



**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

September 20, 2006

Dear Mr. _____:

Attached is a copy of the findings of fact and conclusions of law on your hearing held September 19, 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
Libby Boggess, Bureau of Senior Services
_____, WVMi
Nisar Kalwar, Department's Attorney
Hoyt Glazer, Claimant's Attorney
_____, SCAC

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

_____,
Claimant,

v.

Action Number: 06-BOR-1658

**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 19, 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 September 19, 2006 on a timely appeal filed April 11, 2006. It should be noted that the hearing was originally scheduled for July 6, 2006 but was rescheduled at Department's request when the claimant obtained representation by an attorney.

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, SCAC.
3. _____, RN, Loved Ones.
4. _____, Claimant's caregiver.
5. Hoyt Glazer, Claimant's Attorney.
6. Kay Ikerd, Bureau of Senior Services (participating by speaker phone).
7. _____ West Virginia Medical Institute.(participating by speaker phone).
8. 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 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 (8 pages).
- #2 Copy of PAS-2005 dated 2-27-06 and associated documents
- #3 Copy of potential denial letter dated 3-13-06 (2 pages).
- #4 Copy of denial letter dated 3-28-06 (2 pages).

Claimant's Exhibits:

None.

(It should be noted that other documents were received from the Department prior to the hearing but were not entered as evidence and were marked as Exhibit #NA for identification purposes only.)

VII. FINDINGS OF FACT:

- 1) The claimant was a recipient of benefits under the Title XIX Aged/Disabled Waiver Services when a reevaluation request was received and a new PAS-2005 was completed by _____ of WVMi on 2-27-06 and was denied for medical eligibility (Exhibit #2).
- 2) The PAS-2005 completed by Ms. _____ on 2-27-06 determined that only four (4) deficits existed in the functional activities of eating, bathing, dressing, and grooming and both parties stipulated to those deficits.

- 3) Ms. [REDACTED] testified about the regulations (Exhibit #1).
- 4) Ms. [REDACTED] testified about the PAS-2005 completed 2-27-06 (Exhibit #2). Ms. [REDACTED] testified that she awarded four (4) deficits in the areas of eating, bathing, dressing, and grooming. Ms. [REDACTED] testified that those present included [REDACTED], [REDACTED], and [REDACTED]. Ms. [REDACTED] testified that she observed the claimant walking with a walker, that she did not remember if the claimant staggered when walking, that she does not remember if she asked if he needed one-person assistance at times with walking, that the claimant told her he needed help getting in and out of the bathtub, that assistance getting in and out of the bathtub is included in the area of bathing and not in the area of transferring, and that she does not remember if that is in the guidelines.
- 5) The claimant was notified of potential denial on 3-13-06 (Exhibit #3) and of denial on 3-28-06 (Exhibit #4) and a hearing request was received by the Bureau for Medical Services on 4-11-06, by the Board of Review on 5-12-06, and by the State Hearing Officer on 5-22-06.
- 6) Testimony on behalf of the claimant disagreed with the findings of the PAS-2005 in the areas of walking and transferring.
- 7) In the area of walking, the claimant testified that he does not believe Ms. [REDACTED] asked him if he needed help with walking but was not sure and that he has left side weakness from two (2) strokes. Ms. [REDACTED] testified that Ms. [REDACTED] asked her if she helps the claimant with walking and that she told her she does, that the claimant did ambulate but stumbled when he first got up, and that she helps him hands on with walking on daily basis. Ms. [REDACTED] testified that the claimant got up to walk twice during the assessment and stumbled both times and that she thought he was going to fall and someone got him his walker. Ms. [REDACTED] testified that the regulations do not state that one-person assistance is required at all times in order to qualify for Level III.
- 8) In the area of transferring, the claimant testified that he needs help getting in and out of the tub, that the caregiver helps him, that he needs help getting up and down out of a chair, and that his daughter helps him when the caregiver is not there. Ms. [REDACTED] testified that she helps the claimant getting in and out of the tub and that she helps him three (3) times a week and sometimes more. Ms. [REDACTED] testified that she has witnessed the claimant being pulled up from the chair but that she is not there when he bathes and has not witnessed that. Ms. [REDACTED] testified that the regulations are written to ensure that the policy is applied in a fair, equitable, and consistent manner and that assistance getting in and out of the tub applies only to the area of bathing and not in the area of transferring but that it is not specifically in writing that it only applies to the area of bathing. Ms. [REDACTED] also testified that the regulations do not state that the one-person assistance with transferring be at all times in order to qualify for Level III.
- 9) 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."

10) The areas of dispute in regard to deficits involved the areas of walking and transferring. The State Hearing Officer finds that sufficient evidence was provided to show that one-person assistance with walking was required by the claimant at the time the PAS-2005 was completed. The claimant testified that he needed help with walking and that he did not believe Ms. [REDACTED] asked him if he needed help. Ms. [REDACTED] testified that she did not remember if she asked the claimant whether he needed one-person assistance with walking but did observe the claimant walking with a walker. The claimant's caregiver testified that she assists the claimant hands on with walking. Ms. [REDACTED] testified that she was present and witnessed the claimant stumbling both times that he got up and walked. The claimant testified that he has left side weakness due to strokes. In addition, Ms. [REDACTED] testified that the regulations do not state that one-person assistance be required at all times in order to meet a finding of Level III. The State Hearing Officer finds that the preponderance of evidence and testimony show that the claimant requires one-person assistance (Level III) with walking at times and that this requirement existed at the time the PAS-2005 was completed on 2-27-06. Therefore, an additional deficit is awarded in the area of walking. Since an additional deficit (Level III) is awarded in the area of walking, the claimant also qualifies for an additional deficit in the area of vacating the building. In the area of transferring, the testimony primarily revolved around whether one-person assistance with getting in and out of the bathtub qualified the claimant for a deficit (Level III) in the area of transferring. However, testimony was provided by the claimant and Ms. [REDACTED] that the claimant requires one-person assistance (Level III) at times with getting up from a chair. In addition, Ms. [REDACTED] testified that the regulations do not state that one-person assistance is required at all times in order to qualify for Level III. The State Hearing Officer finds that the preponderance of evidence and testimony show that the claimant qualifies for one-person assistance (Level III) in the area of transferring. Thus, the State Hearing Officer finds that the claimant has a total of seven (7) deficits.

11) The State Hearing Officer finds that the claimant qualifies for three (3) additional points in determining Level of Care in the areas of walking, transferring, and vacating the building.

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 four (4) deficits on the PAS-2005 completed on 2-27-06 in the areas of eating, bathing, dressing, and grooming.
- 3) The areas of dispute involved 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 walking (Level III) and transferring (Level III). The State Hearing Officer determined that since the claimant qualified for Level III in the area of walking, he also qualified for an additional deficit in the area of vacating the building. The claimant met the criteria for seven (7) deficits.
- 4) The claimant meets the medical criteria for the Title XIX Aged/Disabled Waiver Services Program as five (5) deficits are required and the claimant has a total of seven (7) deficits.

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.

X. RIGHT OF APPEAL:

See Attachment

XI. ATTACHMENTS:

The Claimant's Recourse to Hearing Decision

Form IG-BR-29

ENTERED this 20th Day of September, 2006.

**Thomas M. Smith
State Hearing Officer**