



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

May 14, 2007

Case Name: _____

Dear Ms. _____:

Attached is a copy of the findings of fact and conclusions of law with respect to the referenced hearing held April 11, 2007. Your hearing request was based on the Department of Health and Human Resources' proposal to deny your request 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 the referenced hearing confirms that _____ does not qualify to meet the criteria necessary to establish eligibility for participation in the MR/DD Waiver Program.

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

Sincerely,

Raymond Keener, III
State Hearing Officer
Member, State Board of Review

cc: Chairman, Board of Review
Stephen Brady, Operations Coordinator, MR/DD Waiver Program

Alva Page, Esq.

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

Claimant,

vs.

Action Number: 06-BOR-2320

**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 April 11, 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 April 11, 2007 on a timely appeal filed June 26, 2006.

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 "Department").

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

_____, Counsel for Claimant

_____, Claimant's mother/representative

_____, Claimant's father/representative

_____, D.O., Claimant's treating physician

Stephen Brady, Operations Coordinator, MR/DD Waiver Program

Richard Workman, Psychologist Consultant, Bureau for Medical Services

Alva Page, Counsel for Bureau for Medical Services

Presiding at the hearing was Raymond Keener, III, 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 request 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 500-8

VI. LISTING OF DOCUMENTARY EVIDENCE ADMITTED

Joint-1 Title XIX MR/DD Home and Community-Based Waiver Program Revised Operations Manual, Chapter 500-8 (Effective July 1, 2005)

BMS-1 Notice of Denial dated 5/03/06 (mailed 5/10/06)

BMS-2 DD-2a, Annual Medical Evaluation

BMS-3 DD-3, Comprehensive Psychological Evaluation completed on 3/16/06

BMS-4 DD-4, Social History dated 4/11/06

Claimant – 1 Curriculum Vitae for Dr. _____ D.O.

VII. FINDINGS OF FACT:

- 1) Prior to taking evidence, the Examiner heard arguments with respect to a procedural issue whereby the Bureau for Medical Services (“BMS”) moved for a continuance based upon counsel’s assertion that he had not received notice of this particular hearing. In response, Mr. [REDACTED] counsel for the Claimant, argued that he had in fact filed a notice of appearance with the hearing examiner dated March 23, 2007 and in regard to which he had received a written response from the hearing examiner dated March 26, 2007 which had been copied to Mr. Stephen Brady of BMS, thereby providing notice to BMS of the instant hearing. In addition, Mr. [REDACTED] stated that he actually spoke with Mr. Brady directly regarding his appearance in this matter with respect to his intent to represent the Claimant. It appears to this Examiner that GOOD CAUSE exists to GRANT in part and to DENY in part the motion to continue the hearing made by counsel for BMS. Accordingly, it is found that based upon the arguments of the parties, that GOOD CAUSE exists to allow the Claimant to proceed first with his case-in-chief and then to allow the BMS to proceed with its case-in-chief.
- 2) In accordance with section 504 of the Medicaid MR/DD Waiver Manual and the Code of Federal Regulations, the Claimant underwent a medical evaluation to determine eligibility for participation in the MR/DD Waiver Program.
- 3) On or about May 10, 2006, the Claimant was notified via a Notice of Denial (Exhibit BMS-1) that his request for Waiver services was denied. This notice provides further, in pertinent part:

Documentation submitted for review does not support the presence of a diagnosis which is related to mental retardation which results in cognitive delays and substantial adaptive deficits which are similar to individuals diagnosed with mental retardation who requires an institutional level of care. While documentation supports the need for extensive personal assistance, the need for active treatment such as that provided in an institutional setting is not supported.

- 4) The Claimant presented as his first witness, Dr. [REDACTED] Dr. [REDACTED] testified that he is board certified in pediatrics and that he currently serves as an Associate Professor for the [REDACTED] School of Medicine, [REDACTED] Division. Dr. [REDACTED] further testified that he also serves in basically the same teaching capacity for the West Virginia School of Osteopathic Medicine.
- 5) Dr. [REDACTED] testified that he is Claimant’s pediatrician and that he initially began treating Claimant in 1998.
- 6) Dr. [REDACTED]’s prognosis of Claimant is that Claimant is likely to have contractures in the knees and feet in the future. Dr. [REDACTED] further testified that surgery related to this condition would serve to only reduce the pain associated with the condition.

