



State of West Virginia
DEPARTMENT OF HEALTH AND HUMAN RESOURCES
Office of Inspector General
Board of Review
P.O. Box 2590
Fairmont, WV 26555-2590

Joe Manchin
Governor

Martha Yeager Walker
Secretary

November 23, 2005

C/O _____

Dear Mr. _____:

Attached is a copy of the findings of fact and conclusions of law on your hearing held November 2, 2005. Your Hearing request was based on the Department of Health and Human Resources' proposal to terminate benefits and services through the MR/DD Waiver 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 MR/DD Home and Community-Based Waiver Program is based on current policy and regulations. Policy states that in order to be eligible for the Title XIX MR/DD Home & Community-Based Waiver Program, an individual must have a diagnosis of mental retardation and/or a related condition. A related condition means any other condition, other than mental illness, found to be closely related to mental retardation because this condition results in impairment of general intellectual functioning or adaptive behavior similar to that of mentally retarded persons, and requires treatment or services similar to those required for these persons. The condition must be severe and chronic with concurrent substantial deficits that require the level of care and services provided in an Intermediate Care Facility for individuals with Mental Retardation and /or related conditions (ICF/MR Facility). (West Virginia Title XIX MR/DD Waiver Home & Community-Based Policy Manual, Chapter 502.1).

Clinical evidence submitted at the hearing reveals that while you possess an eligible diagnosis of Mild Mental Retardation, your adaptive delays are the result of chronic Mental Illness. Additionally, the evidence fails to demonstrate that you require an ICF/MR Level of Care. As a result, you are no longer eligible to participate in the MR/DD Waiver Program.

It is the decision of the State Hearing Officer to **uphold** the Department's proposal to terminate benefits and services provided through the Medicaid, Title XIX MR/DD Waiver Program.

Sincerely,

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

cc: Chairman, Board of Review
Susan Hall, MR/DD Waiver Program Manager
Alva Fuzzy Page, Esq., BMS
[REDACTED] Esq., Legal Aid of WV

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

Claimant,

vs.

Action Number: _____

**West Virginia Department of
Health and Human Resources,**

Respondent.

DECISION OF THE STATE HEARING OFFICER

I. INTRODUCTION

This is a report of the State Hearing Officer resulting from a fair hearing concluded on November 23, 2005 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 originally scheduled for July 8, 2005, but was rescheduled and convened on November 2, 2005 on a timely appeal filed December 1, 2004.

It should be noted that benefits and services continued pending a hearing decision.

All persons giving testimony were placed under oath.

II. PROGRAM PURPOSE:

The program entitled MR/DD Home and Community-Based Waiver is set up cooperatively between the Federal and State Government and administered by the West Virginia Department of Health and Human Resources.

The Medicaid *Home and Community-Based MR/DD Waiver* (authorized under Title XIX, Section 1915(c) of the Social Security Act) provides an alternative to services available in Intermediate Care Facilities for individuals with Mental Retardation or related conditions (ICF/MR). The primary purpose of an ICF/MR facility is to provide health and rehabilitative services. An ICF/MR facility provides services to persons who are in need of and who are receiving active treatment.

West Virginia's MR/DD Waiver Program provides for individuals who require an ICF/MR level of

care, and who are otherwise eligible for participation in the program, to receive certain services in a home and/or community-based setting for the purpose of attaining independence, personal growth, and community inclusion.

III. PARTICIPANTS

_____, Claimant

_____, Esq., Legal Aid of WV
_____, LSW, Service Coordinating Supervisor, _____
_____, DSE, _____ (primary care-giver)
_____, RN, _____
_____, CM, _____
_____, Program Coordinator, _____
_____, QMRP, _____

Alva Fuzzy Page, Esq., BMS

Susan Hall, Program Manager, Program Manager, MR/DD Waiver Program

Richard Workman, Psychologist Consultant, Bureau for Medical Services

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

IV. QUESTION(S) TO BE DECIDED

The question to be decided is whether the Department was correct in their proposal to terminate the Claimant's benefits and services through the MR/DD Waiver Program.

