's hearing request was received by the Bureau for Medical Services on 2-10-06, by the Board of Review on 3-7-06, and by the State Hearing Officer on 3-9-06.
- 3) The findings of the PAS-2005 dated 1-20-06 resulted in 16 total points which resulted in Level of Care B for three (3) hours per day or 93 hours per month.
- 4) Ms. Ikerd testified about the regulations from the Title XIX Aged/Disabled Home and Community Based Services Waiver Manual (Exhibit #D-1).
- 5) Ms. [REDACTED] presented her findings from the PAS-2005 completed on 1-20-06 (Exhibit #D-2). Ms. [REDACTED] testified that Mr. [REDACTED] and the claimant were present during the assessment, that she explained the importance, and that the homemaker, Mr. [REDACTED], was in agreement with the findings. Ms. [REDACTED] testified that Mr. Kalwar reviewed the evidence presented by the claimant's attorney with her and that she was awarding another point for dyspnea for a total of 17 points but could not give a point for dysphagia as she did on the PAS-2005 completed last year as the regulations require that a diagnosis be provided or that medication be prescribed before a point can be awarded. Ms. [REDACTED] testified that she was informed on last year's PAS-2005 that the claimant had early stages of Alzheimer's but the revised PAS-2005 and new policy asks the question of whether the individual has it and there was no medical evidence of Alzheimer's, and that she observed the claimant transfer and ambulate with a cane but Mr. [REDACTED] was close to him.
- 6) Ms. [REDACTED] testified she does R. N. assessments every six (6) months and completed one on the claimant on 8-10-05, that she indicated that Mr. [REDACTED] needed assistance with transferring and ambulation, that he has shortness of breath on exertion due to left heart failure, that he has been diagnosed with osteoarthritis, that during her visit, she witnessed the homemaker assist Mr. [REDACTED] up from the chair to go to the kitchen, that the homemaker assisted him by walking by him and holding his arm, and that she has observed this assistance more than one time.
- 7) Ms. [REDACTED] testified that the Plan of Care is marked as assistance with ambulation.
- 8) Mr. [REDACTED] testified that he is the claimant's caregiver/homemaker and that he was present during the assessment on 1-20-06, that the claimant has pain in his knees, wrist, and one elbow 2-3 times a week, that he assists the claimant getting out of a chair or couch, that it is more often than not, that he sometimes has to help him get out of bed, that he assists him with ambulation every day, that he has fallen several times, that he does not need assistance with ambulation every time but needs him there in case he falls, and that he takes no pain medication other than tylenol.
- 9) The PAS-2005 completed on 1-20-06 showed the following points: item #23-6 points for (a) Angina Rest, (b) Angina Exertion, (d) Significant Arthritis, (i) Diabetes, (j) Contractures, and (l) other for HTN, Thyroid; item #24-0 points,

item #25-10 points based on the following: a-1 point, b-1 point, c-1 point, d-1 point, e-2 points, f-1 point, g-1 point, h-1 point, i-1 point, j-0 points, l-0 points, m-0 points, item #26-0 points, #27-0 points, item #33-0 points, item #34-0 points, vacating the building 0-points. Total of 16 points for Level of Care B.

10. During the hearing, Ms. [REDACTED] awarded an additional point for dyspnea under item #23, c which gave the claimant a total of 17 points but did not change the Level of Care.

- 11). Policies and Procedures Manual Section 570.1,c states, in part

"LEVELS 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) Medical Condition

#24 - 1 point Decubitus

#25 - Level I - 0 points Functional levels

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

#26 - 1 point for continuous oxygen

#27 - 1 point for "No" answer-medical administration

#33 - 1 point if Alzheimer's or other dementia

#34 - 1 point if terminal."

Total number of points possible is 44."

- 12). Policies and Procedures Manual Section 570.1.d 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"

- 13) The areas of dispute with the findings of the PAS-2005 completed 1-20-06 for which additional points could be awarded included item #23 h (pain), transferring and walking under item #25 h and I, and item #33 Alzheimer's. In regard to pain, testimony revealed that the claimant has arthritis but takes only Tylenol and does not take a prescribed medication for pain. No additional point is awarded for pain (item #23 h). In the area of walking, the State Hearing Officer finds that the testimony and evidence revealed that the claimant requires assistance at times with walking. The regulations provided as evidence by the Department do not state that the requirement for one-person assistance be at all times. Therefore, the State Hearing Officer finds that the claimant requires Level III (one-person assistance) with walking and an additional point is awarded in the area of walking (item #25 i). In addition, since a Level III was

awarded in the area of walking, an additional point is awarded for vacating the building. In the area of transferring, the State Hearing Officer finds that the testimony and evidence revealed that the claimant requires one-person assistance at times with transferring. The regulations provided as evidence by the Department do not state that the requirement for one-person assistance with walking be at all times. Therefore, the State Hearing Officer finds that the claimant requires Level III (one-person assistance) with transferring and an additional point is awarded for transferring. As to question #33 in regard to Alzheimer's, there was no substantial evidence provided to show that the claimant has Alzheimer's. While it was reported on the previous PAS-2005 that he was in the early stages of Alzheimer's, there was no supporting evidence provided to show that Alzheimer's had been documented by physician. Therefore, an additional point can not be awarded for Alzheimer's (item #33). The State Hearing Officer finds that the claimant has a total of 20 points which translates to Level of Care C for four (4) hours per day or 124 hours per month.

VIII. CONCLUSIONS OF LAW:

Title XIX Aged/Disabled Waiver Policies and Procedures Manual 570.1.c provides the criteria for determining the points awarded for each functional activity of daily living and Section 570.1.d provides the service limits. The claimant qualified for 20 points which translates into Level of Care C and four (4) hours per day and 124 hours per month.

IX. DECISION:

It is the decision of the State Hearing Officer to **reverse** the action of the Department (WVMI) to determine Level of Care C for four (4) hours per day or 124 hours per month.

X. RIGHT OF APPEAL:

See Attachment

XI. ATTACHMENTS:

The Claimant's Recourse to Hearing Decision

Form IG-BR-29

ENTERED this 17th Day of July, 2006.

Thomas M. Smith
State Hearing Officer