



State of West Virginia
DEPARTMENT OF HEALTH AND HUMAN RESOURCES
Office of Inspector General
Board of Review
1027 N. Randolph Ave.
Elkins, WV 26241

Joe Manchin
Governor

Martha Yeager Walker
Secretary

July 21, 2006

Dear Ms. _____:

Attached is a copy of the findings of fact and conclusions of law on your hearing held July 17, 2006. Your hearing request was based on the Department of Health and Human Resources' action to deny benefits and services under 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. 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 and must have manifested prior to the age of 22. (West Virginia Title XIX MR/DD Home & Community-Based Waiver Revised Operations Manual, Chapter 500).

Evidence presented during the hearing does not verify the presence of severe and chronic mental retardation with concurrent adaptive deficits that manifested prior to the age of 22.

It is the decision of the State Hearing Officer to **uphold** the action of the Department to deny benefits and services through the MR/DD Waiver Program.

Sincerely,

Pamela L. Hinzman
State Hearing Officer
Member, State Board of Review

cc: Chairman, Board of Review
Stephen Brady, Acting Director, MR/DD Waiver Program

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

_____,

Claimant,

vs.

Action Number: 05-BOR-7200

**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 July 21, 2006 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 convened on July 17, 2006 on a timely appeal filed December 13, 2005. The hearing was originally scheduled for March 22, 2006, but was rescheduled by the Hearing Officer due to a scheduling conflict.

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

[REDACTED], Claimant
[REDACTED] Patient Advocate, [REDACTED]
[REDACTED], sister of Claimant
[REDACTED] Health Service Worker, [REDACTED]
[REDACTED] Program Director, [REDACTED]
Susan Hall, Program Manager, MR/DD Waiver Program (participating telephonically)
Linda Workman, Psychologist Consultant, Bureau for Medical Services (participating telephonically)

Presiding at the hearing was Pamela L. Hinzman, 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 its proposal to deny 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

VI. LISTING OF DOCUMENTARY EVIDENCE ADMITTED

Department's Exhibits:

- D-1 Notice of Decision dated November 2, 2005
- D-2 Title XIX MR/DD Home and Community-Based Waiver Program Revised Operations Manual, Chapter 500
- D-3 DD-2A Annual Medical Evaluation
- D-4 Psychological Evaluation from [REDACTED] dated October 3, 2005
- D-5 Social History from [REDACTED] dated September 26, 2005
- D-6 Psychological Evaluation dated March 23, 1984
- D-7 [REDACTED] information dated September 15, 2004
- D-8 Psychological Evaluation dated December 10, 1990
- D-9 Psychological Evaluation dated September 17, 1992

- D-10 Psychological Evaluation dated December 1978
- D-11 Notice of Decision dated June 30, 2006

Claimant's Exhibits:

- C-1 Notice of Decision dated November 2, 2005
- C-2 DD-2A Annual Medical Evaluation
- C-3 Psychological Evaluation dated October 3, 2005
- C-4 Psychological information from Claimant's childhood
- C-5 Current psychological information
- C-6 Information from [REDACTED]

VII. FINDINGS OF FACT:

- 1) The Claimant applied for MR/DD Waiver services in October 2005.
- 2) Ms. Workman testified about documents originally submitted to the Department in conjunction with the Claimant's application.

She referred to a DD-2A Medical Evaluation (D-3) completed on September 9, 2005 which lists the Claimant's diagnosis as seizure disorder with mental retardation and certifies the need for an ICF/MR level of care. The evaluation states that the Claimant, who was 33 years old at the time, is ambulatory with mechanical help, is continent and feeds herself. In addition, this document indicates that the Claimant needs assistance with personal hygiene and requires close supervision.

Ms. Workman discussed a Psychological Evaluation Report completed by [REDACTED] of [REDACTED] on October 3, 2005 (D-4). This report, which recommends an ICF-MR level of care for the Claimant, indicates that the Claimant had three hospitalizations for psychiatric issues and was hospitalized in March 2002 for what was described as a stroke and seizure, resulting in paralysis on the left side. The report states that the Claimant had prior testing at [REDACTED] in the period of 1978 to 2005. She was deemed educable mentally retarded in 1978, was found to have borderline intellectual functioning in 1988 and 1990, and was listed as having mild mental retardation in August 2005. Ms. Workman testified that this information is inconsistent and stated that the results of a Slossen Intelligence Test administered in October 2005 measured the Claimant's I.Q. as 46 (moderate mental retardation). She said this result is "grossly inconsistent" with evaluations performed during the Claimant's developmental period. The Adaptive Behavior Scale on the October 2005 evaluation reflects deficits in present functioning levels following the Claimant's significant medical events, Ms. Workman testified.

