



**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

March 13, 2006

Dear Ms. _____:

Attached is a copy of the findings of fact and conclusions of law on your hearing held March 9, 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 do not 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 uphold 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
Libby Boggess, Bureau for Senior Services
_____, WVMI
Kelly Ambrose, Department's Attorney
Hoyt Glazer, Claimant's Attorney
_____, First Care Services
_____, Claimant's POA
_____, Pro-Careers

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

_____,

Claimant,

v.

Action Number: 05-BOR-7135

**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 March 9, 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 March 9, 2006 on a timely appeal filed December 13, 2005.

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. _____, Claimant's nephew and POA.

3. [REDACTED] Casemanager, First Care Services, Inc.
4. [REDACTED] R.N., Pro-Careers.
5. [REDACTED] Claimant's caregiver.
6. Leann Rice, Paralegal, Legal Aid of WV.
7. Hoyt Glazer, Claimant's Attorney, Legal Aid of WV.
8. Kelly Ambrose, Department's Attorney (participating by speaker phone).
9. Libby Boggess, Bureau for Senior Services (participating by speaker phone).
10. [REDACTED] 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:

- D-1 Copy of regulations (9 pages).
- D-2 Copy of PAS-2005 completed 11-4-05 (7 pages).
- D-3 Copy of potential denial letter dated 11-16-05 (2 pages).
- D-4 a Copy of letter from [REDACTED] 11-18-05 (3 pages).
- D-4 b Copy of RN assessment form 9-1-05 (4 pages).
- D-4 c Copy of Plan of Care/Homemaker Worksheet (2 pages).
- D-5 Copy of denial letter dated 12-6-05 (2 pages).
- D-6 Copy of evaluation request.

Claimant's Exhibits:

None. (It should be noted that the claimant's attorney presented a letter from [REDACTED] M. D. dated 3-6-06 as evidence but Ms. Ambrose objected as the letter did not state that it represented the claimant's medical condition at the time of the completion of the PAS-2005 on 11-4-05 and the objection was upheld and the document was not entered as evidence.)

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 #D-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. Boggess testified regarding the regulations (Exhibit #D-1) and testified that new guidelines implemented effective November, 2005 changed the way a deficit was determined for the areas of incontinence and vacating the building, that previous regulations provided a deficit if incontinence was 3-4 times a week and now the incontinence must be total incontinence in order to receive a deficit, and that previous regulations allowed a deficit for vacating the building but new regulations require that a Level III be assigned to walking or orientation before a deficit can be allowed for vacating the building.
- 4) Ms. [REDACTED] testified that she completed the PAS-2005 on 11-4-05 and those present were the claimant, [REDACTED] (claimant's POA), [REDACTED] (the case manager), and [REDACTED] (the homemaker), that all were in agreement with the findings of the assessment, that additional information was received (Exhibit #D-4a, b, & c) but no changes occurred as a result.
- 5) The claimant was notified of potential denial on 11-16-05 (Exhibit #D-3) and of denial on 12-6-05 (Exhibit #D-5) and a hearing request was received by the Bureau for Medical Services on 12-13-05, by the Board of Review on 1-20-06, and by the State Hearing Officer on 1-24-06.
- 6) Testimony on behalf of the claimant disagreed with the findings of the PAS-2005 in the areas of incontinence, walking, wheelchair, medication administration, and vacating the building.
- 7) Testimony from the claimant's witnesses revealed that the claimant's incontinence is not total. Ms. [REDACTED] testified that incontinence was less than total. Ms. [REDACTED] testified that she was informed by the claimant that her incontinence was only partial. An additional deficit cannot be awarded for incontinence.
- 8) Testimony from the claimant's witnesses indicated that the claimant does not require one-person assistance in the home with walking. Mr. [REDACTED] testified that the claimant ambulates with a walker in the home but needs someone with her in case she falls. Ms. [REDACTED] testified that she has witnessed the claimant walking in the home with the walker but with an unsteady gait. Ms. [REDACTED] testified that the claimant could not walk in the home without assistance but also testified that she indicated on the R.N. assessment completed 9-1-05 (Exhibit #D-4 b) that the claimant ambulates with walker. An additional deficit cannot be awarded for walking.
- 9) Testimony from Mr. [REDACTED] indicated that the claimant uses a wheelchair in the home four (4) days out of the week and that she must be pushed when she uses it. Narrative by Ms. Sang on page 4 of the PAS-2005 completed 11-4-05 indicated that no wheelchair was used in the home. Regardless, since the claimant did not receive a Level III in walking, a deficit cannot be awarded for wheeling.
- 10) Testimony from the claimant's witnesses indicated that the claimant cannot open her medication bottles. Mr. [REDACTED] testified that he opens the bottles and puts the pills in the claimant's hand. Mr. [REDACTED] later testified that the claimant can put the

medications in her own hand and take them but has to be watched as she throws them away. Ms. [REDACTED] testified that the claimant cannot open her bottles. Ms. [REDACTED] testified that she indicated on the Plan of Care (Exhibit #D-4 c) that the claimant needed prompting and reminding only for medication administration. Since the opening of medication bottles would be considered as medication set-up and testimony from Mr. [REDACTED] indicated that the claimant could place the medication in her own hand, a deficit cannot be awarded for administration of medication.

- 11) The State Hearing Officer found that any testimony tendered during the hearing regarding claimant's ability to vacate the building must be related to the areas of walking and orientation as a Level III determination must exist in those areas in order for a deficit to be awarded in the area of vacating the building in an emergency. The claimant's attorney, Mr. Glazer, argued that testimony from his witnesses would show that the claimant could not vacate the building in an emergency without physical assistance. However, the State Hearing Officer ruled on the objection of Ms. Ambrose that any testimony regarding vacating the building was only relevant as it related to the areas of walking and orientation. Since there was no finding of Level III care in the areas of walking or orientation either by Ms. [REDACTED] or by the State Hearing Officer, a deficit cannot be awarded for vacating the building. The State Hearing Officer also ruled against Mr. Glazer's argument that the regulations previous to the changes effective November, 2005 be addressed and used in the hearing to determine medical eligibility for the claimant. The State Hearing Officer also upheld Ms. Ambrose's objection that testimony regarding findings from previous PAS-2000's were irrelevant.
- 12) 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."

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 incontinence, walking, wheeling, medication administration, and vacating the building. The State Hearing Officer was convinced by the evidence and testimony presented during the hearing that the claimant did not qualify for a deficit in the areas of continence, walking, wheeling, medication administration or vacating the building. The State Hearing Officer determined that the PAS-2005 completed 11-4-05 correctly assessed the claimant in those areas.
- 4) The claimant qualifies for three (3) deficits and did not meet 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 uphold the action of the Department (WVMI) to deny medical eligibility for the Title XIX Aged/Disabled Waiver Services Program.

X. RIGHT OF APPEAL:

See Attachment

XI. ATTACHMENTS:

The Claimant's Recourse to Hearing Decision

Form IG-BR-29

ENTERED this 13th Day of March, 2006.

**Thomas M. Smith
State Hearing Officer**