



State of West Virginia
DEPARTMENT OF HEALTH AND HUMAN RESOURCES
Office of Inspector General
Board of Review
1027 N. Randolph Ave.
Elkins, WV 26241

Joe Manchin III
Governor

Martha Yeager Walker
Secretary

September 3, 2009

Dear -----:

Attached is a copy of the findings of fact and conclusions of law on your hearing held July 7, 2009. Your hearing request was based on the Department of Health and Human Resources' proposal to reduce your homemaker service hours under the Aged/Disabled (HCB) Title XIX Waiver Services 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 Aged/Disabled Waiver Program is based on current policy and regulations. One of these regulations specifies that for the Aged/Disabled Waiver Program, the number of homemaker service hours is determined based on the Level of Care (LOC). The Level of Care is determined by evaluating the Pre-Admission Screening Form (PAS) and assigning points to documented medical conditions that require nursing services. Program services are limited to a maximum number of units/hours which is reviewed and approved by WVMI. (Aged/Disabled Home and Community-Based Services Waiver Policy and Procedures Manual 501.3)

Information submitted at your hearing reveals that you continue to require the degree of care and services necessary to qualify medically for the Aged/Disabled Waiver Program and your documented medical conditions confirm that your Level of Care should be a Level "B" rating. As a result, you are eligible to receive three (3) hours per day or 93 hours per month of homemaker services.

It is the decision of the State Hearing Officer to **uphold** the proposal of the Department to decrease your Level of Care under the Aged/Disabled Waiver Program.

Sincerely,

Pamela L. Hinzman
State Hearing Officer
Member, State Board of Review

cc: Erika H. Young, Chairman, Board of Review
Mark Toor, Esq., Legal Aid of West Virginia
Michael Bevers, Esq., Office of Attorney General
Bureau of Senior Services
West Virginia Medical Institute
Central West Virginia Aging Services

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

-----,

Claimant,

v.

Action Number: 08-BOR-2268

**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 September 3, 2009 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 7, 2009 on a timely appeal filed October 6, 2008 and received by the Hearing Officer on November 3, 2008. The hearing was originally scheduled for February 4, 2009, but was continued at the request of the Claimant. It was rescheduled for April 8, 2009, but was continued due to inclement weather. The hearing was subsequently scheduled for May 12, 2009, but was continued at the request of the Claimant.

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

II. PROGRAM PURPOSE:

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:

Kay Ikerd, Department's witness (participated telephonically)
Courtenay Smith, Department's witness (participated telephonically)
Mark Toor, Esq., Legal Aid of West Virginia (participated telephonically)
Michael Bevers, Esq., Office of Attorney General (participated telephonically)

Presiding at the hearing was Pamela L. Hinzman, 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 Agency was correct in its proposal to reduce the Claimant's homemaker service hours under the Aged/Disabled Waiver (HCB) Program.

V. APPLICABLE POLICY:

Aged/Disabled Home and Community-Based Services Manual Sections 501.3.2.1, 501.3.2.2 and 501.3.4, D

VI. LISTING OF DOCUMENTARY EVIDENCE ADMITTED:

Department's Exhibits:

- D-1 Aged/Disabled Home and Community-Based Services Manual Sections 501.3.1.1, 501.3.2, 501.3.2.1 and 501.3.2.2
- D-2 Pre-Admission Screening (PAS) assessment completed on September 4, 2008
- D-3 Notice of Decision dated October 2, 2008

Claimant's Exhibits:

- C-1 Electronic mail transmissions dated April 30, 2009 between Stacy Leadman, Kay Ikerd, Melinda LaHue and Debbie Snyder
- C-2 West Virginia Medicaid Aged and Disabled Waiver Program Informed Consent and Release of Information

VII. FINDINGS OF FACT:

- 1) The Claimant, a recipient of Aged/Disabled Waiver (ADW) Medicaid benefits, underwent an annual reevaluation to verify continued medical eligibility for the program.
- 2) The West Virginia Medical Institute (WVMI) Nurse completed a Pre-Admission Screening (PAS) medical assessment (D-2) on September 4, 2008 and determined that the Claimant continues to meet the medical eligibility criteria. The Claimant was assigned 16 points to documented medical conditions that require nursing services and meets the criteria necessary to qualify as a Level of

- 3) The Claimant was sent notification on October 2, 2008 (D-3) advising her of the proposed reduction in homemaker service hours.
- 4) The PAS includes WVMi Nurse Courtenay Smith's narrative concerning her observations on the date of the assessment. The Claimant's attorney questioned the WVMi Nurse about why she did not verify whether the Claimant has medical diagnoses of dyspnea and paralysis. In regard to dyspnea, the PAS narrative states: "Member has occasional wheezing and snorting episodes. No DX noted." The PAS includes the following comments in regard to paralysis: "Member has difficulty using her left side at times and it is weaker than her right since the seizure. No DX noted." Additional PAS comments state that "Member's sister states she had a severe seizure that left her totally paralyzed in her left side. She underwent physical therapy and had to be completely retrained. Her sister states she is still weak in her left side." The PAS also indicates that the Claimant's sister "stated that she (the Claimant) has improved and she hated to see her level of care drop, but she has been encouraging her to do more for herself and was glad to see her become more independent."

