



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 III
Governor

Martha Yeager Walker
Secretary

September 6, 2007

_____ for

Dear _____:

Attached is a copy of the findings of fact and conclusions of law on your hearing held August 31, 2007. Your Hearing request was based on the Department of Health and Human Resources' action to deny your application for 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. 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).

The information submitted at your hearing confirms that you do not meet the criteria necessary to establish medical eligibility for participation in the MR/DD Waiver Program.

It is the decision of the State Hearing Officer to **uphold** the Department's action in denying your application for benefits and services through the Medicaid, Title XIX MR/DD Waiver Program.

Sincerely,

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

Pc: Chairman, Board of Review
John Sassie, BMS, Program Manager, MR/DD Waiver Program

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

_____,

Claimant,

vs.

Action Number: 07-BOR-1529

**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 September 6, 2007 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 August 31, 2007 on a timely appeal filed May 17, 2007.

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's Mother/Representative
John Sassie, BMS, Program Manager, MR/DD Waiver Program
Richard Workman, Psychologist Consultant, BMS

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 its action to deny the Claimant's application for 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, Volume 13.

VI. LISTING OF DOCUMENTARY EVIDENCE ADMITTED

Departments Exhibits:

- D-1 Title XIX MR/DD Home and Community-Based Waiver Program Revised Operations Manual, Chapter 500, Volume 13.
- D-2 Notice of Denial dated 5/4/07
- D-3 DD-2a, Annual Medical Evaluation, dated 3/27/07
- D-4 Psychological Evaluation dated 2/16/07
- D-5 Preschool Developmental Team Assessment dated 5/13/06

VII. FINDINGS OF FACT:

- 1) On or about May 4, 2007, the Claimant was notified via a Notice of Denial (Exhibit D-2) that his application for benefits and services through the MR/DD Waiver Program was denied. This notice states, in pertinent part:

Medicaid MR/DD Waiver Program
Your Waiver Application is hereby denied.

Your application was denied because:

- 1) The application packet lacked a measure of Autism and the non-mental retardation ABS-S:2 results do not meet the eligibility criteria regarding substantial delays. Documentation indicates a Gilliam Autism Rating Scale and a Vineland Adaptive Behavior Scale were approved by _____. Please provide a copy of the

results from the GARS and the Vineland along with a copy of the report from the Klingberg Center for further consideration.

- 2) The evidence reveals that the Claimant has a program qualifying diagnosis of Autism, however, the Department contends that the severity of the Claimant's condition does not demonstrate the need for an ICF/MR level of care. The Department acknowledged that while some of the documentation appeared conflicting, the Claimant appears to be demonstrating a substantial adaptive deficit in *Self-Care*. However, the Department contends that the clinical evidence fails to support the finding of a substantial adaptive deficit in three (3) of the six (6) major life areas.
- 3) In addition to a substantial adaptive deficit in *Self-Care*, the Claimant's representative contends that medical eligibility should have been established because her son demonstrates qualifying adaptive deficits in two other major life areas - *Mobility* and *Learning*. She stated that she has applied for MR/DD Waiver benefits because she needs respite care.
- 4) The Claimant's representative stated that mobility is an issue due to safety concerns as the Claimant often does not look where he is going. She indicated that the Claimant has no fear of hurting himself and will walk off elevated equipment at the park if he is not watched closely. According to the evidence found in Exhibit D-3 the Claimant can ambulate independently and Exhibit D-4 states "Rate of motor movement is average. Rate of speech is slow. Fine motor ability is adequate. Gross motor ability is adequate."

In order to qualify for a deficit in mobility, an individual would need to demonstrate that they are unable to ambulate. The evidence clearly demonstrates that the Claimant ambulates independently and is not demonstrating a substantial adaptive deficit in *Mobility*.

- 5) The Claimant's representative stated that she is worried about the Claimant's leaning abilities, however, no additional documentation or clinical evidence was submitted to support her concern. The psychological evaluation (Exhibit D-4) was completed on the Claimant when he was 3 years and 5 months old. Section III.A.1 (Current Evaluation, Intellectual / Cognitive) of Exhibit D-4 states "Due to his low level of responsiveness to the examiner and his general environment during this evaluation, no attempts at testing were completed." The Department cited this area of the psychological evaluation to demonstrate that there is no information available to assess the Claimant for a substantial adaptive deficit in *Learning*. In the absence of documentary evidence a substantial adaptive deficit in Learning cannot be awarded.
- 6) Eligibility Criteria 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 (Effective 7/1/05). 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/or 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, 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 {Emphasis added} 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 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) The regulations that govern the MR/DD Waiver Program require eligible individuals to have a diagnosis of Mental Retardation and/or a related condition, which must be severe and chronic, in conjunction with substantial deficits. Substantially limited functioning in three or more of the major life areas is required (Emphasis added). Substantial limits is defined on standardized measures of adaptive behavior scores as three (3) standard deviations below the mean or less than 1 percentile when derived from non-MR normative populations. The presence of substantial deficits must be supported by the documentation submitted for review, i.e., psychological evaluation, the IEP, Occupational Therapy evaluation, narrative descriptions, etc.). The documentation must demonstrate that the individual needs the same level of care and services that is provided in an ICF/MR institutional setting.
- 2) The Claimant presents a program qualifying diagnosis of Autistic Disorder, however, the standardized measures of adaptive behavior, and the supporting clinical documentation, identify only one (1) substantial adaptive deficit in the major life areas (Self-Care) as acknowledged by the Department. The Claimant's Learning ability has not been assessed and mobility is not deficient.
- 3) Whereas the evidence fails to demonstrate that the Claimant requires an ICF/MR level of care, medical eligibility for participation in the MR/DD 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 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 6th Day of September, 2007

**Thomas E. Arnett
State Hearing Officer**