



State of West Virginia
DEPARTMENT OF HEALTH AND HUMAN RESOURCES
Office of Inspector General
Board of Review
9083 Middletown Mall
White Hall, WV 26555

Joe Manchin III
Governor

Patsy A. Hardy, FACHE, MSN, MBA
Cabinet Secretary

November 18, 2009

C/O -----

Dear -----:

Attached is a copy of the findings of fact and conclusions of law on your hearing held October 27, 2009. Your hearing request was based on the Department of Health and Human Resources' action to deny your application for benefits and services through 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. Some of these regulations state as follows: The Aged/Disabled (HCB) Title XIX Waiver Services Program is 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 a nursing facility level of care but have chosen the waiver program as a means to remain in their home where services can be provided. [Aged/Disabled (HCB) Services Manual Section 501]

Information submitted at the hearing fails to demonstrate that you require a sufficient number of services and the degree of care required to medically qualify you for the Aged/Disabled Home and Community Based Services Waiver Program.

It is the decision of the State Hearing Officer to **uphold** the Department's action to deny your application for benefits and services through the Medicaid Aged/Disabled Waiver Services Program.

Sincerely,

Thomas E. Arnett
State Hearing Officer
Member, State Board of Review

Pc: Erika H. Young, Chairman, Board of Review
Charles Rogers, Esq., LAWV
Michael Bevers, Esq., AG's Office
BoSS
WVMI

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

-----,

Claimant,

v.

Action Number: 09-BOR-1641

**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 November 18, 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 October 27, 2009 on a timely appeal filed August 4, 2009.

II. PROGRAM PURPOSE:

The ADW Program is defined as a long-term care alternative that provides services that enable 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., Legal Aid of WV, Counsel for Claimant

-----, Claimant's witness

, Claimant's witness

Michael Bevers, Esq., Attorney General's Office, Counsel for the Department

Angel Khosa, LSW, Bureau for Senior Services (BoSS)

Sarah "Betsy" Carpenter, RN, West Virginia Medical Institute (WVMI)

Presiding at the hearing was Thomas E. Arnett, State Hearing Officer and a member of the State Board of Review.

IV. QUESTION TO BE DECIDED:

The question to be decided is whether or not the Department was correct in its action to deny the Claimant's application for benefits and services through the Medicaid Aged/Disabled Home and Community-Based Waiver Services Program.

V. APPLICABLE POLICY:

Medicaid Aged & Disabled Home and Community-Based Waiver Services Manual, Chapter 500, Section 501

VI. LISTING OF DOCUMENTARY EVIDENCE ADMITTED:

Department's Exhibits:

- D-1 Aged/Disabled Home and Community-Based Services Policy Manual Section 501.3, 501.3.2, 501.3.2.1 and 501.3.2.2
- D-2 Medical Necessity Evaluation Request dated June 1, 2009
- D-3 Letter from ----- dated July 6, 2009
- D-4 WVMi Independent Review Pre-Admission Screening for Aged/Disabled Waiver Services dated June 30, 2009
- D-5 Notice of Decision of Denial dated July 20, 2009

Claimant's Exhibits:

Claimant's-1 DD-2a ICF/MR Level of Care Evaluation dated August 11, 2009; Psychological Evaluation dated May 22, 2009 and supporting documentation.

VII. FINDINGS OF FACT:

- 1) On July 20, 2009, the Claimant was evaluated (medically assessed) to determine medical eligibility for participation in the Aged/Disabled Waiver Services Program, hereinafter AD Waiver Program (See Exhibit D-4, Pre-Admission Screening (PAS) form).
- 2) In response to a Notice of Potential Denial, -----, Claimant's father, drafted correspondence (D-3) dated July 6, 2009 challenging the potential denial notice and indicated the "Nursing assessment is full of errors and poorly done." In his correspondence, the Claimant's father reviews several of the functional areas wherein he contends that a deficit should have been awarded. In addition to addressing concerns related to potential denial, the Claimant's father expressed concern regarding delay as he indicated his son made application to the AD Waiver Program in February 2009. It should be noted, however, that Exhibit D-2 confirms the Claimant's physician did not submit a request for Medical Necessity Evaluation prior to June 1, 2009.

