



**State of West Virginia
DEPARTMENT OF HEALTH AND HUMAN RESOURCES
Office of Inspector General
Board of Review
P.O. Box 1736
Romney, WV 26757**

Joe Manchin III
Governor

Martha Yeager Walker
Secretary

May 9, 2008

by _____

Dear Ms. _____:

Attached is a copy of the findings of fact and conclusions of law on your brother's hearing held April 23, 2008. Your hearing request was based on the Department of Health and Human Resources' action to deny services under the Title XIX MR/DD Waiver Services Program for your brother.

In arriving at a decision, the State Hearings 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 related condition. A related condition would be any condition, other than mental illness, found to be closely related to mental retardation if this condition results in impairment of general intellectual functioning or adaptive behavior similar to that of mentally retarded persons. 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 the Mentally Retarded (ICF/MR facility). (Chapter 500 of Title XIX MR/DD Home and Community Based Waiver Program Revised Operations Manual, November 2005).

The information, which was submitted at the hearing, did not support that your brother's limitations are due to a diagnosis of mental retardation or a condition closely related to mental retardation. He therefore, does not meet the medical criteria to be eligible for the Title XIX MR/DD Waiver Services Program.

It is the decision of the State Hearings Officer to **uphold** the action of the Department to deny medical eligibility for the Title XIX MR/DD Waiver Services Program.

Sincerely,

Sharon K. Yoho
State Hearing Officer
Member, State Board of Review

cc: Erika H. Young, Chairman, Board of Review
Steve Brady, BBHMF
Richard Workman, BBHMF

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

_____ by: _____,

Claimant,

v.

Action Number: 08-BOR-822

**West Virginia Department of
Health and Human Resources,**

Respondent.

DECISION OF STATE HEARING OFFICER

I. INTRODUCTION:

This is a report of the State Hearing Officer resulting from a fair hearing concluded on April 23, 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 April 23, 2008 on an appeal, filed February 5, 2008.

II. PROGRAM PURPOSE:

The program entitled MR/DD Home and Community-Based Wavier is set up cooperatively between the Federal and State governments and administered by the West Virginia Department of Health & 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 Witnesses:

_____, Claimant
_____, Claimant's sister and guardian
_____, Claimant's brother-in-law
_____, Claimant's brother

Department's Witnesses:

Steven Brady, Bureau of Behavioral Health (participating by speakerphone)
Richard Workman, Psychologist Consultant, BMS (participating by speakerphone)

Presiding at the Hearing was Sharon K. Yoho, State Hearing Officer and a member of the State Board of Review.

IV. QUESTIONS TO BE DECIDED:

The question to be decided is whether the claimant meets the medical eligibility requirements of the Title XIX MR/DD Waiver Services Program.

V. APPLICABLE POLICY:

Title XIX MR/DD Home and Community-Based Waiver Program Revised Operations Manual,
Chapter 500
The Code of Federal Regulations – 42 CFR 435.1009 and 42 CFR 483.440

VI. LISTING OF DOCUMENTARY EVIDENCE ADMITTED:

Department's Exhibits:

D-1 Title XIX MR/DD Waiver Program Revised Manual Chapter 500
D-2 Notification of denial dated November 7, 2007
D-3 DD-2A Level of Care Evaluation dated September 19, 2007
D-4 Psychological Evaluation dated December 1, 2007
D-5 Letter from _____ dated December 10, 2007
D-6 Letter from _____ dated January 9, 2008

Claimant's Exhibits:

C-1 Neuropsychological Evaluation dated December 10, 2007
C-2 Neuropsychological Evaluation dated November 6, 1996
C-3 Special Education Eligibility Committee Report dated April 22, 1992
C-4 IEP _____ School dated March 22, 1999

- C-5 Referral Form – School Based Assistance Team dated October 2, 1991
- C-6 Psychologist recommendations dated April 18, 1996
- C-7 Letter from Human Service employee dated April 23, 2008