V. APPLICABLE POLICY

Title XIX MR/DD Home and Community-Based Waiver Program Revised Operations Manual, Chapter 500-8 (revised November 2004).

The Code of Federal Regulations - 42 CFR 435.1009(a)(2) and 42 CFR 441.302 (c)(2).

VI. LISTING OF DOCUMENTARY EVIDENCE ADMITTED

Departments' Exhibits:

- D-1 Notice of Denial dated 9/17/05
- D-2 Annual Medical Evaluation (DD-2A) dated 5/3/04
- D-3 Psychological Evaluation Update dated 4/1/04
- D-4 Comprehensive Psychiatric Evaluation dated 12/8/04
- D-5 IEP 10/19/1988

Claimant's Exhibits:

- C-1 Annual Medical Evaluation (DD-2A) dated 5/10/05

VII. FINDINGS OF FACT:

- 1) In accordance with the Code of Federal Regulation found at 42 CFR 441.302 (c) (2) and the Department's Medicaid, MR/DD Waiver Manual, the Claimant was undergoing an annual medical evaluation to determine eligibility for continued participation in the MR/DD Waiver Program.

- 2) On September 17, 2004, the Department sent a Notice of Denial (D-1) to the Claimant which includes some of the following pertinent information:

Your Waiver services have been terminated.

Documentation submitted reflects delays primarily related to a chronic mental illness. Also please note the previous denial letter dated 11-26-02. At that time the documentation did not support substantial delays related to mental retardation. He did not meet eligibility criteria for and ICF/MR level of care and he was beyond 22 years of age at that time. Continued eligibility is not warranted.

- 3) The Department contends that the clinical evidence reviewed for eligibility supports the finding that the Claimant's chronic mental illness is the primary cause of his adaptive delays and cited exhibits D-2, D-3, D-4 and D-5 in support of this conclusion. Additionally, they contend that he does not exhibit substantial adaptive deficits and therefore does not require and ICF/MR level of care.
- 4) The Department cited exhibit D-2, Annual Medical Evaluation (DD-2A), dated May 3, 2005 and noted the diagnostic section found on page four (4) provides a diagnosis of Paranoid Schizophrenia and Mild Mental Retardation.
- 5) Exhibit D-3, Psychological Evaluation Update dated 4/1/04, Section I,A, reveals that the Claimant's last hospitalization was when he spent four days at [REDACTED] last year. He spent two

days at [REDACTED] Hospital on the Behavioral Health Unit in 2002 and the Claimant has reportedly been hospitalized more than 100 times in his life, beginning at the age of 16. At least four of these hospitalizations have been long term with the longest being for one year at [REDACTED] State Hospital in [REDACTED]

Section I, B, provides IQ testing results that place the Claimant intelligence at the upper Mild Mental Retardation to Borderline Range. These scores are incompatible with individuals who have Moderate level Mental Retardation and typically require institutional, ICF/MR, Level of Care. Further, in Section VII of this evaluation, the evaluator states - "His measured IQ appears to be an underestimate of his true ability and his true IQ may well be in the Borderline range."

Section I, C, reveals that the Claimant does odd jobs, mowing grass and working part time at a dog kennel, as he likes the extra spending money for cigarettes. He has a reported history of substance abuse, which includes marijuana and PCP, that lasted for about five years but he has been clean for several years. These behaviors are inconsistent with individuals who requires institutional, ICF/MR, level of care.

Section II, B, 1, (Psychomotor) reveals that the Claimant's fine and gross motor skills appear to be normal.

Section II, B, 2, (Self Help) states that the Claimant is independent for such skills as personal hygiene and daily living, although it was noted that he sometimes tries to fake taking a shower and often requires a good deal of prompting to initiate and complete tasks. He requires assistance with financial management as Consumer Credit is assigned as his payee but he is reported to be his own guardian.

Section II, B, 3, (Language) indicates that the Claimant's expressive language skills appear to be intact, however, his receptive language skills appear to be limited in that he has difficulty with comprehension.