- 7) Dr. [REDACTED] further testified that Claimant cannot walk and that Claimant presently has problems swallowing which are not classified as major. Dr. [REDACTED] testified that Claimant's disability is physical as opposed to mental.
- 8) Dr. [REDACTED] testified that Claimant's condition is a severe chronic disability. Dr. [REDACTED] further testified that Claimant's condition is comparable to a spinal cord injury, Spina Bifida and Cerebral Palsy but unrelated to a traumatic brain injury or to Tuberous Sclerosis. Dr. [REDACTED] further testified that Claimant's condition was manifested prior to Claimant having reached the age of twenty-two (22) years of age.
- 9) In Dr. [REDACTED] professional opinion, if twenty-four (24) hour care were made available to Claimant, then Claimant would be able to function independently of an institutional setting. On cross-examination, Dr. [REDACTED] stated that he had not been in an ICF facility for at least ten (10) years.
- 10) On re-direct, Dr. [REDACTED] testified that in reference to his previously completed Annual Medical Evaluation, that if he were to re-evaluate the form today, that he would now under the category entitled "ADDITIONAL RECOMMENDATIONS" recommend additional treatment such as physical therapy, occupational therapy, and possibly speech therapy. Dr. [REDACTED] further testified that these recommendations would be considered part of his normal treatment recommendations he would make for any patient and that his testimony herein was based upon his reasoned medical opinion.
- 11) Claimant, _____, testified on his own behalf and stated that he is twenty (20) years old, currently a sophomore at [REDACTED] University, majoring in Journalism/Psychology. Claimant also testified that he graduated from [REDACTED] High School in [REDACTED] West Virginia in 2005 and that while in high school, Claimant took advanced placement courses.
- 12) Claimant further testified and described his normal day and stated that such a day begins at approximately 10:30 a.m. to 11:00 a.m. at which time his aides arrive and awake him. Prior to that time, his aides have been intermittently turning him over throughout the night because he is unable to do so himself. Upon his aides awakening him, such aides will then proceed to turn him back onto his back utilizing a drawsheet and the aides will then proceed to take off Claimant's "by-pap". A "by-pap" is a medical device recommended by Dr. [REDACTED] which is designed to aide Claimant's breathing and assist with his sleeping patterns. Claimant further testified that his aides would then assist him with a full body sponge bath followed by assisting him into his wheelchair to enable him to ready himself for school by placing any needed school supplies into his wheelchair.

Claimant proceeded to describe his day by stating that he then goes to class if the weather permits. If the weather is bad, his teachers usually are understanding

with respect to allowing him to miss classes due to such bad weather. Claimant further testified that at school, arrangements have been made at the restroom facilities to permit him to urinate but that his having a bowel movement is not possible so he has no recourse but to wait until the end of the day. During the day, as far as snacks/lunch is concerned, Claimant testified that he is able to either order food or go to friend's houses to eat. Claimant testified that he will then proceed to work on his computer or watch television and relax toward the end of the day. Claimant further testified that his aides will then come in around midnight and proceed to help undress him and help him with performing range of motion exercises prior to putting him to bed at which time they will assist him with a bowel movement. Claimant further testified that his aides will then assist in cleaning him after his bowel movement prior to placing his "bi-pap" back on. Claimant stated that essentially describes his normal day.

- 13) Claimant further testified that he can not get out of his chair by himself. Claimant testified that he can not shower or bathe by himself without assistance. Claimant testified that he can urinate by himself only with the assistance of extreme alterations but can not, on his own, perform a bowel movement. Claimant further testified that he has very limited cooking skills, is able to purchase food on a very limited basis on-line, can not drive an automobile, and is unable to get out of bed on his own and is unable to turn over while in bed.
- 14) Claimant further testified that at the conclusion of his studies at [REDACTED] University, he believes he would have the capacity to obtain gainful employment. Claimant further testified that absent twenty-four (24) hours care, that he does not believe that would be able to successfully complete his studies and obtain gainful employment. Claimant testified that it is his goal to become a taxpaying citizen of West Virginia. Claimant further testified that that he generally does not believe that it is safe for him to be alone and he was able to list a few specific reasons that he has trouble swallowing and that he may have trouble exiting a building in the case of a fire hazard.
- 15) Mr. Richard L. Workman, psychologist, testified on behalf of the Department and provided a brief description of his background by stating that he is a licensed psychologist with a Masters Degree from [REDACTED] University. Mr. Workman further testified that he completed the five year required supervision program in 1981 and then performed various on-site visitations at the Colin Anderson Center and the Greenbrier Center. Mr. Workman further testified that he has been involved with the MR/DD waiver program since its inception.
- 16) Mr. Workman testified that he reviewed the packet of materials submitted on behalf of the Claimant and that he assisted in the eligibility determination. Mr. Workman testified that based upon his review of all information, that the documentation submitted for review does not support the presence of a diagnosis which is related to mental retardation which results in cognitive delays and substantial adaptive deficits which are similar to individuals diagnosed