The Claimant's attorney submitted Exhibit C-2, an Informed Consent and Release of Information form for the Aged/Disabled Waiver Program. The attorney referred to statement No. 2 on the form which states the participant understands "that A/D Waiver staff and/or contracted entities through the Bureau for Medical Services will interview my physician(s), involved family members, friends and other professionals involved in my case."

The WVMi Nurse testified that she contacted the Claimant's physician's (Dr. Wesley Olson's) office in regard to diagnoses listed in the Claimant's chart, but stated that she did not inquire about any specific diagnoses. The WVMi Nurse testified that she did not speak directly with the Claimant's physician, but addressed the issues with a nurse in Dr. Olson's office. Notes on Page 8 of 8 of the PAS indicate that the nurse verified diagnoses of dysphagia and aphasia, and the Claimant was awarded additional points for these conditions, as well as an additional point for pain based on other physician documentation. The nurse testified that she is seldom able to speak directly with physicians when she attempts to verify diagnoses.

PAS comments indicate that the WVMi Nurse received information on September 30, 2008 concerning the Claimant's need for assistance with walking and transferring. However, the nurse did not upgrade the Claimant to Level III (one-person assistance) in these areas because the Claimant walked/transferred independently during the assessment and her homemaker reportedly stated that she never helped the Claimant walk/transfer inside the home.

- 5) No witnesses testified on behalf of the Claimant.
- 6) The hearing record remained open until July 28, 2009 to allow for the submission of written closing arguments.

The Claimant's attorney requested that the Hearing Officer address several issues of due process, all of which were without merit and will not be further addressed.

The Claimant's attorney also addressed the question of which party bears the burden of proof in proceedings before the Board of Review. Language in Section 710.20, F of the Department's Common Chapters Manual states: "The Department will present its case and then the applicant or recipient will present his or her case. The burden of proof is first on the Department to prove, by a preponderance of the evidence, that its adverse action was correct, then shifts to the applicant or recipient to prove, again by a preponderance of evidence, that the Department's action was incorrect." The language in this Common Chapters section simply addresses the manner in which the hearing proceeds and states that the burden of proof shifts between the parties during the course of the hearing. The burden of proof does not lie solely with one party.

- 7) Aged/Disabled Home and Community-Based Services Waiver Policy Manual Sections 501.3.2.1 and 501.3.2.2 (D-1): There will be four levels of care for clients of ADW homemaker services. Points will be determined based on the following sections of the PAS:

- #23- Medical Conditions/Symptoms- 1 point for each (can have total of 12 points)
- #24- Decubitis- 1 point
- #25- 1 point for b., c., or d.
- #26- Functional abilities
 - Level 1- 0 points
 - Level 2- 1 point for each item a. through i.
 - Level 3- 2 points for each item a. through m.; i. (walking) must be equal to or greater than Level 3 before points are given for j. (wheeling)
 - Level 4 - 1 point for a., 1 point for e., 1 point for f., 2 points for g. through m.
- #27- Professional and Technical Care Needs- 1 point for continuous oxygen
- #28 Medication Administration- 1 point for b. or c.
- #34- Dementia- 1 point if Alzheimer's or other dementia
- #34- Prognosis- 1 point if terminal

The total number of points allowable is 44.

LEVELS OF CARE SERVICE LIMITS

Level A- 5 points to 9 points- 2 hours per day or 62 hours per month

Level B- 10 points to 17 points- 3 hours per day or 93 hours per month

Level C- 18 points to 25 points- 4 hours per day or 124 hours per month

Level D- 26 points to 44 points- 5 hours per day or 155 hours per month

- 8) Aged/Disabled Home and Community-Based Services Waiver Policy Manual Section 501.3.4, D provides the following information requiring procedures for medical reevaluations:

In those cases where there is a medical diagnosis question, the QIO RN will attempt to clarify the information with the referring physician. In the event that the RN cannot obtain the information, he/she will document such, noting that supporting documentation from the referring physician was not received.

VIII. CONCLUSIONS OF LAW:

- 1) Policy dictates that an individual's Level of Care for the Aged/Disabled Waiver Program is determined by the number of points obtained on the PAS assessment tool.
- 2) The Claimant was awarded 16 points as the result of a PAS completed by WVMI in September 2008 in conjunction with her annual medical evaluation.
- 3) As a result of information presented during the hearing, zero (0) additional points are awarded to the Claimant. The Claimant had suffered paralysis on her left side as the result of a previous seizure, however PAS comments indicate that she received therapy and was retrained. While left-side weakness was reported, no documentation or testimony was provided to demonstrate that the Claimant continues to suffer from paralysis. In regard to dyspnea, the PAS narrative states that the Claimant has "wheezing and snorting." However, no evidence or testimony was offered to support a specific diagnosis of dyspnea.

Policy states that the evaluating nurse will attempt to clarify information with the referring physician. However, there is no specific policy language dictating that the nurse make continual attempts to obtain information from the physician if an attempt has been made and the documentation was not received.

- 4) Because no additional points can be awarded, the Department's proposal to decrease the Claimant's Level of Care to Level "B" is correct.

IX. DECISION:

It is the decision of the State Hearing Officer to **uphold** the Agency's proposal to reduce the Claimant's homemaker service hours under the Aged/Disabled, Title XIX (HCB) Waiver Program.

X. RIGHT OF APPEAL:

See Attachment

XI. ATTACHMENTS:

The Claimant's Recourse to Hearing Decision

Form IG-BR-29

ENTERED this 3rd Day of September, 2009.

**Pamela L. Hinzman
State Hearing Officer**