Section II, B, 4, (Affective) states that the Claimant has a history of anger outbursts, which are sometimes expressed physically when he can no longer hold in his depression, anxiety and frustration. He is also somewhat manipulative of those individuals who are lower functioning. The evaluator goes on to say that although the Claimant has reported he is entitled to his benefits, after receiving a denial letter notifying him that he is no longer qualified for waiver services, he is now making every effort to keep services.

Section II, B, 5, (Mental Status) states "He reports having intense paranoia around people and hallucinates that they are talking to him, about him watching him etc. He hears them talking

even if they are not, sometimes.” The Claimant reported a history of suicidal ideation and indicated that he has only attempted suicide about 15 times in his life and has done so by overdosing, cutting wrists, and hanging. He reported having an extensive history of depression, anxiety, social anxiety, and anger.

- 6) The Comprehensive Psychiatric Evaluation identified as exhibit D-4 was completed, as stated in the evaluation, “because of concerns that _____ may lose his access to the Medicaid Waiver program.” The evaluator indicates that he is of the impression that the Claimant must be documented mentally retarded rather than mentally ill. The Department indicated that an individual can be eligible with a dual diagnosis of MI and MR, however, the primary cause of adaptive deficits cannot be from Mental Illness. The Department’s psychologist consultant testified that this document fails to adequately confirm that adaptive deficits are caused by the Claimant’s Mental Retardation. Further, the Department cited the diagnostic section that includes diagnoses of Intermittent Explosive Disorder and Psychotic Disorder NOS.
- 7) The IEP dated October 19, 1988, exhibit D-5, reveals under the Annual Goals Achieved – _____ has maintained full-time competitive employment for the past year. He was reported to be independent in self help/care and his adaptive behavior quotient is 73 – which is in the Borderline Range.
- 8) The evidence reveals that the Claimant not does exhibit substantial adaptive deficits in **Self-Care**. Testimony received at the hearing indicates that he sometimes requires prompting to keep good hygiene, but that he knows how to complete these tasks and does not require active treatment. His **Learning** skills (functional academics) are clearly delayed, but they are not substantial delays, as indicated in the evaluations. The Claimant’s IQ scores are in the Mild MR to Borderline Range and one evaluator suggests that his IQ may be higher than the scores reflect. The Claimant does not exhibit any deficits in **Mobility** and although his **Capacity for Independent Living** is a concern, there is insufficient evidence to indicate substantial adaptive deficits. While his finances are managed for him, he is reported to be his own guardian, he is involved in community activities and he can use a microwave to fix simple meals. **Receptive and /or Expressive Language** skills are developed as he can make his wants and need known, and although the evaluations indicate that the Claimant’s receptive language skills are delayed, there is no evidence of a substantial deficit. **Self-Direction** skills are well developed as evidence by his choice to fake showers, independently buy cigarettes and chose to participate in swimming, billiards, etc... The Claimant’s **Economic Self-sufficiency** (Employment), however, appears to be an area where the Claimant exhibits substantial adaptive deficits. This finding is consistent with testimony received at the hearing as well as the narrative information in the evaluations and the ABS-RC:2 scores found in exhibit D-3. It remains unclear, however, if the Claimant’s inability to maintain employment is the result of his Mental Illness or Mental Retardation.
- 9) Counsel for the Claimant contends that the Claimant has been eligible for this program since he was initially approved in 2001 and there are no documents to substantiate the Department’s

claim that he was denied previously. He indicated that the Claimant's history of being eligible for this program and his need of continued services should count toward eligibility.

- 10) Testimony offered by and on behalf of the Claimant indicates that the Claimant requires prompting on a daily basis. He is under the supervision of [REDACTED] 24-hours a day / 7-days a week. Testimony included reports of anger outbursts (i.e. putting his fist through a window and wall), inappropriate social behaviors, and an incident where [REDACTED] was involved in a transfer to [REDACTED] Hospital in 2002 following an episode of explosive disorder. It is noted, however, that the Department's interpretation of the clinical findings, with the exception of the Claimant's ability to maintain employment, was virtually uncontested.

