



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 30, 2008

██████████
Legal Aid of West Virginia

RE: _____

Dear Mr. _____:

Attached is a copy of the findings of fact and conclusions of law on your hearing held September 25, 2008. Your hearing request was based on the Department of Health and Human Resources' termination of benefits under the Medicaid Aged/Disabled Waiver (ADW) 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 ADW program is based on current policy and regulations. Some of these regulations require that ADW services are granted to those individuals who meet all eligibility requirements. One of these requirements is that the individual must qualify medically. Eligible individuals are those who qualify medically for nursing facility level of care but have chosen the waiver program as a means to remain in their home, where services can be provided.

The information that was submitted at your hearing identified two (2) additional qualifying deficits and revealed that you established medical eligibility for the ADW program.

It is the decision of the State Hearing Officer to **reverse** the action of the Department to terminate benefits under the Aged/Disabled Waiver Program.

Sincerely,

Todd Thornton
State Hearing Officer
Member, State Board of Review

cc: Erika H. Young, Chairman, Board of Review
Mary McQuain, Esq., Assistant Attorney General
Kay Ikerd, BoSS
Kathy Gue, RN, WVMI

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

_____,

Claimant,

v. **Action Number: 08-BOR-863**

**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 30, 2008 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 25, 2008 on a timely appeal, filed February 13, 2008.

All persons offering testimony were placed under oath.

The claimant's benefits have been continued through this hearing process.

II. PROGRAM PURPOSE:

The program entitled Aged/Disabled Waiver 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 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:

_____, Claimant
_____, Esq., Claimant's Attorney
_____, RN, Case Manager, Southwestern Community Action
_____, Legal Aid of West Virginia (observing)
_____, Claimant's Homemaker
Mary McQuain, Assistant Attorney General, BMS*
Kathy Gue, RN, WVMI*
Kay Ikerd, Department Representative, BoSS*

*Participating by speakerphone.

Presiding at the Hearing was Todd Thornton, State Hearing Officer and a member of the State Board of Review.

IV. QUESTION TO BE DECIDED:

The question to be decided is whether the Department was correct in its proposal to terminate the Claimant's benefits under the Aged/Disabled Waiver Program.

V. APPLICABLE POLICY:

Aged/Disabled Home and Community Based Service Manual §500

VI. LISTING OF DOCUMENTARY EVIDENCE ADMITTED:

Department's Exhibits:

- D-1 Aged/Disabled Home and Community-Based Services Manual §501
- D-2 Terminated/Denied Notice dated February 7, 2008
- D-3 Hearing/Grievance Record Information with Request for Hearing dated February 11, 2008
- D-4 West Virginia Medical Institute (WVMI) Independent Review Pre-Admission Screening (PAS) for Aged/Disabled Waiver Services dated January 8, 2008
- D-5 Letter of Potential Denial dated January 23, 2008
- D-6 Letter of Potential Denial dated January 15, 2008
- D-7 Medical Necessity Evaluation Request dated November 20, 2007

VII. FINDINGS OF FACT:

- 1) Claimant is a fifty-nine (59) year old male who receives Aged/Disabled Waiver Services. Kathy Gue, RN, completed a Pre-Admission Screening (PAS) of the Claimant to determine his ongoing medical eligibility for the program on January 8, 2008 (Exhibit D-4).

- 2) The Department issued two letters advising the Claimant of potential denial for the program (Exhibits D-5 and D-6). A notice advising the Claimant of the Department's proposed action to terminate his Aged/Disabled Waiver Services was sent on February 7, 2008. The notice stated that eligibility for the program requires deficits in five (5) listed areas, and that the Claimant's PAS indicated deficits in three (3) of the listed areas, specifically *eating, grooming, and dressing*. The notice explained that because this is less than the required five (5) deficits, the Claimant's Aged/Disabled Waiver services would be terminated (Exhibit D-2).
- 3) The Claimant's attorney and witnesses introduced issues in the areas of *bathing, medication administration* and the *ability to vacate in the event of an emergency*.
- 4) Policy from the Aged/Disabled Home and Community-Based Services Waiver Policy Manual 501.3.2 (Exhibit D-1) states:

501.3.2 MEDICAL CRITERIA

An individual must have five (5) deficits on the Pre-Admission Screening Form (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.

Section	Description of Deficits	
#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	
a.	Eating	Level 2 or higher (physical assistance to get nourishment, not preparation)
b.	Bathing	Level 2 or higher (physical assistance or more)
c.	Dressing	Level 2 or higher (physical assistance or more)
d.	Grooming	Level 2 or higher (physical assistance or more)
e.	Continence, bowel	Level 3 or higher; must be incontinent.
f.	Continence, bladder	
g.	Orientation	Level 3 or higher (totally disoriented, comatose).
h.	Transfer	Level 3 or higher (one-person or two-person assistance in the home)
i.	Walking	Level 3 or higher (one-person assistance in the home)
j.	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 for 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 his/her own medications.	

All of the above medical criteria information also applies to Personal Options.

