



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 8, 2008

_____ for

Dear Mr. _____:

Attached is a copy of the findings of fact and conclusions of law on your hearing held May 2, 2008. Your hearing request was based on the Department of Health and Human Resources' action to deny your application for benefits and services through the Medicaid 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 500).

The information submitted at your hearing reveals that you do not meet the criteria necessary to establish medical eligibility for participation in the Medicaid 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
Steve Brady, MR/DD Waiver

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

_____,

Claimant,

vs.

Action Number: 08-BOR-739

**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 May 8, 2008 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 May 2, 2008 on a timely appeal filed December 3, 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
Steve Brady, Program Coordinator, MR/DD Waiver
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.

All parties participated telephonically.

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

Medicaid, Title XIX MR/DD Home and Community-Based Waiver Program Manual, Chapter 500-8

VI. LISTING OF DOCUMENTARY EVIDENCE ADMITTED

Department's Exhibits:

- D-1 Medicaid, Title XIX MR/DD Home and Community-Based Waiver Program Manual, Chapter 500-8
- D-2 Notice of Denial dated December 3, 2007
- D-3 DD-2a, ICF/MR Level of Care Evaluation completed on 9/17/07
- D-4 DD-3, Comprehensive Psychological Evaluation dated October 24, 2007

VII. FINDINGS OF FACT:

- 1) In response to the Claimant's application to determine medical eligibility for participation in the Medicaid MR/DD Waiver Program, the Claimant was notified via a Notice of Denial dated December 3, 2007 that his application was denied. This notice (Exhibit D-2) states, in pertinent part:

Your waiver application is hereby denied.

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. Specifically, the documentation failed to demonstrate substantial limitations in the following major life areas: Learning, Self-

direction, Receptive or Expressive Language, Mobility and Capacity for Independent Living. The notice indicates that Self-care was identified as a substantial adaptive deficit.

- 2) As a matter of record, the Department stipulated that the Claimant presents an eligible diagnosis [Autism], however, the Department contends that the evidence fails to demonstrate the level of severity [substantial adaptive deficits in three or more of the six major life areas] required to qualify for an ICF/MR level of care. The Department acknowledged that the Claimant is demonstrating a substantial adaptive deficit in the area of Self-care but indicated the documentation fails to identify any additional substantial adaptive deficits.
- 3) The Claimant's representative is contesting the denial as she contends that the Claimant is demonstrating functional delays, particularly in his Capacity for Independent Living. The Claimant will be 18 years old in June 2008 and according to his representative, he requires 24-hour supervision, he does not like to go out in public and his abilities have regressed in the last three years.
- 4) The Department acknowledged that the Claimant is demonstrating some degree of delay in most areas, however, these delays are not severe enough to qualify for an ICF/MR level of care. The clinical documentation as well as the AMAR Adaptive Behavior Scale-School, Second Edition was reviewed to explain how severe adaptive deficits are identified and why the documentation provided failed to meet that criterion. The Department acknowledged that the Claimant's deficiencies in Self-care indicate that he could have substantial delays in his Capacity for Independent Living, however, there was insufficient evidence to confirm or determine the extent of these delays.

The Department further explained that the Claimant's Autism severity was evaluated by The Childhood Autism Rating Scale (CARS) and a total score of 32.5 was recorded (see Exhibit D-4, page 4). A score of 32.5 indicates that the Claimant's Autism is in the mild to moderate range (as noted in Exhibit D-4) and the Department's psychologist testified that severe Autism scores are in the 37 to 60 range. In addition, the Claimant is functioning in the Borderline Range of intellectual functioning, and because he is home-schooled and there is no Individualized Education Program (IEP), it is difficult to tell how well he might be doing if he were still receiving intensive instruction through the public school system.

- 5) Additional clarification was requested by the Claimant's representative in the major life area of Self-direction, however, the Claimant's representative did not contest the Department's findings or provide evidence to indicate that the Claimant is demonstrating a substantial adaptive deficit in this area. It should be noted that no other major life areas were specifically contested.
- 6) Eligibility Criteria for the MR/DD Waiver Program are outlined in Chapter 500-8 of the Title XIX MR/DD Home and Community-Based Waiver Program Manual.

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, in conjunction with substantial deficits. Substantially limited functioning in three or more of the major life areas is required. 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., 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 evidence reveals that the Claimant presents a program qualifying diagnosis of Autism, however, the standardized measures of adaptive behavior, and the supporting clinical documentation, identify only one substantial adaptive deficit – Self-care. While the Department acknowledged that the Claimant’s Capacity for Independent Living would appear to be a problem area, there was limited information to confirm a deficit. Moreover, in the absence of evidence to confirm a third qualifying deficit [presuming Capacity for Independent Living was substantially delayed], medical eligibility cannot be established.
- 3) Whereas the evidence fails to demonstrate that the Claimant requires an ICF/MR level of care, 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 8th Day of May, 2008

**Thomas E. Arnett
State Hearing Officer**