- 3) Sarah “Betsy” Carpenter, RN, WVMi reviewed the documentation included in Exhibit D-3 and determined that no changes would be made to the PAS assessment. On or about July 20, 2009, the Claimant was notified that medical eligibility could not be established via a Termination/Denial Notice (Exhibit D-5). This notice states, in pertinent part:

Your request for benefits under the Home and Community Based Aged/Disabled Waiver Program has been terminated/denied.

An evaluation of your current medical condition indicates that you are not entitled to services under the A/D Waiver Program. A decision has been made to terminate/deny your homemaker and case management services. You have a right to dispute this decision and ask for a hearing.

Reason for Decision: Eligibility for the Aged/Disabled Waiver Program requires deficits in at least 5 of the health areas below. Your PAS (Pre-Admission Screening Form) indicated deficiencies in 2 areas – Vacate a Building and Grooming.

Because you have less than 5 deficits at the level required, your services are being terminated/denied.

- 4) Consistent with the documentation found in Exhibit D-5, the Department, by counsel, stipulated that the Claimant demonstrates two (2) functional deficits (Vacate a building and grooming) but indicated the medical assessment completed in June 2009 fails to identify five (5) functional deficits required to establish medical eligibility for participation in the A/D Waiver Program.
- 5) The Claimant, by counsel, contends that he should have been found to be medically eligible as he is also demonstrating a functional deficit in the following areas: Eating, Bathing, Dressing, Incontinence (bladder), Walking and Administering Medications.

Eating- The Claimant’s father, -----, contends that eating should be identified as a deficit due to a risk of choking from eating too fast. In addition, he purported that his son has limited meal preparation skills. In order to qualify for a deficit in eating, the individual must require hands-on physical assistance to receive nourishment. Individuals who require this level of care are not expected to have the ability to prepare their own meals, and pursuant to policy, meal preparation is not considered when determining a functional deficit in eating. The evidence reveals that the Claimant was assessed at a level 1 (self/prompting) and documentation found in Exhibit D-4 (page 7 of 8) indicates the Claimant reported that he is able to feed himself, he can cut his own food, make a sandwich, peel an apple and that he uses the microwave. Documentation found in Claimant’s-1 (ICF/MR Level of Care Evaluation, page 3 of 3) further indicates the Claimant is able to feed himself and the evaluating psychologist noted that –“----- is able to dine independently using all utensils.” Whereas the evidence fails to demonstrate the Claimant requires physical assistance to receive nourishment, a deficit cannot be awarded in eating.

Bathing- The Claimant was assessed at a level 1 (self/prompting) in bathing, and according to documentation found in Exhibit D-4, page 7 of 8, the Claimant reported that he takes a tub bath and denied requiring physical assistance with transferring in/out of the tub and that he can wash himself. Documentation by the WVM RN further indicates that the Claimant's mother agreed with the information provided by the Claimant and stated that he can wash himself. The Claimant's father alleges that bathing should be considered a deficit because his son does not like to bathe, he often smells and must be reminded to take a bath. The Psychological Evaluation included in Claimant's-1 states – “----- has the skills to bathe himself independently but reportedly requires verbal prompting to complete this activity.” Pursuant to existing policy, only those individuals who require hands-on physical assistance (level 2) to bathe qualify for a deficit. Because the evidence clearly demonstrates the Claimant requires only prompting to bathe, a deficit cannot be awarded.

Dressing- The Claimant's father testified that the Claimant is unable to wash his own laundry and that he will often wear the same dirty clothes for several days. In addition to not changing his clothes frequently, he will often go outside in the cold weather without wearing a coat or warm clothing. Information consistent with testimony presented at the hearing by the Claimant's father is documented in Exhibit D-4, page 7 of 8, however, when evaluating a functional deficit for the purpose of determining a functional deficit in dressing, the individual must demonstrate the need physical assistance. The evidence demonstrates that the Claimant practices poor hygiene and doesn't always wear clothing appropriate for the weather, but he can button, zip, and put on all articles of clothing, including his Velcro shoes, independently. Based on the evidence, the Claimant was assessed correctly at a level 1 (prompting/supervision) and does not qualify for a deficit in dressing.

Incontinence (bladder)– The Claimant's father testified, as documented in Exhibit D-3, that sometimes his son sleeps so soundly he urinates himself in bed. In order to qualify as incontinent (level 3 or higher) the individual must have three (3) or more episodes of urinary incontinence per week. The WVM RN testified that the Claimant and his mother denied any episodes of bowel or bladder incontinence during the assessment and denied the use of any incontinent supplies. Moreover, the ICF/MR Level of Care Evaluation found in Claimant's-1, page 3 of 3, indicates the Claimant is continent. Whereas the evidence fails to support a finding of bladder incontinence, a functional deficit cannot be awarded.

