



**State of West Virginia
DEPARTMENT OF HEALTH AND HUMAN RESOURCES
Office of Inspector General
Board of Review
203 East Third Avenue
Williamson, WV 25661**

**Earl Ray Tomblin
Governor**

**Rocco S. Fucillo
Cabinet Secretary**

December 21, 2012

----, Esq. For: ----

RE: ---- v. WV DHHR
ACTION NO.: 12-BOR-2238

Dear Ms. ----:

Enclosed is a copy of the decision resulting from the hearing held in the above-referenced matter.

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.

If you believe the decision was reached in error, you may appeal. See the attached explanation of Claimant's Recourse.

Sincerely,

Stephen M. Baisden
State Hearing Officer
Member, State Board of Review

cc: Erika Young, Chairman, Board of Review
Kay Ikerd, RN, WV Bureau of Senior Services
Kimberly Stitzinger-Jones, Esq., WV Bureau of Medical Services
----, RN, ----, ----

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

IN RE: ----,

Claimant,

v.

ACTION NO: 12-BOR-2238

**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 for ----. This hearing was held in accordance with the provisions found in Chapter 700 of the West Virginia Department of Health and Human Resources' Common Chapters Manual. This Fair Hearing was conducted by telephone conference call on December 18, 2012, on a timely appeal filed September 10, 2012.

II. PROGRAM PURPOSE:

The Aged and Disabled Waiver (ADW) Program is defined as a long-term care alternative that provides services enabling an individual to remain at or return home rather than receiving nursing facility (NF) care. Specifically, ADW services include Homemaker, Case Management, Consumer-Directed Case Management, Medical Adult Day Care, Transportation, and RN Assessment and Review.

III. PARTICIPANTS:

----, Esq., Claimant's Representative
----, Claimant
----, RN, ----, Claimant's Witness
----, RN, ----, Claimant's Witness

Kimberly Stitzinger-Jones, Esq., Department's Representative
Kay Ikerd, RN, WV Bureau of Senior Services, Department's Witness
Brenda Myers, RN, West Virginia Medical Institute (WVMI), Department's Witness

Presiding at the hearing was Stephen M. Baisden, State Hearing Officer and member of the State Board of Review.

The Hearing Officer placed all participants under oath at the beginning of the hearing.

IV. QUESTION TO BE DECIDED:

The question to be decided is whether the Agency was correct in its proposal to terminate Claimant's participation in the Aged and Disabled Home and Community-Based Waiver Program based on a yearly Pre-Admission Screening (PAS) conducted on July 30, 2012.

V. APPLICABLE POLICY:

Aged and Disabled Home and Community-Based Services Manual Section 501.

VI. LISTING OF DOCUMENTARY EVIDENCE ADMITTED:

Department's Exhibits:

- D-1 Aged and Disabled Home and Community-Based Services Manual Section 501
- D-2 Pre-Admission Screening (PAS) assessment conducted on July 30, 2012, *and* statement from ----, M.D., dated August 17, 2012
- D-3 Notice of Decision, dated August 29, 2012
- D-4 Pre-Admission Screening (PAS) assessment conducted on June 17, 2011

Claimant's Exhibits:

- C-1 Aged and Disabled Home and Community-Based Services Manual Section 501
- C-2 42 US Code §1396r
- C-3 WV Medicaid ADW Program Homemaker Worksheet, for July 16-31, 2012
- C-4 Statement from ----, M.D., dated August 17, 2012, with attached examination notes
- C-5 WVMI Authorization Request Form for durable medical equipment or medical supplies, with delivery tickets from ----, ----
- C-6 Progress notes from ----, MD, dated October 12, 2012, with attached notes from -- --, ----, ----

VII. FINDINGS OF FACT:

- 1) Claimant was a participant in the Aged and Disabled Home and Community-Based Waiver (ADW) Program. As part of his continuing participation in the program, a nurse from the West Virginia Medical Institute (WVMI) performed a yearly Pre-Admission Screening (PAS) in his home on July 30, 2012. (Exhibit D-2.)
- 2) Aged/Disabled Home and Community-Based Services Waiver Policy Manual Section 501.5.1 (Exhibit D-1), MEDICAL CRITERIA, states in pertinent part:

An individual must have five (5) deficits on the Pre-Admission Screening (PAS), Attachment 14, to qualify medically for the ADW Program. These deficits are derived from a combination of the following assessment elements on the PAS.

#24 Decubitus - Stage 3 or 4

#25 In the event of an emergency, the individual is c) mentally unable or d) physically unable to vacate a building. a) Independently and b) With Supervision are not considered deficits.

