



**STATE OF WEST VIRGINIA
DEPARTMENT OF HEALTH AND HUMAN RESOURCES
Office of the Inspector General
Board of Review**

**Sherri A. Young, DO, MBA, FAAFP
Interim Cabinet Secretary**

**Christopher G. Nelson
Interim Inspector General**

December 11, 2023



RE: [REDACTED] v. WVDHHR
ACTION NO.: 23-BOR-3333

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 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 ensure that all persons are treated alike.

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

Sincerely,

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

Encl: Decision Recourse
Form IG-BR-29
CC: Terry McGee, II, Bureau for Medical Services
Lori Tyson, Bureau for Medical Services

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

[REDACTED],

Appellant,

v.

Action Number: 23-BOR-3333

**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 [REDACTED]. 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 convened on November 28, 2023.

The matter before the Hearing Officer arises from the Respondent's October 24, 2023 decision to deny the Appellant medical eligibility for Medicaid Long-Term Care admission.

At the hearing, the Respondent appeared by Terry McGee, II, Bureau for Medical Services. Appearing as a witness for the Respondent was Melissa Grega, RN, KEPRO. The Appellant was represented by [REDACTED], his Health Care Surrogate. Appearing as witnesses on behalf of the Appellant were [REDACTED] (hereafter, Facility) Administrator; [REDACTED], Facility Business Office Manager; [REDACTED], Facility Social Worker; and [REDACTED], Facility Director of Nursing. All witnesses were sworn in and the following documents were admitted into evidence.

Department's Exhibits:

- D-1 Notice of Denial for LTC, dated October 24, 2023
Exhibit Checklist, dated November 1, 2023
- D-2 Bureau for Medical Services (BMS) Manual Excerpts
- D-3 Pre-Admission Screening (PAS), dated October 23, 2023

Appellant's Exhibits:

- A-1 [REDACTED] Progress Notes and Records

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) At the time of the PAS, the Appellant resided in a long-term skilled nursing facility.
- 2) On October 24, 2023, the Respondent issued a notice advising the Appellant his application for Medicaid LTC eligibility had been denied because the submitted Pre-Admission Screening (PAS) form failed to demonstrate the presence of five (5) deficits at the level required (Exhibit D-1).
- 3) The Appellant has deteriorating Vascular Dementia (Exhibit D-3).
- 4) On February 10, 2023, the Appellant's physician, [REDACTED], determined the Appellant is an incapacitated adult due to dementia.
- 5) The nature of the Appellant's incapacitation includes short-term memory loss and inability to process information.
- 6) The Appellant's incapacitation is expected to persist long-term.
- 7) On March 10, 2023, DHHR was appointed as the Appellant's healthcare surrogate.
- 8) The Respondent determined the Appellant met eligibility criteria to establish the presence of deficits in *medication administration* and *bathing* (Exhibits D-1 and D-3).
- 9) The Appellant can physically vacate the building with supervision (Exhibit D-3).
- 10) At the time of the PAS, the Appellant was mentally unable to vacate the building in the event of an emergency.
- 11) On October 23, 2023, [REDACTED] completed a PAS with the Appellant (Exhibit D-3).
- 12) The PAS reflected "Level 1-self/prompting" in *eating, dressing, and grooming* (Exhibit D-3).
- 13) The Appellant's focused treatment area, *ADL Self Care Performance deficit, requires assistance with ADL Cognitive deficit*, reflected foot care as an assigned nursing staff responsibility (Exhibit A-1).
- 14) At the time of the PAS, the Appellant had occasional incontinence for bowel and bladder (Exhibit D-3).

- 15) At the time of the PAS, the Appellant did not require physical assistance for *transferring* or *walking* (Exhibit D-3 and A-1).
- 16) At the time of the PAS, the Appellant did not require a wheelchair (Exhibits D-3 and A-1).
- 17) At the time of the PAS, the Appellant was oriented to person and place (Exhibit D-3 and A-1).
- 18) At the time of the PAS, the Appellant did not require skilled needs in suctioning, tracheostomy, ventilator, parenteral fluids, sterile dressings, or irrigations (Exhibit D-3 and A-1).
- 19) The Appellant's symptoms include delusions, inappropriate social behavior, seriously impaired judgment, severe challenging behaviors, and sexual aggression (Exhibit D-3).
- 20) The physician indicated the Appellant has limited rehabilitative potential (Exhibit D-3).
- 21) The physician recommended nursing facility placement only (Exhibit D-3).
- 22) On PAS item #38 *Physician Recommendations*, the physician indicated the Appellant would not be able to return home or be discharged based on present medical findings (Exhibit D-3).