with mental retardation who requires an institutional level of care. While documentation supports the need for extensive personal assistance, the need for active treatment such as that provided in an institutional setting is not supported.

- 17) Mr. Workman further testified that it is clear that Claimant does require extreme personal assistance and does have substantial deficits/delays in three of the six major life areas. Mr. Workman stated that that particular issue is not a major concern to him today but of greater importance is whether Claimant would require an institutional setting for individuals with mental retardation or cognitive delays.
- 18) Mr. Workman testified with respect to his evaluation of the "ANNUAL MEDICAL EVALUATION" prepared by Dr. [REDACTED] previously identified and marked as BMS -2, and stated that under the mental status section of the evaluation, that there was no listing of any cognitive delays on the part of Claimant. Mr. Workman further testified that he did observe that Dr. [REDACTED] listed Claimant's condition of progressive spinal muscular atrophy within the physical section of the evaluation. Mr. Workman further testified that there were no recommendations for treatment in the form of therapy listed and that Dr. [REDACTED] listed his recommendation of an ICF level of care which is required for eligibility.
- 19) Mr. Workman testified with respect to his review of the "COMPREHENSIVE PSYCHOLOGICAL EVALUATION" prepared by Ms. [REDACTED] Supervised Psychologist, and Ms. [REDACTED] MA, Licensed Psychologist, dated March 16, 2006, and marked as BMS -3. Mr. Workman testified that, based upon his review of this document, that he agreed that the Claimant had significant delays in the major life areas of capacity for independent living, self care, and mobility. Mr. Workman further testified regarding the extremely high intelligent quotient scores attained by Claimant as well as the high Adaptive Behavioral scores attained by Claimant and further noted the absence of any psychiatric diagnosis within the report.
- 20) Mr. Workman testified with respect to the "SOCIAL HISTORY" prepared by Mr. [REDACTED] [REDACTED] dated April 11, 2006. Specifically, Mr. Workman stated that within this document, there was no recommendation set forth for any ICF/MR level of care for Claimant. Mr. Workman also noted that the Social History contained a recommendation that Claimant would benefit from the Title XIX waiver program services which he did not disagree with but that the primary issue was whether Claimant would benefit from the services provided by the active treatment provided within an institutional setting.
- 21) Mr. Workman testified with respect to the "INDIVIDUAL EDUCATION PLAN" ("IEP") submitted as part of the packet of documents on behalf of Claimant. Mr. Workman testified that within the IEP, he referenced the fact that Claimant's educational program will lead to a standard diploma, Claimant has a career goal to attend [REDACTED] University, Claimant has high test scores, and that these factors taken together with all the other data in the IEP

leads him to conclude that Claimant does not appear to be the typical candidate for placement within an ICF/MR setting given the need for active treatment and training.