A Social History (D-5) completed for the Claimant on September 26, 2005 indicates that the Claimant has a history of epilepsy and grand mal seizures. She has had difficulty with her gait following her 2002 medical problems and has experienced some psychotic behavioral changes. The report indicates that the Claimant has tested as having borderline intellectual functioning and that she completed the 9th grade, but had learning difficulties in school. She currently requires direct assistance and supervision in her activities of daily living and has decompensated due to extensive surgeries, the report states.

- 3) On November 2, 2005, the Claimant was sent an initial Notice of Denial (D-1) which states, in part:

Your Waiver Application is hereby denied. Additional information is required. Please submit documentation which supports the presence of mental retardation with associated substantial adaptive deficits within the development (sic). Reported psycho-metric history is inconclusive in this regard.

Ms. Workman testified that documents submitted in conjunction with the application did not verify the presence of mental retardation with substantial adaptive deficits during the Claimant's developmental period (up to age 22). She also testified that the Claimant had serious medical issues in 2002 which caused her to lose adaptive function.

- 4) In response to the Notice of Denial, the Department received the results of Peabody Picture Vocabulary Tests (C-4) administered in 1978 and 1979 while the Claimant was in kindergarten. Ms. Workman testified that this test is a screening instrument mostly administered by speech/language therapists. The 1978 test shows an I.Q. of 55, while the 1979 test lists an I.Q. of 59. The 1978 report includes a written comment by [REDACTED] (occupation unknown) which indicates that Ms. [REDACTED] "does not believe the test performance of the subject was fairly represented. I believe she has the ability to improve her vocal language structure." Ms. Workman stated that children with very low I.Q. scores may not qualify for speech therapy because they will not benefit from the services.
- 5) Ms. Workman testified that the additional information did not change the Department's decision to deny the application and a second Notice of Denial was issued to the Claimant on July 5, 2006 (D-11) as information remained inadequate to establish the presence of mental retardation with substantial adaptive deficits in the developmental period.
- 6) The Department received additional information, including a March 1984 report (D-6) completed by [REDACTED] school psychologist, when the Claimant was 12 years old. The report states that the Claimant's has a verbal I.Q. of 72, a performance I.Q. of 74 and a full-scale I.Q. of 71, which is in the borderline range of intellectual functioning. Mr. [REDACTED] recommended that the Claimant be placed in a program for educable mentally

retarded students. Ms. Workman testified that school systems will place children who score as high as a 75 I.Q. in programs for mentally retarded students. The criterion for the MR/DD Waiver Program differs in that eligible mentally retarded individuals have achieved scores of 55 or below. The evidence indicates that the Claimant completed a County Test of Basic Skills (CTBS), which Ms. Workman stated is administered to all school children unless they are so impaired that they are exempt from testing. The Claimant received a total battery score in the 24th percentile, which Ms. Workman said translates to a standard score of 89. She testified that eligible Waiver recipients normally have scores below the 1st percentile, so the Claimant's scores were outside of the range for program qualification. Ms. Workman testified that the Wechsler Intelligence Scale is a thorough measure of intellectual functioning and that the Claimant scored in the average range in arithmetic picture completion and arrangement. Additional test results included scores of 78 in reading and 79 in arithmetic, which would be ineligible scores for the Waiver Program.

Ms. Workman testified that the Claimant's achievement level is very inconsistent with an individual who has an I.Q. of 55. She stated that no data was provided from the Claimant's 10 years in school indicating that she required assistance with activities of daily living. In addition, she contended that the Claimant's Peabody Test I.Q. scores of 55 and 59 could not be accurate because the Claimant would have never been able to read at her achieved level if the scores were correct. Ms. Workman pointed out that the Claimant scored in the 24th percentile on the county achievement test and that the 25th percentile is average range. She stated that there is no way the Claimant could have been substantially retarded and achieved that score.