VII. FINDINGS OF FACT:

- 1) The claimant's sister and guardian submitted an application for the Title XIX MR/DD Waiver program through [REDACTED] and Psychologist, [REDACTED] in October 2007. The Department reviewed the documents and determined that the claimant did not meet the medical eligibility criteria for the program. The denial letter dated November 7, 2007 stated in part: "While the physician has offered the diagnosis of mental retardation on the DD-2A this diagnosis is not supported by the psycho-metric data nor was the diagnosis rendered by the psychologist. Therefore, the applicant has not been awarded an eligible diagnosis. Further, the psychologist has not indicated that he requires an ICF/MR level of care."
- 2) The claimant is a twenty six-year-old male who resides with his sister. He remains at the home alone during the day while his sister and brother-in-law are at work. He started receiving special education instruction in fifth grade. He graduated from High School without being held back. He lived with his brother for a short time at age twenty-four. He experimented with marijuana and alcohol. He had a driver's license that was revoked due to two DUI's. He has taken the DUI classes and testified that he could get his license back. He was employed for one year at [REDACTED] where he stocked materials and assembled furniture. He was employed for approximately one year at the [REDACTED] in maintenance. He was employed for approximately four years at a restaurant in kitchen preparation. His employment has been heavily supervised and his family has been responsible for getting him up and ready for work. He was more social when he was a young child and is becoming more withdrawn and quiet as he ages. His symptoms increased in his teens and twenties.
- 3) The most current DD-2A, Level of Care Evaluation, (Exhibit D-3) dated September 19, 2007, reports that the claimant is ambulatory, continent, feeds himself and is independent with personal hygiene/self care. The physician, completing this evaluation, listed an Axis II diagnosis as Mild Mental Retardation and certifies that the claimant requires the level of care and services provided in an Intermediate Care Facility for individuals with mental retardation and/or related conditions.
- 4) A Psychological dated October 1, 2007, (Exhibit D-4) reports that the claimant is independent with self-care tasks, but requires prompting for most activities. The Psychological reports scores for a Wechsler Adult Intelligence Scale test. His full scale IQ was 78. Adaptive Behavior Scores (ABS) were in the Average range for the most part. His scores were below average in Pre-vocational Activities, Self-Direction, Personal-Social Responsibility and Trustworthiness. The Psychologist completing the psychological strongly recommended that the claimant have a psychiatric evaluation to determine the appropriateness of medication to treat current psychotic symptoms. He lists an Axis I diagnosis of Psychotic Disorder, NOS and an Axis II diagnosis of Borderline Intellectual Functioning. He states that his prognosis is fair and indicates that with appropriate medication and management of his symptoms there will likely be an improvement in his adaptive functioning.

- 5) The Psychologist reports that no change in placement is anticipated in the near future. He contends that the claimant's deficits in social functioning and independent living are likely due to his Axis I diagnosis, psychotic disorder.
- 6) A physician from [REDACTED] notes in (Exhibit D-5) that the claimant has been diagnosed with Pervasive Developmental Disorder and Mild MR. He contends that the claimant cannot live independently. A physician from [REDACTED] writes in (Exhibit D-6), "He has been diagnosed with Psychosis N.O.S. R/o Schizoaffective Disorder R/O Pervasive Personality Disorder, Mild mental retardation, Obesity and Chronic mental illness." The psychologist completing a Neuropsychological Evaluation (Exhibit C-1) notes a diagnosis of schizoaffective disorder and pervasive development disorder. He states that the claimant does not meet the criteria for a diagnosis of mental retardation.
- 7) A Neuropsychological Evaluation completed when the claimant was age 14 years 3 months reports that the child had a long standing learning disorder. He at that time was maintaining a C average in Jr. High. A full scale IQ of 84 was reported in this document. An Individualized Education Program, IEP, from [REDACTED] Schools (Exhibit C-4) reports the claimant at age 16 to be reading at a 5th grade level. It notes that he has age appropriate daily living skills and community living skills.
- 8) Exhibit C-5, a referral for School Based Assistance, notes that the claimant at age 9 had poor concentration and comprehension as well as memory problems. Exhibit C-6 notes that at age 14 his intellectual functioning fell along the low average to average continuum.
- 9) Title XIX MR/DD Home and Community-Based Waiver Program Revised Operations Manual, Chapter 500, November 2005 states, in part:

"Medical Eligibility Criteria

The MR/DD State Waiver Office determines the medical eligibility for an applicant in the MR/DD Waiver Program. In order to be eligible to receive MR/DD Waiver Program Services, an applicant must meet the following medical eligibility criteria:

* Have a diagnosis of mental retardation and/or a related condition

* Require the level of care and services provided in an ICF/MR (Intermediate Care Facility for the Mentally Retarded) as evidenced by required evaluations and corroborated by narrative descriptions of functioning and reported history. An ICF/MR provides services in an institutional setting for persons with mental retardation or related condition. An ICF/MR facility provides 24-hour supervision, training, and supports.

The MR/DD State Waiver Office determines the level of care based on the Annual Medical Evaluation (DD-2A), Psychological Evaluation (DD-3), that documents that the 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. Other documents, if applicable and available, that can be utilized include the Social

History, IEP for school age children, Birth to Three assessments, and other related assessments.

The evaluations must demonstrate that the applicant has a diagnosis of mental retardation and/or a related developmental condition, which constitutes a severe and chronic disability. For this program, individuals must meet the diagnostic criteria for medical eligibility not only by the relevant test scores, but also the narrative descriptions contained in the documentation.

Medical Eligibility Criteria: Diagnosis

- * Must have a diagnosis of mental retardation, with concurrent 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, and requires services similar to those required for persons with mental retardation.