- 11) MR/DD Policy Manual, Chapter 1:

I. Level of care Criteria for medical eligibility:

- A. In order to be eligible for the Title XIX MR/DD Home & Community-Based Waiver Program an individual must have both a diagnosis of mental retardation and/or a related condition (s), and require the level of care and services provided in an Intermediate Care Facility for Individuals with Mental Retardation and /or related conditions (ICF/MR Facility).

- B. The following list includes some examples of related conditions. This list does not represent all related conditions.

Autism or Pervasive Developmental Disability, NOS

Spina Bifida

Cerebral Palsy

Tuberous Sclerosis

Traumatic Brain injury and/or Spinal Cord injuries (occurring during the developmental period).

- C. The evaluations must demonstrate that an individual has a diagnosis of mental retardation and/or a related condition which constitute a severe chronic disability which is:

Attributable to a mental or physical disability or a combination of both;

Manifested before a person reaches twenty-two (22) years of age;

Likely to continue indefinitely; and

Substantially limits functioning in three or more of the following areas of major life activities:

- a. Self-Care
- b. Learning (functional academics)

- c. Mobility
- d. Capacity for Independent Living (home living, social skills, health and safety, community use, leisure)
- e. Receptive and /or expressive Language
- f. Self-Direction
- g. Economic Self-sufficiency (Employment)

D. Level of care determinations are made by the Office of Behavioral Health Services (OBHS) and the Bureau for Medical Services (BMS) based on the medical, psychological and social evaluations (DD-2A, DD-3, and DD-4)

E. Evaluations must demonstrate the need for an ICF/MR level of care and services. This is demonstrated by the individual's need for intensive instruction, services, safety, assistance and supervision to learn new skills and increase independence in activities of daily living. The level of care and services needed must be the same level which is provided in an ICF/MR facility

- 12) The Federal Code of Regulation - 42 CFR 435.1009(a)(2) states that persons with a related condition means any other condition, other than mental illness, found to be closely related to mental retardation because this condition results in impairment of general intellectual functioning or adaptive behavior similar to that of mentally retarded persons, and requires treatment or services similar to those required for these persons.

VIII. CONCLUSIONS OF LAW:

- 1) The regulations that govern the MR/DD Waiver Program require eligible individuals to have a diagnosis of Mental Retardation and/or a related condition, and require an ICF/MR Level of Care. Further, policy requires that each recipient receiving home and community-based services be reevaluated at least annually to determine continued eligibility.
- 2) The Code of Federal Regulations found at 42 CFR 435.1009 indicates that mental illness does not qualify as a related condition. Further, policy requires that the evaluations must demonstrate that the individual's diagnosis of mental retardation and/or a related condition constitutes a severe chronic disability.
- 3) The documentation submitted for recertification reveals that the Claimant's eligible diagnosis of Mild Mental Retardation is not the cause of his adaptive delays. In addition,

the evidence fails to demonstrate that he exhibits substantial adaptive deficits in three or more of the seven major life areas and therefore does not require an ICF/MR Level of Care.

- 4) Whereas the evidence fails to demonstrate that the Claimant's Mild Mental Retardation is the cause of his adaptive delays and he does not require an ICF/MR Level of Care, continued eligibility for participation in the MR/DD Waiver Program cannot be established.

X. DECISION:

While it is apparent that the Claimant has several challenges and requires some assistance to function within the community, the evidence fails to demonstrate that he is an appropriate candidate for participation in the MR/DD Waiver Program. It is the decision of the State Hearing Officer to uphold the Department's proposal to terminate the Claimant's benefits and services through the MR/DD Waiver Program.

X. RIGHT OF APPEAL:

See Attachment.

XI. ATTACHMENTS:

The Claimant's Recourse to Hearing Decision.

Form IG-BR-29.

ENTERED this 23rd Day of November, 2005

State Hearing Officer