



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 14, 2006

Dear Ms. _____:

Attached is a copy of the findings of fact and conclusions of law on your hearing held July 11, 2006. Your hearing request was based on the Department of Health and Human Resources' action to deny medical eligibility for 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 the individual in the Waiver Program must qualify medically. These are individuals who qualify medically to be placed in a skilled nursing care facility but who have chosen the Waiver Program Services as opposed to being institutionalized. (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 meet the medical criteria to be eligible for the Title XIX Aged/Disabled Waiver Services Program.

It is the decision of the State Hearings Officer to reverse the action of the Department to deny medical eligibility for 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, Bureau for Senior Services
_____, WVMI
Nisar Kalwar, Department's Attorney
Benita Whitman, Claimant's Attorney
_____, _____. Comm. Services

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

_____,

Claimant,

v.

Action Number: 05-BOR-7099

**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 11, 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 11, 2006 on a timely appeal filed December 9, 2005. It should be noted that the hearing was originally scheduled for March 16, 2006 and June 28, 2006 but was rescheduled both times at Department'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. _____, Claimant.
2. _____, Casemanager, _____, Community Services.

3. [REDACTED], R.N., [REDACTED]. Community Services.
4. Benita Whitman, Claimant's Attorney.
5. Nisar Kalwar, Department's Attorney (participating by speaker phone).
6. Kay Ikerd, R. N., Bureau for Senior Services (participating by speaker phone).
7. [REDACTED], R. N., West Virginia Medical Institute (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 the claimant meets the medical requirements of the Title XIX Aged/Disabled Waiver Services Program in needing skilled nursing care.

V. APPLICABLE POLICY:

Chapter 500 Title XIX Aged/Disabled Home and Community-Based Services Waiver, Policy and Procedures Manual, 11-3-03, Section 570.

VI. LISTING OF DOCUMENTARY EVIDENCE ADMITTED:

Department's Exhibits:

- #1 Copy of regulations (6 pages).
- #2 Copy of PAS-2005 completed 11-4-05 (8 pages).
- #3 Copy of potential denial letter dated 11-14-05 (2 pages).
- #4 Copy of denial letter dated 12-1-05 (2 pages).

Claimant's Exhibits:

- #CI-1 Copy of fax from [REDACTED] and evaluation request form (2 pages).
- #CI-2 Copy of clinic note from [REDACTED] M. D. dated 10-28-05.
- #CI-3 Copy of letter from [REDACTED], M. D. dated 11-29-05.
- #CI-4 Copy of report from [REDACTED] M. D. 8-17-04 (3 pages).

(It should be noted that additional documents were provided by both parties prior to the hearing as evidence to be submitted during the hearing but were not admitted and these documents were marked as "Documents not submitted into evidence" and were not considered in the hearing decision.

VII. FINDINGS OF FACT:

- 1) The claimant was a recipient for the Title XIX Aged/Disabled Waiver Services when a reevaluation request was received and a new PAS-2005 was completed by [REDACTED] of WVMI on 11-4-05 and was denied for medical eligibility (Exhibit #2).
- 2) The PAS-2005 completed by Ms. [REDACTED] on 11-4-05 determined that only three (3) deficits existed in the functional activities of bathing, dressing and grooming.

- 3) Ms. Ikerd testified about the regulations (Exhibit #1).
- 4) Ms. ■■■ testified about the PAS-2005 completed 11-4-05 (Exhibit #2). Ms. ■■■ testified that she awarded three (3) deficits in the areas of bathing, dressing, and grooming. Ms. ■■■ testified that if she had the additional documentation provided by the claimant for the hearing available during the assessment on 11-4-05, she could have awarded the claimant a deficit in the area of eating due to inability to cut her food. Ms. ■■■ testified that she observed the claimant transferring. Ms. ■■■ testified that she reviewed her findings with the claimant and the claimant did not disagree and that the claimant was the only person interviewed.
- 5) The claimant was notified of potential denial on 11-14-05 (Exhibit #3) and of denial on 12-1-05 (Exhibit #4) and a hearing request was received by the Bureau for Medical Services on 12-9-05, by the Board of Review on 1-9-06, and by the State Hearing Officer on 1-18-06.
- 6) Testimony on behalf of the claimant disagreed with the findings of the PAS-2005 in the areas of eating, walking, and transferring.
- 7) In the area of eating, the claimant testified that she is unable to cut up food due to her trigger finger and arthritis, that she cannot hold utensils, and that the homemaker and family members sometimes have to cut up her food, and that she told Ms. ■■■ that she has to have food cut up sometimes. Ms. ■■■ testified that the claimant is unable to cut up food due to the trigger finger and arthritis, that she cannot grip knives, spoons, and forks, that she drops plates, that she has tremendous pain, and that the homemaker has to cut up her food sometimes. Ms. ■■■ recorded on her notes on page 4 of the PAS-2005 that the claimant denied needing help eating or cutting up her food.
- 8) In the area of walking, the claimant testified that she has COPD and arthritis which make it hard to walk or do anything when her symptoms are really bad, that she is on oxygen all the time and her symptoms are worse in the mornings, that it is hard to walk when she cannot breathe, that she needs help with walking in the home sometimes and that the homemaker sometimes helps her, that she uses a cane in the home, and that she let Ms. ■■■ in and locked the door when she left. Ms. ■■■ testified that her R. N. assessment form reflected that walking required assistance when needed due to arthritis in the back and knees. Ms. ■■■ recorded on page 4 of the PAS-2005 that the claimant informed her that she ambulates in the home with a cane.
- 9) In the area of transferring, the claimant testified that she sometimes needs help getting up from a sitting position due to back pain and breathing, that neighbors and the homemaker have helped her to get up, and that she has to brace herself when she does it by herself and it is painful. Ms. ■■■ testified that her R. N. assessment form reflected that transferring required assistance when needed. Ms. ■■■ recorded on page 4 of the PAS-2005 that she observed the claimant transferring.
- 10) Title XIX Aged/Disabled Home and Community-Based Services Waiver, Policies and Procedures Manual, 11-3-03 states, in part,