#26 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)

Dressing -----Level 2 or higher (physical assistance or more)

Grooming----Level 2 or higher (physical assistance or more)

Continence (bowel, bladder)

-----Level 3 or higher; must be incontinent

Orientation---Level 3 or higher (totally disoriented, comatose)

Transfer-----Level 3 or higher (one-person or two-person assistance in the home)

Walking-----Level 3 or higher (one-person assistance 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)

#27 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.

#28 Individual is not capable of administering her/her own medications.

- 3) The Department's Witness, the WVMI nurse who conducted the July 30 PAS, testified that the Claimant, Claimant's mother, Claimant's case manager from ----,

and she were present for the assessment session. She stated that she assessed Claimant with four (4) deficits on the PAS, for vacating a building during an emergency, bathing, dressing and grooming, and therefore Claimant did not meet the medical eligibility criteria for continuing participation in the Program. The Department sent a Notice of Decision (Exhibit D-3) to Claimant on August 29, 2012, informing him that his participation in the ADW program was terminated.

- 4) Claimant and his Representative asserted that he should have received three (3) additional deficits on the PAS, on item #26, functional abilities, for ***eating*** and ***continence***, and on item #28 for ***administering medications***.
- 5) ***Eating:*** The WVMi nurse rated Claimant at Level 1, “Self/Prompting,” on this item and wrote in the “Nurse’s overall comments” section of the PAS, “He states he can feed himself and can cut up his own foods. I asked if once food is prepared he can use a knife and fork to cut up his own food and I specifically ask[ed] about firm meats, etc. and he states he can do so himself and denies worker or another individual has to cut up food for him. [Case Manager] begins to speak and asks him if on bad days he needs help to cut up foods and began to say that he did last year and at that point he spoke up before she finished her sentence and said no that he cuts up his own foods.” Claimant testified that he suffers from sarcoidosis, with one symptom of this disease being neuropathy, a weakness and/or cramping of the extremities. He stated that as such, when the neuropathy is very serious, he does not have enough muscle strength to cut up his firm foods such as meats.
- 6) ***Continence:*** The WVMi nurse rated Claimant at Level 2, “Occasionally Incontinent,” for both of the functional abilities of “Continence – Bladder” and “Continence – Bowel.” She wrote in the “Nurse’s overall comments” section, “He states he has a neurogenic bladder and states he has trouble with constipation and will cause leakage with bladder. He reports two accidents in the past week/7 days with bladder. He states he has constipation with bowels due to medications and when his bowels do free up he will have occasional accidents. He reports two accidents in the past week for bowels. He states he does wear pull-ups at times but [is] not wearing them today as he is constipated.” Department’s Witness testified that in order to receive a deficit for continence, he should have reported having three or more accidents per week. Claimant testified that he takes several medications that cause constipation. He testified that his primary care physician prescribes MiraLAX in order to counteract his constipation. He stated that when he takes the MiraLAX, he has bowel continence accidents daily. He added that when he does not take it, he can be constipated for several days at a time. Page 4 of the July 30 PAS (Exhibit D-2) contains a list of Claimant’s prescribed medications. MiraLAX is not listed. The Department submitted into evidence the PAS completed for Claimant from the previous year. (Exhibit D-4.) On this PAS, completed on June 17, 2011, Claimant received a deficit for continence. The nurse who completed that PAS recorded in the “Nurse’s overall comments” section, “CONT./BOWEL – Member reports he has bowel accidents almost daily. He reports the bowel

accidents have become worse lately. He states he wears pull-ups and has chux [incontinence sheets] for the bed.”

- 7) ***Administering Medications:*** The WVMi nurse rated Claimant “With Prompting/Supervision,” at this item and wrote in the “Nurse’s overall comments” section, “He states he takes meds directly out of bottles and can place into his own mouth. He uses pain patch that he can apply and remove himself and has topical [prescription] gel that he can apply to chest as well. He states he does need reminders at times from [homemaker] in case he forgets.” Claimant testified that he is under treatment by a psychiatrist and psychologist for MDD, or major depressive disorder. He testified that his depression sometimes causes him to forget to take his medications. He added that when the neuropathy in his extremities is more severe, his hands may become too weak for him to place a pill in his mouth.
- 8) Department’s Witness, the WVMi nurse who conducted the PAS, testified that after the PAS was completed, she received a letter from Claimant’s primary care physician, ----, M.D. (Exhibit D-2, last page.) This letter is dated August 17, 2012, and reads as follows: “To Whom It May Concern: [Claimant] has multiple medical conditions, he has memory problems due to sarcoidosis affecting his nervous system. He also has multiple bowel incontinence issues at least four times a week, and also when he is sick he needs someone to help him in his everyday living such as cutting up his food, helping him out of his bed because his legs are to [sic] weak.” She testified that she had questions about this letter because the information contained therein appeared to contradict information she obtained in the assessment session. She testified that she recorded certain information about this in the “Nurse’s Overall Comments” section of the July 30 PAS. The “Nurse’s Overall Comments” section of the PAS contains the following pertinent information:

