



STATE OF WEST VIRGINIA
DEPARTMENT OF HEALTH AND HUMAN RESOURCES
OFFICE OF THE INSPECTOR GENERAL

Jeffrey H. Coben, M.D.
Interim Cabinet Secretary

Board of Review
416 Adams Street Suite 307
Fairmont, WV 26554
304-368-4420 ext. 30018
Tara.B.Thompson@wv.gov

Sheila Lee
Interim Inspector General

January 25, 2023



RE: [REDACTED] v. WVDHHR
ACTION NO.: 22-BOR-2481

Dear [REDACTED]:

Enclosed is a copy of the decision resulting from the hearing held in the above-referenced matter. In arriving at a decision, the Board of Review 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.

You will find attached an explanation of possible actions that may be taken if you disagree with the decision reached in this matter.

Sincerely,

Tara B. Thompson, MLS
State Hearing Officer
State Board of Review

Enclosure: Decision Recourse
Form IG-BR-29

CC: Tamra Grueser, Bureau of Senior Services

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

██████████,

Appellant,

v.

ACTION NO.: 22-BOR-2481

**WEST VIRGINIA DEPARTMENT OF
HEALTH AND HUMAN RESOURCES,**

Respondent.

DECISION OF STATE HEARING OFFICER

INTRODUCTION

This is the decision of the State Hearing Officer resulting from a fair hearing for ██████████. This hearing was held in accordance with the provisions of Chapter 700 of the West Virginia Department of Health and Human Resources' (DHHR) Common Chapters Manual. This fair hearing was convened on January 4, 2023, on an appeal filed with the Board of Review on November 15, 2022.

The matter before the Hearing Officer arises from the Respondent's October 11, 2022 decision regarding the Appellant's amount of approved Aged and Disabled Waiver (ADW) Program service level limits.

At the hearing, the Respondent appeared by Tamra Grueser, RN, Bureau of Senior Services. The Appellant appeared *pro se*, represented by ██████████ (hereafter, ██████████), who has Medical Power of Attorney (MPOA). Appearing as witnesses on behalf of the Appellant were ██████████ and ██████████, RN (hereafter, ██████████), Coordinating Council for Independent Living (CCIL): West Virginia Choice. All witnesses were sworn in and the following exhibits were entered as evidence.

Department's Exhibits:

- D-1 Bureau for Medical Services Chapter 501 Excerpts
- D-2 Pre-Admission Screening (PAS) Summary, submitted September 30, 2022
- D-3 ADW Medical Necessity Evaluation Request (MNER)
Signed by the physician, August 11, 2021
- D-4 ADW MNER
Signed by the physician, August 2, 2022
- D-5 PAS Form, submitted September 30, 2022

Appellant's Exhibits:

None

After a review of the record — including testimony, exhibits, and stipulations admitted into evidence at the hearing, and after assessing the credibility of all witnesses and weighing the evidence in consideration of the same, the following Findings of Fact are set forth.

FINDINGS OF FACT

- 1) The Appellant has received Level C ADW Program services since 2021.
- 2) On October 11, 2022, the Respondent issued a notice advising that the Appellant had been approved for 124 Medicaid ADW Program service hours per month.
- 3) On September 30, 2022, KEPRO staff, Joel Pitts, RN (hereafter Mr. Pitts), completed a PAS with the Appellant and [REDACTED] (Exhibits D-5).
- 4) The Appellant's representative, [REDACTED] was not present during the PAS (Exhibit D-5).
- 5) Mr. Pitts was no longer employed by KEPRO at the time of the hearing.
- 6) At the time of the PAS, Mr. Pitts reviewed the MNER diagnoses with the Appellant and [REDACTED], who verbalized agreement (Exhibit D-5)
- 7) On the September 30, 2022 PAS, the Appellant received 21 service level points (Exhibit D-2).
- 8) The Appellant received 4 service level points for medical conditions/symptoms that included *significant arthritis, pain, mental disorders, and other — altered mental status* (Exhibits D-2 and D-5).
- 9) The Appellant did not have a decubitus (Exhibits D-2 and D-5).
- 10) The Appellant was physically unable to vacate the building in the event of an emergency (Exhibit D-5).
- 11) The Appellant was awarded one point in the area of *vacating* (Exhibit D-2).
- 12) The Appellant required Level 2 physical assistance with *eating, bathing, dressing and grooming* (Exhibit D-5).
- 13) The Appellant was awarded one service level point each in the areas of *eating, bathing,*

*dress*ing, and *groom*ing (Exhibit D-2).

14) The Appellant was Level 3-Incontinent in the areas of bladder and bowel (Exhibit D-5).