- 22) Mr. Workman further testified with respect to the issue of “active treatment” and stated that within institutional settings, individuals with cognitive delays require assistance in learning how to operate washers/dryers, vending machines, navigating their environments, and other tasks such as cooking and cleaning. Mr. Workman testified that Claimant easily understands these concepts but this it is difficult for him to administer these tasks due to his physical limitations.
- 23) On cross-examination, Mr. Workman testified that he did not write a thesis for his Masters in Psychology at Marshall University, that he did not recall having obtained any honors degrees/awards, and that he did not recall having taken any disability courses during his undergraduate studies. Mr. Workman testified that he his undergraduate work was performed at West Virginia State College at which time he took courses where he evaluated adults and children to prepare him for the work he does today. Mr. Workman testified that he did not evaluate or interview Claimant prior to the hearing and that the only information he relied upon in reaching his eligibility determination were the exhibits introduced during the hearing. As further background, Mr. Workman cited his work with the Walter Reed Hospital, the Spencer State Hospital, and all the various state group homes. Mr. Workman further testified that he has taught, he has no scholarly articles to speak of, and that he has ho medical training.
- 24) Mr. Workman proceeded to testify on cross-examination that his knowledge of muscular spinal atrophy is limited to information he has been able to acquire from the internet. Mr. Workman further testified that he has knowledge of one other case involving spinal muscular atrophy. Mr. Workman further stated that approximately forty percent (40%) of his workload involves work performed for the Bureau of Medical Services and the rest of his work is with his private practice.
- 25) Mr. Workman further testified that he disagreed with Dr. [REDACTED] opinion that Claimant should require an ICF/MR level of care based upon Mr. Workman’s prior experience with institutional homes in West Virginia and also based upon the fact that Claimant’s needs are currently being met by personal assistance. Mr. Workman further testified that in performing his work for the Bureau for Medical Services, that he estimates that he approves approximately seventy percent (70%) of the eligibility applications. Mr. Workman further testified that he disagreed with the findings of the two (2) psychologists who prepared the “COMPREHENSIVE PSYCHOLOGICAL EVALUATION” marked as BMS #3 in which was set forth as a joint recommendation that Claimant requires an ICF/MR level of 24-hour support, training, and supervision.
- 26) Mr. Workman further testified on cross-examination with respect to the document entitled “SOCIAL HISTORY” and previously marked as BMS #4 and acknowledged that Claimant would in fact benefit from a Title XIX placement. Mr. Workman testified that the reason

why Claimant is not eligible for MR/DD Waiver Program services is that there are no cognitive delays.

- 27) Mr. Workman testified that the exact language contained on Joint -1 that can be relied upon as authority to support a position that Claimant is not eligible for ICF/MR level of care can be referenced in the middle of page two of said document wherein language provides that a qualifying applicant must demonstrate: (1) A need for intensive instruction, services, assistance, and supervision, in order to learn new skills and increase independence in activities of daily living; and (2) A need for the same level of care and services that is provided in an ICF/MR institutional setting. Mr. Workman testified that because all these conditions were not met with respect to Claimant, he was not eligible for services.
- 28) 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 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, with concurrent substantial deficits in three or more of the major life areas. Substantial limits are defined on standardized measures of adaptive behavior scores as three (3) standard deviations below the mean or equal to or below the seventy fifth (75) percentile when derived from MR normative populations.

- 2) There is no question or dispute that Claimant presents substantial delays/deficits in three (3) of the six (6) major life areas with those being specifically identified as being capacity for independent living, self care and mobility. However, Claimant has failed to adequately demonstrate his need for the same level of care and services that is being provided in an ICF/MR institutional setting.

Specifically, the evidence is reliable and credible that Claimant lacks any cognitive delays nor would Claimant benefit from any active treatment provided in an institutional setting. The testimony presented by Mr. Workman is deemed reliable and credible to support a finding that although Claimant is in need of personal assistance, he presents no cognitive delays nor would Claimant receive any benefit from active treatment of the type provided in an institutional setting.

The information and testimony of Dr. [REDACTED] was given due consideration in this proceeding. However, the testimony of Dr. [REDACTED] failed to adequately address the issue of whether the Claimant would benefit from intensive instruction, services, assistance and supervision in order to learn new skills and increase independence in activities of daily living.

The evidence presented by the Department generally supports a finding that Claimant does not presently qualify for ICF/MR level of care. As Mr. Workman stated during his testimony, in view of Claimant's extremely high intelligent quotient scoring and the fact that he possesses no cognitive delays, he is not likely to gain any real benefit from the services and continuous active treatment provided from an ICF/MR institutional setting.

- 3) Based on the evidence, eligibility for the MR/DD Waiver Program cannot currently be established.

IX. DECISION:

It is the decision of the State Hearing Officer to **uphold** the Department's proposal to deny Claimant's request 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-46A.

ENTERED this the 14th day of May, 2007

Raymond Keener, III
State Hearing Officer