The Department also received a December 1990 psychological evaluation (D-8) completed by [REDACTED] when the Claimant was 18 years old. In this evaluation, the Claimant achieved scores of 76 in verbal I.Q., 77 in performance I.Q. and a 75 full-scale I.Q. on the Wechsler Adult Intelligence Scale. The psychologist recommended that the Claimant receive training in basic living skills, but no functional deficits were described and there was no indication that the Claimant would have required an ICF-MR level of care in the developmental period, Ms. Workman testified.

The Department also reviewed a December 1978 Stanford-Binet Intelligence Scale (D-10) which was administered to the Claimant when she was six years old. Ms. Workman stated that the Claimant scored a 69, which falls in the upper limit of the mild range of mental retardation. She testified that most psychologists would agree that I.Q. tests are not reliable and valid until a child reaches the age of seven.

The Claimant underwent a psychiatric evaluation at age 20 (D-9), which indicates that she spent five months in a rehabilitation program at [REDACTED] where she reportedly studied math and did well. The diagnosis on the evaluation is borderline intellectual functioning versus mild mental retardation. The report notes that the psychiatrist believes mild mental retardation is a more accurate diagnosis, but there was no testing of I.Q. or adaptive

functioning to substantiate this finding, Ms. Workman testified.

The additional information did not alter the Department's decision to deny the application.

- 7) Mr. [REDACTED] testified about the difficulty he has encountered in obtaining records for the Claimant since Ms. [REDACTED] is an older applicant. He indicated that the Claimant had resided at [REDACTED] a living facility for individuals with mental illness and/or mental retardation, and that obtaining records from that time period has been difficult since the facility has closed.

Mr. [REDACTED] pointed out that the 1984 report by school psychologist [REDACTED] indicates that the Claimant scored at the 3rd percentile of intellectual functioning, but Ms. Workman responded that the Waiver Program considers eligible scores as those that are less than 1 percentile.

Mr. [REDACTED] referred to a psychological evaluation completed for the Claimant at age 34 by [REDACTED] Hospital on July 11, 2006 (C-5). This evaluation lists a full-scale I.Q. of 54, which is in the lower range of mild mental retardation. He contended that this information would imply that the condition was present in childhood as it is common psychiatric practice to diagnose mental retardation only if it occurred in childhood. A report dated September 15, 2004 from [REDACTED] (C-5) also notes that the Claimant, then 32 years old, has intellectual functioning in the mild mentally retarded range. Mr. [REDACTED] pointed out that four psychologists, one medical doctor and two psychiatrists have indicated that the Claimant functions within the range of mental retardation. In addition, he testified that reports indicate that the Claimant's adaptive behavior skills are considered average and below the 75th percentile, and that she requires active treatment (ICF/MR level of care). Ms. Workman testified that she has not personally completed a psychological evaluation for the Claimant, but that she disagrees with those findings.

Ms. [REDACTED] testified that her sister was enrolled in special education classes in school and that she also had difficulty obtaining school records. Ms. [REDACTED] testified that she also has two brothers who are mentally retarded and has no doubt that [REDACTED] was mentally retarded as a child. She stated, however, that her sister was more integrated into the school environment possibly because the school system wanted to be inclusive of mentally retarded children.

Ms. [REDACTED] testified that the Claimant experienced potty accidents beyond the age of five and also could not grasp the concept of why she was in trouble. She testified that [REDACTED] would often shoplift items from the [REDACTED] store and would keep doing so even after she was told to stop. Eventually, her parents were asked to keep [REDACTED] out of the store.

Prior to her placement in facilities, the Claimant was placed in an alternative learning center instead of the elementary school, Ms. [REDACTED] stated. The Claimant attended [REDACTED] and the Claimant testified that this was a work program for which she would receive pay. Ms. [REDACTED] testified that her sister needs assistance in managing her finances, and that she is vulnerable when she is not well supervised. She testified that she

made many trips to [REDACTED] to visit _____ and that there were problems with _____ keeping her apartment clean, bathing, taking medication and shopping. Ms. _____ testified that _____ did not have a stroke in 2002, but had an operation for a seizure disorder. She pointed out that the psychological update of May 24, 2006 indicates that the Claimant has experience no cognitive decline that would affect her functional ability so she functions the same as she did prior to the surgery.