15) The Appellant received 4 total service level points in the area of *continence* (Exhibit D-2).

16) The Appellant was Level 2-Intermittent Disoriented (Exhibit D-5).

17) The Appellant received 1 service point in the area of *orientation* (Exhibit D-2).

18) The Appellant required Level 3 one person assistance with *transferring* (Exhibit D-5).

19) The Appellant received 2 service points in the area of *transferring* (Exhibit D-2).

20) The Appellant required Level 4 two person assistance *walking* (Exhibit D-5).

21) The Appellant received 2 service points in the area of *walking* (Exhibit D-2).

22) The Appellant required Level 3 situational assistance with *wheeling* (Exhibit D-5).

23) The Appellant received 2 service points in the area of *wheeling* (Exhibit D-2).

24) The Appellant did not require continuous oxygen (Exhibit D-3).

25) The Appellant received 1 service point in the area of *administering medication* (Exhibit D-2).

26) The Appellant's prognosis was stable (Exhibits D-4 and D-5).

27) On August 11, 2021 and August 2, 2022, the Appellant's physician, [REDACTED], completed a MNER form for re-evaluation of the Appellant's ADW Program eligibility (Exhibits D-3 and D-4).

28) The MNER forms reflected a box that read, "Contact information (required if applicant/participant has Alzheimer's, Dementia, or Related Diagnoses)" (Exhibits D-3 and D-4).

29) The PAS reflected [REDACTED], with Coordinating Council for Independent Living (CCIL), as the Appellant's contact person (Exhibit D-5).

30) The MNER forms listed [REDACTED], LGSW, with CCIL as the Appellant's contact person (Exhibits D-3 and D-4).

31) The boxes beside "Guardian" and "Medical Power of Attorney" were unchecked (Exhibits D-3 and D-4).

32) On the MNER forms, the Appellant's physician marked "No" beside the question inquiring

whether the Appellant has Alzheimer's, brain multi-infarct, senile dementia, or a related condition (Exhibits D-3 and D-4).

33) On the August 2, 2022 MNER form, the Appellant's physician provided "Altered Mental Status R41.82" as the Appellant's only diagnosis (Exhibit D-4).

APPLICABLE POLICY

Bureau for Medical Services (BMS) Manual § 501.9 provides in pertinent part:

The applicant may choose the case management agency upon application to the ADW program.

BMS Manual § 501.11 provides in pertinent part:

The Utilization Management Contractor (UMC) is the entity that is responsible for conducting medical necessity assessments to confirm an applicant's medical eligibility for waiver services. The purpose of the medical eligibility review is to ensure the following:

- Existing members are medically eligible based on current and accurate evaluations
- Each member determined to be medically eligible for ADW services receives an appropriate Service Level that reflects current/actual medical condition and short and long-term service needs.

BMS Manual § 501.11.2.1 provides in pertinent part:

The total number of points possible is 44. Service Levels for personal attendant services are determined based on the following sections of the PAS:

- #23: Medical Conditions/Symptoms - 1 point for each (can have total of 12)
- #24: Decubitus - 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 at Level 3 or 4 to get points for j. (wheeling).
- #27: Profession 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
- #35: Prognosis - 1 point if terminal

BMS Manual § 501.11.2.2 provides in pertinent part:

To be eligible for an ADW service Level C — 194-124 service hours per month, the member must score 18-25 points.

To be eligible for an ADW service Level D — 125-155 service hours per month, the member must score 26-44 points.

BMS Manual § 501.11.2.5 provides in pertinent part:

Annual re-evaluations for medical eligibility for each member must be conducted. The process is as follows:

A MNER form with current updated contact information must be submitted to the UMC after being signed and dated by the member, legal representative/designated contact, and referent physician A referent's signature is required annually and must include the ICD diagnosis code(s).

If the MNER indicates that the applicant has Alzheimer's, multi-infarct, senile dementia, or related condition; or if she has a guardian, contact person, or legal representative, the assessment will not be scheduled without the guardian, contact person or legal representative present to assist the member.

DISCUSSION

The Respondent approved the Appellant for Level C ADW Program services. The Appellant's representative argued that the PAS should not have been completed without her participation. Therefore, the Appellant contended that the information reflected on the PAS was not an accurate representation of the Appellant's functioning and care needs. The Appellant's representative argued that the Appellant should have been awarded more ADW Program service hours per month. During the hearing, the Respondent's representative testified that the Appellant has received Level C services since 2021. The Appellant's representative did not refute the Appellant's historic level of ADW care, only that the Appellant should qualify for an increase in monthly ADW Program service hours..