APPLICABLE POLICY

Bureau for Medical Services Manual § 514, Appendix 514B *Pre-Admission Screening (PAS)* provides the following options in the corresponding form sections:

25. In the event of an emergency, the individual can vacate the building: (check only one) a. Independently b. With Supervision c. Mentally unable d. Physically Unable

For *eating, bathing, dressing, and grooming*, the following levels are indicated:

- Level 1- Self/Prompting
- Level 2- Physical Assistance
- Level 3- Total Feed/ Total Care
- Level 4- For *eating*: Tube Fed

For *continence/bladder* and *continence bowel*, the following levels are indicated:

- Level 1- Continent
- Level 2-Occasionally Incontinent, less than 3 per week
- Level 3-Incontinent
- Level 4- Catheter/Colostomy

For *orientation*, the following levels are indicated:

- Level 1- Oriented
- Level 2- Intermittent Disoriented
- Level 3- Totally Disoriented

Level 4- Comatose (Level 5)

For *transferring* and *walking*, the following levels are indicated:

Level 1- Independent

Level 2- Supervised/ Assistive Device

Level 3- One-person Assistance

Level 4- Two-person Assistance

BMS Manual § 514.5.1 *Application Procedures* provides in relevant sections:

The medical eligibility determination is based on a physician's assessment of the medical and physical needs of the individual The Pre-Admission Screening (PAS) assessment must have a physician's signature dated not more than 60 days prior to admission to the nursing facility. A physician who has knowledge of the individual must certify the need for nursing facility care.

BMS Manual § 514.5.3 *Medical Eligibility Regarding the Pre-Admission Screening* provides in relevant sections:

BMS has designated a tool known as the Pre-Admission Screening (PAS) form (Appendix B) to be utilized for physician certification of the medical needs of individuals applying for the Medicaid benefit.

An individual must have a minimum of five deficits identified on the PAS. These deficits will be determined based on the review by a BMS/designee in order to qualify for the Medicaid nursing facility benefit.

These deficits may be any of the following (numbers represent questions on the PAS form):

- #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 ...
- #26: Functional abilities of the 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 incontinent)
 - Orientation: Level 3 or higher (totally disoriented, comatose)
 - Transfer: Level 3 or higher (one person or two person assist in the home)
 - Walking: Level 3 or higher (one person assists in the home)
 - Wheeling: Level 3 or higher ...

- #27: Individual has skilled needs in one 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

DISCUSSION

The Appellant was a recipient of Medicaid LTC benefits. The Appellant's physician, [REDACTED], signed a PAS that identified two deficit areas present at the time of the PAS. The Respondent denied the Appellant's eligibility for Medicaid LTC because the PAS failed to establish the presence of five deficits. The Appellant's representative argued that the Appellant should be medically eligible because he requires nursing facility services due to dementia.

The Board of Review is required to follow the policy, cannot grant exceptions to the policy, and cannot award eligibility beyond the circumstances described in the policy. The Respondent must rely on the PAS for physician certification of the Appellant's medical needs.

The evidence revealed the same physician completed the PAS and determined the Appellant's incapacity status. According to the evidence, the physician certified the Appellant's need for nursing facility care. Although the physician's PAS recommendations and prognosis specified that the Appellant should remain in nursing facility placement, the policy requires the documentation to disclose the existence of five deficit areas at the time of the PAS. Submitted evidence about the Appellant's functioning after the October 24, 2023 PAS was given little weight as only the Appellant's functioning at the time of the PAS can be considered when determining whether the Respondent correctly denied the Appellant Medicaid LTC eligibility.

The Respondent bears the burden of proof and had to demonstrate by a preponderance of the evidence that the Appellant did not have deficits in five areas at the time of the PAS. The evidence demonstrated that the Respondent acknowledged the presence of deficits in *medication administration* and *bathing*.

Vacating

To receive a deficit in *vacating*, the Appellant had to be mentally or physically unable to vacate the building in the event of an emergency. The PAS revealed the Appellant can physically vacate a building with supervision. The submitted evidence indicated that the Appellant is physically able to vacate the building with supervision but failed to establish that the Appellant was mentally able to vacate the building.

The healthcare surrogate records established that the Appellant was an incapacitated adult at the time of the PAS.

The February 2023 physician's record revealed that the nature of the Appellant's long-term incapacity manifested short-term memory loss and inability to process information due to dementia. Testimony from the parties indicated that the Appellant may be unable to identify dangerous situations due to his illness.