Walking – The Claimant's father noted in Exhibit D-3 (#10) that his son has an unsteady gait and tries to walk faster than his mind can tell his legs to move. He notes that his diagnosed condition of Tardive Dyskinesia and Psuedo Parkinsonism causes his arms to flail about, hitting and striking things in his path of travel. He goes on to note that there is a constant concern that he may fall. Individuals who qualify for a deficit in walking require hands-on, weight bearing, one-person physical assistance (level-3 or higher). The WVM RN documented that the Claimant ambulated in his residence during the assessment and that he denied the use of medical equipment inside the home to ambulate. Because the Claimant was observed using walls and furniture for balance, he was assessed at a level-2 (supervised/assistive device). Documentation found in Claimant's-1, ICF/MR Level of Care Evaluation, page 3 of 3, and the Psychological Evaluation (Section C,1, page 3) state that the Claimant is ambulatory. The evidence clearly demonstrates the Claimant does not qualify for a functional deficit in walking.

Administering Medications – In order to qualify for a functional deficit, the individual must require someone to administer his medication for them (pill to mouth, etc...). The Claimant was assessed as requiring prompting and supervision by the WVMi RN, although she documented in Exhibit D-4, page 8 of 8 that - he denies a history of forgetting to take prescription medications; his mom states he is real good about taking medications on his own and that the Claimant and his mother denied anyone prompts/supervises his medication regimen. The Claimant's father indicates in Exhibit D-3 – "I really wonder if ----- is taking his medication on time." If the Claimant's medication was being administered to him by a third party (mother or father), there would be no question. Clearly the Claimant does not require someone to administer his medication – a deficit cannot be awarded.

Orientation – Orientation was not fully explored at the hearing, but because the issue was questioned in Exhibit D-3, a finding on this issue is necessary. Orientation is commonly assessed to determine if the individual oriented person, place and time (referred to as orientation x3). Exhibit D-3 questions the Claimant's orientation, however, it fails to identify any occasions wherein the Claimant demonstrates disorientation. The PAS completed by the WVMi RN (Exhibit D-4) notes at the top of page 8 of 8 – "Knew full name, DOB, SS#, phone#, full address including city, state, zip code and county. Knew the current month, date, day of week and year, aware of age." The evidence reviewed in this functional area clearly demonstrates the Claimant was correctly assessed at a level-1 (oriented) and therefore does not qualify for a deficit.

- 6) Aged/Disabled Home and Community-Based Services Manual Section 501.3 (D-1) - Program Eligibility for Client:

Applicants for the ADW Program must meet the following criteria to be eligible for the program:

C. Be approved as medically eligible for NF Level of Care.

- 7) Aged/Disabled Home and Community-Based Services Manual Section 503.1.1 – 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 A/DW services receives an appropriate LOC that reflects current/actual medical condition and short and long-term services needs.
- C. The medical eligibility determination process is fair, equitable and consistently applied throughout the state.

- 8) Aged/Disabled Home and Community-Based Services Waiver Policy Manual 501.3.2 Medical Criteria: An individual must have five (5) deficits on the Pre Admission Screening (PAS) 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 B
(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.

VIII. CONCLUSIONS OF LAW:

- 1) Medicaid policy requires that an individual must demonstrate five (5) functional deficits on the PAS assessment in order to qualify medically for the Aged/Disabled Waiver Program.
- 2) The evidence reveals that the Claimant was awarded two (2) deficits on a PAS completed by WVMi in June 2009 – Vacate a Building and Grooming.
- 3) The evidence submitted at the hearing fails to confirm the Claimant was demonstrating any additional deficits at the time of the June 2009 assessment.
- 4) Whereas the Claimant demonstrated only two (2) program qualifying deficits, medical eligibility for the Aged/Disabled Waiver Program cannot be established.

IX. DECISION:

It is the decision of the State Hearing Officer to **uphold** the Department's action in denying the Claimant's application for benefits and services through the Medicaid, 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 18th Day of November, 2009.

**Thomas E. Arnett
State Hearing Officer
Member, State Board of Review**