8/21/12: Received letter from MD office that was faxed to CMA then on to WVMi. The contents of letter states [Claimant] has multiple medical conditions, has memory problems due to sarcoidosis, he has multiple bowel incontinence issues of 4 x weekly and when he is sick he needs someone to help in his every day living such as cutting up his food, helping him in and out of his bed . . . The letter from MD’s office has conflicting information than information that was provided by [Claimant] and reviewed with him along with [case manager] during visit so [Department’s Witness] called MD’s office to discuss and I left detailed message . . . Will wait for call from MD’s office.

[The PAS records that Department’s Witness indicated she had not received a return phone call but had received telephone messages from someone in Dr. ----’s office.]

8/27/12: . . . spoke with ----, who had left the messages for me. I explained I had conducted an assessment for [Claimant] on July 30th

and then received a letter from MD last week with information that was different from [that which] had been discussed with me and documented during the assessment. I asked her if she could review [Claimant's] record regarding the content of the letter and asked when he had last seen Dr. ----. ---- states [Claimant] record shows last visit was on 7/18/12 and notes indicate he was seen for sore throat, stuffiness, cold-like symptoms. I asked her to review [Claimant] chart for any information [regarding] complaints of memory problems or [diagnosis] of memory problems or dementia or related [diagnosis] or any [medications] ordered for memory problems and she states there is no such information in record only a [diagnosis] of depression and anxiety. I asked if there [is] any record of bowel incontinence or frequency of bowel incontinence and she denies and then I lastly asked if there was any information in his record regarding need for transferring in/out of bed and again she states there is nothing listed in client chart regarding this. I then asked how the information that was indicated in the letter was drafted to be sent to CMA and she states notes in chart indicate [case manager] called in and stated member had recent evaluation with WVMi and had a potential termination of services and she needed a letter to be sent in on physician letterhead with that specific information so she could turn it in to keep him from losing his services. ---- states letter was drafted and faxed to CM as requested . . . Due to above clarification and review of PAS material, [Department's Witness] is unable to change any indicators . . . there was no supporting information in the patient record to verify the information that was typed and sent to [Case Manager].

VIII. CONCLUSIONS OF LAW:

- 1) Policy dictates that an individual must receive five (5) deficits on the PAS assessment in order to qualify medically for the Aged and Disabled Waiver Program. On his PAS that was performed on July 30, 2012, Claimant was assessed with four (4) deficits.
- 2) The Department was correct in its decision not to assess a deficit in the area of eating. The WVMi nurse recorded on the July 2012 PAS that Claimant reported he could feed himself and could cut up firm foods such as meats.
- 3) The Department was incorrect in its decision not to assess a deficit in the area of continence. The WVMi nurse recorded on the July 2012 PAS that Claimant reported he had two bowel and two bladder accidents in the previous week. However, policy does not dictate that the assessing nurse only consider incontinence accidents within the previous seven days in determining whether or not to assess a deficit for continence. In consideration of the submitted evidence indicating that Claimant received a deficit for continence on the June 2011 PAS, and that Claimant reported

incontinence accidents only marginally less frequently than the standard of three per week, Claimant should have received a deficit for this functional ability.

- 4) The Department was correct in its decision not to assess a deficit in the area of administering medications. The WVMi nurse testified and recorded on the July 2012 PAS that Claimant reported he could take his medications without assistance, but needed to be reminded to take them.
- 5) Claimant provided evidence to support a finding that one additional deficit should have been assessed on the July 2012 PAS, for continence. The required five (5) deficits have been established to meet medical eligibility criteria for the Aged and Disabled Waiver Program.

IX. DECISION:

It is the decision of the State Hearing Officer to **reverse** the Agency's proposal to terminate Claimant's participation in the Aged and Disabled Waiver Program.

X. RIGHT OF APPEAL:

See Attachment.

XI. ATTACHMENTS:

The Claimant's Recourse to Hearing Decision

Form IG-BR-29

ENTERED this 21st Day of December, 2012.

**Stephen M. Baisden
State Hearing Officer**