KEPRO is the Utilization Management Contractor (UCM) responsible for conducting medical necessity assessments to confirm a person's medical eligibility for ADW Program services. ADW Program service levels are determined by the PAS. The PAS is the assessment tool used by KEPRO to determine the Appellant's ADW Program eligibility and service level. Pursuant to the policy, to receive ADW Program services over 124 hours per month, the Appellant was required to have 26-44 points, as indicated on the PAS. The Respondent bears the burden of proof and had to demonstrate by a preponderance of the evidence that the Appellant was not eligible for 26-44 service level points at the time of the PAS.

During the hearing, the Appellant's representative testified that the Appellant needs a high level of

care and argued that the Appellant is not receiving sufficient services due to CCIL staffing issues. The Respondent's representative argued that the Appellant is eligible for ADW program services seven days per week. The Appellant's representative testified that in December 2022, the Appellant only received services on eight days. The policy allows the Appellant to choose the provider to implement ADW Program services for the Appellant. The Board of Review can only determine whether the Respondent correctly determined the Appellant's ADW service level and cannot grant relief in aligning cooperation from the chosen provider's staff to perform services for which the Appellant has already been determined to be eligible for.

MNER

Annually, the Appellant's physician must complete and sign an MNER form that includes the ADW member's ICD diagnosis codes. If the MNER indicates that the Appellant has Alzheimer's, multi-infarct, senile dementia, or related condition; or if she has a guardian, contact person, or legal representative, the PAS may not be scheduled without the Appellant's guardian, contact person, or legal representative present to assist her.

The evidence revealed that the Appellant's physician completed the MNER forms for the Appellant's 2021 and 2022 ADW Program annual eligibility assessments. Pursuant to the evidence, the Appellant's physician did not indicate that the Appellant had a diagnosis of Alzheimer's, multi-infarct, senile dementia, or related condition. The MNER only reflected a diagnosis of Altered Mental Status. No evidence was submitted to verify that Altered Mental Status was a physician-established dementia related diagnosis. Further, the evidence reflected that the Appellant's physician indicated on the MNER that the Appellant did not have an appointed guardian, MPOA, or legal representative. Both the 2021 and 2022 MNER forms reflect CCIL as the Appellant's contact person.

The Respondent's representative contended that the Respondent has no record of the Appellant's representative or MPOA records. The Appellant's representative argued that WV Choice has a record of her MPOA appointment by the Appellant. Although the Appellant's representative may have provided WV Choice with the appropriate information, no reliable corroborating evidence was submitted to establish when the Appellant's MPOA appointment was established.

The evidence revealed that participants of the PAS were advised of the diagnoses and agreed. [REDACTED] was present during the PAS. No evidence was submitted to indicate that [REDACTED] advised KEPRO, during the PAS, that the Appellant had a diagnosis of dementia, that she lacked the capacity to make decisions, that she had a guardian, or that the Appellant's representative was appointed MPOA authority.

The Appellant's representative testified that she has a list of diagnoses from the Appellant's physician that were not reflected on the MNER or PAS — including a diagnosis of dementia and lacks capacity to make decisions. No corroborating evidence was submitted to establish when the Appellant may have received those diagnoses or what physician diagnosed the Appellant.

While the Appellant's physician may have provided the Appellant's representative with a comprehensive list of diagnoses, the preponderance of the evidence presented demonstrated that

the Appellant's physician only included one diagnosis on the MNER form. Because the policy requires the Respondent to consider diagnoses established on the MNER, diagnoses not reflected on the MNER cannot be affirmed or considered when determining the Appellant's eligibility for additional ADW Program service hours.

The preponderance of the evidence submitted failed to establish that the Appellant's hearing representative was required by the policy to be present during the PAS completion. Because CCIL was listed on the MNER as the Appellant's contact person and CCIL was present via [REDACTED] during the PAS, the Respondent correctly considered the PAS completed with [REDACTED] input.

Service Level Points

To be eligible for ADW Service Level D, the Appellant's PAS score had to fall within the 25-44 point range. The evidence revealed that the Appellant's PAS score was 21— below the threshold for Service Level D eligibility. The Respondent had to prove by a preponderance of the evidence that the Appellant's PAS score did not fall within the 25-44 point range.

Medical Conditions/ Symptoms and Decubitus

Pursuant to the policy, the Appellant may receive one point for each assessed medical condition/symptom indicated on the PAS and a *decubitus*. The Appellant received 4 service level points for medical conditions/symptoms that included *significant arthritis, pain, mental disorders, and other — altered mental status*. Because no evidence was entered to support that the Appellant had additional medical conditions/symptoms or a decubitus, additional points could not be awarded in these areas.

