



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

June 9, 2008

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
Dear Ms. \_\_\_\_\_:

Attached is a copy of the findings of fact and conclusions of law on your hearing held May 22, 2008. 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 & 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 in three (3) or more major life areas 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 indicates that you have an eligible diagnosis of traumatic brain injury, but fails to support the presence of three (3) or more substantial adaptive deficits in the major life areas.

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, Operations Coordinator, MR/DD Waiver Program

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

\_\_\_\_\_,

**Claimant,**

**vs.**

**Action Number: 07-BOR-2291**

**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 June 9, 2008 for [REDACTED]. 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 May 22, 2008 on a timely appeal filed October 17, 2007. The hearing was originally scheduled for January 24, 2008, but was rescheduled at the request of the Claimant.

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

\_\_\_\_\_, Grandfather of Claimant

Stephen Brady, Operations Coordinator, MR/DD Waiver Program (participated telephonically)

Linda Workman, Psychologist Consultant, Bureau for Medical Services (participated 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 action 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 Title XIX MR/DD Home and Community-Based Waiver Program Revised Operations Manual, Chapter 500
- D-2 ICF/MR Level of Care Evaluation
- D-3 Comprehensive Psychological Evaluation (Triennial) dated May 31, 2007
- D-4 Notice of Denial/Termination dated September 14, 2007
- D-5 Neuropsychological examination report from Dr. [REDACTED]

#### **Claimant's Exhibits:**

- C-1 Psychological Evaluation dated January 10, 2008

### **VII. FINDINGS OF FACT:**

- 1) The Claimant applied for MR/DD Waiver services and the Department reviewed her medical/psychological documentation to determine whether she meets medical eligibility

requirements for the program.

- 2) The Department determined that the Claimant is ineligible for Waiver services and sent a Notice of Denial/Termination dated September 14, 2007 (D-4), which states:

Your Waiver Application is hereby denied. Your application was Denied because: While an eligible diagnosis has been provided, the documentation submitted for review does not support the presence of substantial delays in three of the six major life areas.

Documentation submitted does not support the presence of substantial adaptive deficits in three or more of the six major life areas identified for Waiver eligibility.

*The notice indicates that the Claimant failed to demonstrate substantial limitations in the check-marked areas of self-care, self-direction, receptive/ expressive language and mobility. While the areas of learning and capacity for independent living were not check-marked, the BMS Psychologist Consultant testified that the Claimant fails to exhibit substantial deficits in these areas as well. Therefore, the Department contends that the Claimant displays substantial limitations in none of the major life areas.*

- 3) The BMS Psychologist Consultant testified that the Claimant, now 21 years old, has a potentially eligible diagnosis of traumatic brain injury. The injury was sustained in an automobile accident that occurred when the Claimant was 17 years of age. The consultant stated, however, that the Department found zero substantial adaptive deficits for the Claimant based on the information provided.

The Psychologist Consultant reviewed the Claimant's Level of Care Evaluation (D-2) dated July 2, 2007. The physician noted no physical problems, however he indicated that the Claimant has a short attention span and is impulsive/irrational. The Claimant has a decreased stride and a heel strike, increased tone in her right extremities and increased reflexes on her right side. The report indicates that the Claimant is continent, feeds herself and is independent in self-care, but requires close supervision and has self-injurious behavior. The physician recommended occupational and physical therapy and certified the need for an ICF-MR level of care.

Exhibit D-3, a Comprehensive Psychological Evaluation completed by [REDACTED] states that the Claimant exhibits "diffuse cognitive deficits and mood liability consistent with her history of moderate to severe closed head injury." As a result of the head injury and associated personality change, the Claimant exhibits labile affect, poor planning ability,

disorganization, lack of insight and poor judgment.

Regarding psychomotor skills, the evaluation states that the Claimant has adequate use of her limbs and that her gross/fine motor skills are relatively intact. The report states that the Claimant's independent functioning is at the 16 year level based on Adaptive Behavior Scale (ABS) scores. The Claimant is able to feed herself and generally exhibits appropriate table manners. She is continent of bowel and bladder and toilets without assistance. In addition, the Claimant cares for her all of her personal hygiene needs without assistance or prompting. She dresses herself and chooses appropriate clothing for the occasion. The report states that the Claimant communicates verbally and is able to express her wants/needs. The Claimant can write letters and read books suitable for children over age 9. The Adaptive Behavior Scale places her language development at a 12 year level. The Claimant is able to state her name and address, can tell time and associate different activities with the time of day. The report indicates, however, that the Claimant becomes easily agitated and exhibits poor judgment.

The Claimant scored a 54 on the Slosson Intelligence Test, which falls in the moderate range of mental retardation, according to the Department's Psychologist Consultant.