The submitted records, prepared by different providers, corroborate the Appellant's information processing barriers. The preponderance of the evidence failed to establish that, at the time of the PAS, the Appellant had the mental capacity to consistently identify emergencies and exercise the mental ability to vacate the building. The PAS form provides the option "(c) mentally unable" in the area related to vacating the building in the event of an emergency. The preponderance of the evidence revealed that the Appellant was mentally unable to independently vacate the building at the time of the PAS and should have received a deficit in this area.

Eating, Dressing, and Grooming

To qualify as deficits, the Appellant had to require physical assistance in *eating, grooming, or dressing*. The preponderance of the evidence revealed that the Appellant did not require physical assistance in *eating or dressing* at the time of the PAS.

According to the Appellant's records, his treatment interventions included physical assistance with foot care under his treatment focus area for ADL completion. The submitted records did not indicate that this grooming intervention had been terminated. Requiring physical assistance with foot care is inconsistent with the PAS assessment that the Appellant can complete grooming tasks independently with prompting. Because the evidence revealed the Appellant required physical assistance with foot care at the time of the PAS, the Appellant should have received a deficit in the area of *grooming*.

Continence

To qualify as a deficit in *continence*, the Appellant had to be completely incontinent. The Appellant's physician assessed the Appellant as occasionally incontinent. The submitted records did not reveal any active physician orders or treatment interventions for bowel or bladder incontinence at the time of the PAS. The preponderance of the evidence failed to establish that an additional deficit should have been awarded for *continence*.

Orientation

To qualify as a deficit in *orientation*, the Appellant had to be totally disoriented or comatose at the time of the PAS. The evidence revealed the Appellant has persistent short-term memory loss and an inability to process information.

During the hearing, the Appellant's representative testified that the Appellant was intermittently disoriented and stated he observed the Appellant's total disorientation in May 2023. The Facility's records revealed that on October 24, 2023, the Appellant was oriented to "person place situation." On October 10, 2023, the Appellant was "alert and oriented to person and place." The testimony provided was consistent with the PAS determination that the Appellant was oriented at the time of the PAS.

The preponderance of the evidence failed to prove that the Appellant was totally disoriented or comatose at the time of the PAS. Because the Appellant was oriented at the time of the PAS, a deficit could not be awarded for *orientation*.

Transfer and Walking

To qualify as a deficit in *transfer* or *walking*, the Appellant had to require physical assistance. The Appellant's treatment records revealed fall prevention interventions; however, no listed interventions provided the Appellant with physical assistance to transfer or walk. Because the submitted evidence failed to establish that the Appellant required physical assistance transferring or walking at the time of the PAS, deficits could not be affirmed in these areas.

Skilled Needs

To establish a skilled needs deficit, the Appellant had to require one of the qualifying listed services at the time of the PAS. While the evidence revealed the Appellant required therapies, the submitted evidence failed to establish that the Appellant required any of the qualifying skilled services.

Total Functioning Deficit Areas

The presence of five functioning deficits is required to establish Medicaid LTC eligibility. The PAS identified the presence of two deficits. The preponderance of evidence revealed the presence of two additional deficit areas at the time of the PAS. Because the policy requires the documentation to establish the presence of five deficit areas, the four deficit areas supported by the evidence are insufficient to establish the Appellant's eligibility for Medicaid LTC. Because the evidence proved the presence of fewer deficit areas than is required by the policy, the Respondent correctly denied the Appellant's medical eligibility for Medicaid LTC.

Although the submitted evidence contradicted the PAS in *vacating* and *grooming*, the PAS was not determined to be wholly unreliable as the preponderance of the submitted evidence was consistent with the PAS evaluation.

CONCLUSIONS OF LAW

- 1) To be eligible for Medicaid LTC benefits, the Appellant had to have deficits in five areas at the time of the PAS.
- 2) The PAS revealed the presence of deficits in *bathing* and *medication administration*.
- 3) The preponderance of the evidence revealed the Appellant required physical assistance with foot care at the time of the PAS.
- 4) Because the Appellant required physical assistance with foot care, he should have received a deficit in *grooming*.
- 5) The preponderance of the evidence demonstrated that at the time of the PAS, the Appellant was mentally incapable of vacating a building in the event of an emergency.
- 6) Because the Appellant was mentally incapable of vacating a building in an emergency, he should have received a deficit in *vacating*.

- 7) Because the preponderance of evidence failed to demonstrate the presence of five deficits at the time of the PAS, the Respondent correctly denied the Appellant's medical eligibility for Medicaid LTC.

DECISION

It is the decision of the State Hearing Officer to **UPHOLD** the Respondent's decision to deny the Appellant's medical eligibility for Medicaid Long-Term Care benefits.

Entered this 11th day of December 2023.

Tara B. Thompson, MLS
State Hearing Officer