- 5) The contention of the Claimant’s attorney is that his documented limitations in the areas of vision and orientation adversely influence the areas of *bathing*, *medication administration* and the *ability to vacate in the event of an emergency*. The PAS (Exhibit D-4) describes orientation (#26.g) as “Intermittent Disoriented” and vision (#26.k) as “Impaired/Not Correctable.” Comments on the PAS regarding orientation note:

HE KNEW TODAY’S [sic] DATE. HE SAYS THAT HE HAS TIMES THAT HE GETS CONFUSED WHEN HE WAKES UP.

Comments on the PAS regarding vision note:

HE SAYS THAT HE IS LEGALLY BLIND. HE SAYS THAT HE HAS TUNNEL VISION. HE SAYS THAT HE HAS GLASSES BUT THAT THEY DO NOT HELP.

- 6) With regard to *bathing*, testimony from the Department indicated that there is no frequency requirement in assessing this element. The WVMI nurse testified that frequency is simply a personal preference. The Claimant’s testimony indicated that he bathes himself, but would like to more often. He refuses help with bathing from females, stating that he does not want to expose his naked body to a female worker. The WVMI nurse testified that this is not considered in the PAS process.
- 7) With regard to *medication administration*, the PAS (Exhibit D-4, page 6 of 6) states, in pertinent part:

HM SETS UP HIS MEDICATIONS IN A WEEKLY PLANNER. HE TAKES THEM FROM THE PLANNER WHEN THEY ARE DUE.

Testimony from the WVMI nurse indicated that a weekly planner has medication arranged for a person according to date and time, that they are available in Braille for blind persons, and that some blind persons do use weekly planners for medication administration and can recognize their medication by touch. Testimony from the Claimant and his Homemaker confirmed that the Claimant spills his medication frequently.

- 8) With regard to the *ability to vacate in the event of an emergency*, testimony from the WVMI nurse provided no criteria for distinguishing between an assessment that the Claimant can vacate with supervision and an assessment that the Claimant is unable to

vacate. Upon questioning, the WVMI nurse explained that this was her judgment, and that she tries to be consistent with her judgment. The PAS (Exhibit D-4) assesses the Claimant in this area as capable of vacating (#25) "With Supervision" and the PAS comments for this area note:

HE SAYS THAT HE DOES NOT KNOW IF HE COULD VACATE
THE HOME IN THE EVENT OF AN EMERGENCY.

Questioning from the Claimant's attorney confirmed that the same response was provided to the WVMI nurse in a prior assessment, and the Claimant was previously classified as unable to vacate the building in the event of an emergency. The Department countered that past hospitalization and the Claimant's history of a fractured wrist could account for changes in the PAS. The WVMI nurse also testified that on the day of the assessment the Claimant demonstrated to her that he was able to walk. The Claimant testified that he did not know if he could vacate the building or not, reiterating his prior statements and reinforcing the fact that nothing has changed with regard to this element.

VIII. CONCLUSIONS OF LAW:

- 1) The Aged/Disabled Waiver policy provides that an individual must have five (5) qualifying deficits to be medically eligible for the Aged Disabled Waiver program. The WVMI nurse determined, at the time of the PAS, that the Claimant had only three (3) qualifying deficits in the areas of *eating*, *grooming*, and *dressing*.
- 2) Evidence and testimony provided for this hearing support that additional deficits should have been assessed in the areas of *medication administration* and the *ability to vacate in the event of an emergency*.
- 3) Although the Department contended that there are weekly medication planners available in Braille and used by blind persons, the primary issue for the Claimant is not identifying and knowing when to take his medications, but the frequency with which he is spilling his medications. It is evident that for a blind person to relocate and identify spilled medications would be problematic, and could be impossible. The Claimant is unable to administer his own medications, given his blindness and documented tendency to spill medications from his weekly planner.
- 4) The Department offered possible explanations for a change in the most recent PAS from a prior one, and the consideration of a prior PAS is given reduced weight. However, the Department was unable to explain why the same response given for the Claimant's *ability to vacate in the event of an emergency* elicited two different assessments in two different years. Testimony from the Department confirmed that this assessment is based on the Claimant's response in the PAS and by the Claimant's demonstration of independent walking capability on the day of the PAS. Given the inability to predict the timing or urgency of any emergency, the Claimant is unable to vacate based on his limitations with vision and his problems with orientation upon waking. With two additional deficits, the Claimant is medically eligible for Aged/Disabled Waiver services.

IX. DECISION:

After reviewing the information presented during this hearing and the applicable policy and regulations, I find that the Department was incorrect in their determination that the Claimant is no longer medically eligible for the Aged/Disabled Waiver program. I am ruling to **reverse** the Department's action to terminate this Claimant's services under the Aged/Disabled Waiver program. I further rule that the Department assess points associated with the additional two deficits in determining the level of care.

X. RIGHT OF APPEAL:

See Attachment

XI. ATTACHMENTS:

The Claimant's Recourse to Hearing Decision

Form IG-BR-29

ENTERED this _____ Day of September, 2008.

Todd Thornton
State Hearing Officer