Ms. _____ testified that the Claimant resided at [REDACTED] for a period of about six months in 2002. Upon visiting, Ms. _____ testified that her sister had lost 100 pounds during this time period, was malnourished and enemic, and had to be hospitalized for a week. She testified that she found mold in the dishes, discovered blood on the floor and table, and stated that _____ had a severe infection. The Claimant added that her “wrists and vagina were raw” during this time period and that she was in poor condition. Ms. _____ testified that this episode depicts her sister’s vulnerability and inability to care for herself without staff and supervision. She stated that _____ would not regularly attend to her personal hygiene without direction, is unable to administer her own medications and requires assistance with the activities of daily life.

Ms. [REDACTED] testified that the Claimant must be redirected on a frequent basis.

- 8) Eligibility requirements for the MR/DD Waiver Program are outlined in Chapter 500 of the Title XIX MR/DD Home and Community-Based Waiver Program Revised Operations Manual (D-2).

The level of care criteria for medical eligibility is outlined in this chapter and reads as follows:

Diagnosis

- Must have a diagnosis of mental retardation, which must be severe and chronic, in conjunction with substantial deficits (substantial limitations associated with the presence of mental retardation), and/or
- Must have a related developmental condition, which constitutes a severe and chronic disability with concurrent substantial deficits.
 - Examples of related conditions which may, if severe and chronic in nature, make an individual eligible for the MR/DD Waiver Program include, but are not limited to, the following:
 - Any 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

- Autism
 - Traumatic brain injury
 - Cerebral Palsy
 - Spina Bifida
 - Tuberous Sclerosis
- Additionally, mental retardation and/or related conditions with associated concurrent adaptive deficits:
- Were manifested prior to the age of 22, and
 - Are likely to continue indefinitely.

Functionality

- Substantially limited functioning in three or more of the following major life areas: (Substantial limits is defined on standardized measures of adaptive behavior scores three (3) standard deviations below the mean or less than 1 percentile when derived from non MR normative populations or in the average range or equal to or below the seventy fifth (75) percentile when derived from MR normative populations. The presence of substantial deficits must be supported by the documentation submitted for review, i.e., the IEP, Occupational Therapy evaluation, narrative descriptions, etc.)
- Self-care
 - Receptive or expressive language (communication)
 - Learning (functional academics)
 - Mobility
 - Self-direction
 - Capacity for independent living (home living, social skills, employment, health and safety, community use, leisure).

Active Treatment

- Requires and would benefit from continuous active treatment.

Medical Eligibility Criteria: Level of Care

- To qualify for ICF/MR level of care, evaluations of the applicant must demonstrate:

- A need for intensive instruction, services, assistance, and supervision in order to learn new skills and increase independence in activities of daily living.
- A need for the same level of care and services that is provided in an ICF/MR institutional setting.

VIII. CONCLUSIONS OF LAW:

- 1) Regulations governing the MR/DD Waiver Program require eligible individuals to have a diagnosis of mental retardation, which must be severe and chronic, in conjunction with substantial deficits (substantial limitations associated with the presence of mental retardation), and/or a related developmental condition which constitutes a severe and chronic disability with concurrent substantial deficits. Testimony offered by the Department indicates that the MR/DD Waiver Program considers individuals to have severe/chronic mental retardation if they attain I.Q. scores of 55 and below.
- 2) Peabody Picture Vocabulary Tests, which Ms. Workman testified are screening instruments normally administered by speech/language therapists, were administered to the Claimant in 1978 and 1979 when the Claimant was in kindergarten. The 1978 test shows an I.Q. of 55, while the 1979 test lists an I.Q. of 59. Written comments on the 1978 test indicate, however, that the Claimant's test performance may not have been fairly represented. At 12 years old, the Claimant's I.Q. was measured at 71, which is in the borderline range of intellectual functioning. At 18 years old, the Claimant achieved a full-scale I.Q. score of 75. Ms. Workman testified that the lower I.Q. scores are inconsistent with the Claimant's educational achievement level and CTBS scores.

Information concerning the Claimant's I.Q. scores during the developmental period is inconsistent and inconclusive, and no documentation was provided to confirm the existence of substantial adaptive deficits during that time period. Ms. _____ testified about some of the Claimant's deficiencies during the developmental period, but that information was mainly anecdotal in nature.

- 3) While it is clear that the Claimant's condition poses many challenges, the Department acted correctly in denying her MR/DD Waiver application in the absence of more conclusive evidence.

IX. DECISION:

It is the decision of the State Hearing Officer to **uphold** the Department's action to deny 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 21st Day of July, 2006

**Pamela Hinzman
State Hearing Officer**