On the Adaptive Behavior Scale, the Claimant received scores ranging from 13 to 16 (superior to above average range when compared to persons with mental retardation) in all areas of functioning except economic activity (score of 12 - average range). The Psychologist Consultant testified that scores of 12 or below are considered as eligible ratings for the MR/DD Waiver Program. The Claimant received superior scores in the areas of independent functioning, physical development, language development, numbers and time, and domestic activity. She received above average scores in pre-vocational activity, self-direction, responsibility and socialization.

The report states that the Claimant is not mentally retarded, but exhibits cognitive deficits consistent with her traumatic brain injury. She received a score of 144 (very superior range) in personal self-sufficiency, 121 (superior range) in community self-sufficiency and 112 (above average) in personal-social responsibility.

The Department's Psychologist Consultant testified that scores of 55 and below are considered program-eligible scores on the Wide Range Achievement Test. The Claimant's only eligible score on this instrument was 55 in math computation.

The evaluator wrote that the Claimant's abilities "wax and wane, unpredictably." He indicated that the Claimant needs intensive training and 24-hour supervision to ensure her safety. In addition, he stated that he believes the Claimant's skills in her home setting are acquired and maintained through structure/routine, and are not independent choices/skills. He recommended an ICF-MR level of care. The Department's Psychologist Consultant testified that the Claimant's abilities in her home setting indicate that she is capable of learning skills outside of the MR/DD Waiver Program.

The Psychologist Consultant testified that Exhibit D-5, a Neuropsychological Evaluation performed by Dr. [REDACTED] states that the Claimant enjoys being on the internet, talking with friends and reading information. She independently manages her medication, however her grandparents handle her finances. She is typically helpful around the house, but has no assigned chores. Dr. [REDACTED] indicated that the Claimant would be unable to live independently without a marked degree of assistance.

As a result of documentation provided to the Department, the Psychologist Consultant testified that the Claimant is not substantially deficient in the areas of self-care, learning, mobility, language, self-direction or capacity for independent living. She testified that the Claimant's test scores, as well as her stated abilities, indicate that the Claimant does not require the degree of treatment provided in an ICF-MR facility.

- 4) The Claimant testified that she was comatose for three weeks following her automobile accident and spent six months in a rehabilitation center. She testified that she continues to have problems with her leg. The Claimant testified that she wants to live with her boyfriend and has future plans to marry. The Claimant's grandfather/guardian testified that the Claimant wishes to live independently, however, he is uncertain about how to accomplish this goal. Neither the Claimant nor her grandfather addressed points of contention regarding the Department's findings. The Claimant did, however, submit Exhibit C-1, a Psychological Evaluation dated January 10, 2008, for the Department's review. The hearing record remained open to permit review of the document. The Psychologist Consultant reviewed the evaluation and reported on June 4, 2008 that the information did not alter the Department's decision to deny services.
- 5) 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-1).

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 and/or a related developmental condition, which must be severe and chronic, in conjunction with substantial deficits (substantial limitations associated with the presence of mental retardation). The Claimant must exhibit substantial adaptive deficits in three (3) or more major life areas.
- 2) The Department established that the Claimant has an eligible diagnosis of traumatic brain injury that manifested prior to the age of 22 and is likely to continue indefinitely.
- 3) Based on information provided during the hearing, the Hearing Officer finds that the Claimant exhibits substantial adaptive deficits in none of the major life areas specified in policy.

While it is clear that the Claimant's abilities have been impaired by her traumatic brain injury, she clearly possesses *self-care* skills as evidenced by her ABS scores and the ability to feed herself, attend to her personal hygiene needs, toilet independently, and dress appropriately.

The Claimant possesses *self-direction* skills as evidenced by her test scores and documentation that indicates she independently chooses activities such as exploring the internet, talking with friends and reading. The Claimant also expressed her desire to live with her boyfriend and marry at a future date.

Documentation indicates that the Claimant has adequate use of her limbs and her gross/fine motor skills are relatively intact. Therefore, she is not substantially limited in *mobility*.

Test scores- with the exception of the WRAT mathematics score- and documentation indicate that the Claimant has functional academics and is not substantially limited in *learning*.

The Claimant received superior-range ABS scores in language development, and



documentation indicates that the Claimant is able to communicate verbally and express her wants and needs. Therefore, no substantial deficit can be established in the area of *receptive/expressive language*.

While the Claimant would face some challenges living independently and managing her finances, she received above average to very superior ABS scores in personal and community self-sufficiency and personal-social responsibility. Her domestic activity score was in the superior range and she attained above average scores in pre-vocational activity, self-direction, responsibility and socialization. These scores indicate that the Claimant is not substantially deficient in *capacity for independent living*.

- 4) As evidence does not corroborate the presence of substantial deficits in three (3) of the six (6) major life areas, the Department correctly determined that the Claimant does not require an ICF-MR level of care and, therefore, is medically ineligible for the MR/DD Waiver Program.

#### **IX. DECISION:**

It is the decision of the State Hearing Officer to **uphold** the Department's decision 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 9th Day of June, 2008.**

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**Pamela Hinzman**  
**State Hearing Officer**