"Section 570 PROGRAM ELIGIBILITY FOR CLIENT

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

- A. Be 18 years of age or older
- B. Be a permanent resident of West Virginia.....
- C. Be approved as medically eligible for NF Level of Care.
- D. Meet the Medicaid Waiver financial eligibility criteria for the program as determined by the county DHHR office, or the SSA if an active SSI recipient.
- E. Choose to participate in the ADW Program as an alternative to NF care.

Even if an individual is medically and financially eligible, a waiver allocation must be available for him/her to participate in the program.

570.1 MEDICAL ELIGIBILITY

A QIO under contract to BMS determines medical eligibility for the A/D Waiver Program.

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 ADW services receives an appropriate LOC that reflects current/actual medical condition and short- and long-term service needs.
- C. The medical eligibility determination process is fair, equitable, and consistently applied throughout the state.

570.1.b MEDICAL CRITERIA

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

- A. Decubitus - Stage 3 or 4
- 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, Alheimers, or related condition. (Item 25, I and 33, on the PAS-2005).
- C. Functional abilities of individual in the home.

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 persons 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 - (g) suctioning, (h) tracheostomy, (i) ventilator, (k) parenteral fluids, (l) sterile dressings, or (m) irrigations. (Item 26 on the PAS-2005)

E 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 some one other than the recipient at all times."

11) The areas of dispute in regard to deficits involved eating, walking, and transferring. The State Hearing Officer finds that the claimant requires physical assistance with eating due to inability to cut up her food. The Department acknowledged that if the information contained in documents provided as evidence by the claimant (Exhibits #CI-2 and #CI-3) had been available during the assessment, a deficit could have been awarded the claimant in the area of eating. The evidence and testimony clearly show that the claimant should be awarded a deficit in the area of eating. The State Hearing Officer finds that the claimant requires one-person assistance at times with walking. Evidence and testimony provided during the hearing showed that the claimant requires one-person assistance with walking at times due to the severity of her arthritis and COPD. The regulations provided as evidence by the Department (Exhibit #1) do not state that the one-person assistance (Level III) be required at all times. Therefore, an additional deficit is awarded the claimant in the area of walking. In addition, since a finding of Level III is awarded to the claimant in the area of walking, the claimant qualifies for an additional deficit for vacating the building. The State Hearing Officer finds that the claimant requires one-person assistance at times with transferring. The evidence and testimony provided during the hearing showed that the claimant requires one-person assistance with transferring due to the arthritis and associated pain in attempting to transfer on her own. The regulations provided as evidence by the Department (Exhibit #1) do not state that the one-person assistance (Level III) be required at all times. Therefore, an additional deficit is awarded the claimant in the area of transferring. In awarding the additional deficits, the State Hearing Officer acknowledges that the findings of Ms. [REDACTED] were based on answers provided by the claimant. However, the State Hearing Officer is convinced that the claimant understated her responses during an interview which lasted approximately 50 minutes and that the claimant's responses during the assessment may not have been as detailed as possible.

12) The State Hearing Officer finds that the claimant qualifies for Level of Care B in the amount of three (3) hours per day or 93 hours per month. The Level of Care B is based on the following points: item #23: 5 points; item #25: 10 points, including an additional point for Eating (a) and an additional point for Transferring (h) and Walking (i); 1 point for continuous oxygen (item #26); and 1 point for vacating the building. Total of 17 points.

VIII. CONCLUSIONS OF LAW:

- 1) Regulations in Section 570.1.b require that five (5) deficits exist in the major life areas to meet the medical criteria for the Title XIX Aged/Disabled Waiver Services Program.
- 2) The claimant was determined to have only three (3) deficits on the PAS-2005 completed on 11-4-05 in the areas of bathing, dressing and grooming.
- 3) The areas of dispute involved eating, walking, and transferring. The State Hearing Officer was convinced by the evidence and testimony presented during the hearing that the claimant qualified for additional deficits in the areas of eating, walking, and transferring. In addition, since the claimant was awarded a Level III finding in the area of walking, she also qualified for a deficit in the area of vacating the building.
- 4) The claimant qualifies for seven (7) deficits and meets the medical criteria for the Title XIX Aged/Disabled Waiver Services Program as five (5) deficits are required.

IX. DECISION:

It is the decision of the State Hearing Officer to reverse the action of the Department (WVMI) to deny medical eligibility for the Title XIX Aged/Disabled Waiver Services Program. The claimant qualifies for 17 points and Level of Care B for three (3) hours per day or 93 hours per month.

X. RIGHT OF APPEAL:

See Attachment

XI. ATTACHMENTS:

The Claimant's Recourse to Hearing Decision

Form IG-BR-29

ENTERED this 14th Day of July, 2006.

**Thomas M. Smith
State Hearing Officer**