Vacating a Building

Pursuant to the policy, the Appellant may receive one point for this area. The evidence revealed that the Appellant was awarded the maximum number of points available for this area; therefore, no additional points may be awarded for *vacating*.

Functional Abilities

Pursuant to the policy, the Appellant may receive one point each for functional abilities assessed as Level 2 on the PAS. To be awarded two points, functional abilities must be assessed on the PAS as Level 3 or higher.

Eating, Bathing, Dressing, and Grooming

The Appellant received one point each in these areas. To receive additional points in these areas, the Appellant would have to require total feed to eat and total care for *bathing, dressing, and grooming*. No evidence was presented to establish that the Appellant should have been assessed at a higher level in these areas. Because the evidence failed to establish that the Appellant should have been assessed as a Level 3 or higher in these areas, additional points cannot be awarded.

Orientation

To be assessed as Level 3, the Appellant had to be totally disoriented or comatose at the time of the PAS. The PAS reflected that the Appellant was intermittently disoriented. During the hearing, [REDACTED] testified that during the PAS, the Appellant was intermittently disoriented and was

only able to answer some of the questions during the PAS. No evidence was submitted to indicate that the Appellant was totally disoriented or comatose during the PAS.

Additionally, [REDACTED] offered testimony regarding her assessment of the Appellant in December 2022. Because information from [REDACTED] December 2022 assessment was not available at the time of the PAS completion, information presented regarding the Appellant's functioning after the PAS was given little weight in the decision of this Hearing Officer.

Continence: Bladder and Bowel

Pursuant to the policy, the Appellant may be awarded two points each for areas assessed as Level 3 or higher. The evidence revealed that the Appellant was assessed as Level 3 and received two points each in the areas of *continence bladder* and *continence bowel*. To be awarded a Level 4 in these areas, the Appellant would have to require the use of a catheter or colostomy equipment. No evidence was entered to indicate the Appellant should have been assessed as a Level 4 in the area of *continence*.

Transferring, Walking, and Wheeling

Pursuant to the policy, these functioning areas are eligible for a maximum of two points for Level 3 or higher. The evidence revealed that the Appellant was assessed as Level 3 and received two points in the area of *transferring*. The Appellant was assessed as a Level 4 and received two points in the area of *walking*. The Appellant was assessed as a Level 3 and received 2 points in the area of *wheeling*. The evidence revealed that the Appellant received the maximum number of service level points for these areas.

Administering Medication

Pursuant to the policy, this area is eligible for a maximum of one point in this area. The evidence revealed the Appellant received the maximum number of service level points in this area.

Dementia

Pursuant to the policy, this area is eligible for a maximum of one point for diagnosis of Alzheimer's or other dementia. During the hearing, the Appellant presented with confusion and had barriers recalling her birth date and zip code. The PAS assessed the Appellant as intermittently disoriented and indicated that the Appellant had some confusion at times.

The MNER reflected a diagnosis of "Altered Mental Status." Because the MNER failed to establish the Appellant had a diagnosis of Alzheimer's or senile dementia, no additional points could be awarded in the area of *dementia*.

Prognosis

Pursuant to the policy, to receive a point in this area, the Appellant must have a terminal prognosis. The MNER reflected that the Appellant's prognosis is not terminal and the PAS indicated her prognosis was stable. The preponderance of evidence failed to demonstrate that the Appellant should have received a point in this area.

CONCLUSIONS OF LAW

- 1) If the MNER form indicates that the Appellant has Alzheimer's or dementia, the assessment must not be scheduled without the contact person present to assist her.
- 2) The evidence demonstrated that the Appellant's physician did not list a diagnosis of Alzheimer's, multi-infarct, senile dementia, or related condition.
- 3) If the MNER indicates that the Appellant has a guardian, contact person, or legal representative, the PAS may not be scheduled without the Appellant's guardian, contact person, or legal representative present to assist her.
- 4) The evidence demonstrated that the MNER did not indicate the Appellant had a guardian or legal representative.
- 5) The evidence demonstrated that CCIL, the contact agency listed for the Appellant on the MNER, was present via [REDACTED] during the PAS to assist the Appellant.
- 6) To be eligible for ADW Service Level D, the Appellant's PAS score had to fall within the 26-44 point range.
- 7) The preponderance of evidence demonstrated that the Appellant's PAS score was 21.
- 8) The preponderance of evidence established that the Appellant is eligible for ADW Service Level C.

DECISION

It is the decision of the State Hearing Officer to **UPHOLD** the Respondent's decision regarding the Appellant's ADW Service Level.

ENTERED this 25th day of January 2023.

Tara B. Thompson, MLS
State Hearing Officer