- * Autism
- * Traumatic brain injury
- * Cerebral Palsy
- * Spina Bifida
- * Tuberous Sclerosis

Additionally, mental retardation and/or related condition with associated concurrent adaptive deficits:

- * were manifested prior to the age of 22, and

- * are likely to continue indefinitely

- * Must have the presence of at least three(3) substantial deficits as that term is defined in Title 42, Chapter IV, Part 435.1009 of the Code of Federal Regulations (CFR). Substantial deficits associated with a diagnosis other than mental retardation or a related diagnosis do not meet eligibility criteria. Individuals diagnosed with mental illness whose evaluations submitted for medical eligibility determination with no indication of a previous co-occurring history of mental retardation or developmental disability prior to age 22 must provide clinical verification through the appropriate eligibility documentation that their mental illness is not the primary cause of the substantial deficits and the mental retardation or developmental disability occurred prior to the age of twenty-two (22).

Functionality

* Substantially limited functioning in three or more of the following major life areas: (Substantially limited” 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 not only by the relevant test scores, but also the narrative descriptions contained in the documentation submitted for review, i.e., psychological, the IEP, Occupational Therapy evaluation, etc.) Applicable categories regarding general functioning include:

- 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 and, leisure activities)

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

The applicant, his/her family, and/or legal representative must be informed of the right to choose between ICF/MR services and home and community-based services under the MR/DD Waiver Program, and informed of his/her right to a fair hearing (Informed Consent, DD-7).

10) 42 CFR 435.1009 states, in part:

"Active Treatment in intermediate care facilities for the mentally retarded means treatment that meets the requirements specified in the standard concerning active treatment for intermediate care facilities for persons with mental retardation under 483.440(a) of this subchapter.....

Institution for the mentally retarded or persons with related conditions means an institution (or distinct part of an institution) that--

(a) Is primarily for the diagnosis, treatment, or rehabilitation of the mentally

retarded or persons with related conditions; and

(b) Provides, in a protected residential setting, ongoing evaluation, planning, 24-hour supervision, coordination, and integration of health or rehabilitative services to help each individual function at his greatest ability....

Persons with related conditions mean individuals who have a severe, chronic disability that meets all of the following conditions:

(a) It is attributable to--

(1) Cerebral palsy or epilepsy; or

(2) Any other condition, other than mental illness, found to be closely related to mental retardation because this condition results in impairment of general intellectual functioning of adaptive behavior similar to that of mentally retarded persons, and requires treatment or services similar to those required for these persons.

(b) It is manifested before the person reaches age 22.

(c) It is likely to continue indefinitely.

(d) It results in substantial functional limitations in three or more of the following areas of major life activity:

(1) Self-care

(2) Understanding and use of language

(3) Learning

(4) Mobility

(5) Self-direction

(6) Capacity for independent living

11) 42 CFR 483.440(a) states, in part:

"(a) Standard: Active treatment.

(1) Each client must receive a continuous active treatment program, which includes aggressive, consistent implementation of a program of specialized and generic training, treatment, health services and related services described in this subpart, that is directed toward--

(i) The acquisition of the behaviors necessary for the client to function with as much self determination and independence as possible; and

(ii) The prevention or deceleration of regression or loss of current optimal functional status.

(2) Active treatment does not include services to maintain generally independent clients who are able to function with little supervision or in the absence of a continuous active treatment program.

VIII. CONCLUSIONS OF LAW:

- (1) Regulations provide that substantial deficits associated with a diagnosis other than mental retardation or a related diagnosis do not meet eligibility criteria. Although this claimant does demonstrate substantial deficits in some of the major life areas, the most recent psychological notes an Axis I diagnosis of Psychotic Disorder and an Axis II diagnosis of Borderline Intellectual Functioning. The psychologist recommends a psychiatric evaluation to determine the appropriateness of medication to treat current psychotic symptoms. This psychologist states that the claimant's prognosis is fair and he contends that the claimant's deficits in social functioning and independent living are likely due to his Axis I diagnosis, psychotic disorder. He indicates that with appropriate medication and management of his symptoms there will likely be an improvement in his adaptive functioning. It can be concluded that the claimant's deficits are primarily associated with mental illness diagnosis rather than mentally retarded or related diagnosis.
- (2) Policy stipulates that a diagnosis of mental retardation and/or related developmental condition must constitute a severe and chronic disability. The DD-2A dated September 19, 2007 list a diagnosis of Mild Mental Retardation. Additional documents report diagnosis of Psychosis, Schizoaffective Disorder, Pervasive Development Disorder, Mild MR and Chronic mental illness. Documents provided for early years support that the claimant had a learning disorder in the developmental years. While some Mild Mental Retardation is noted, evidence and testimony support that this condition does not constitute a severe disability.

IX. DECISION:

It is the decision of the State Hearing Officer to **uphold** the action of the Department to deny medical eligibility for services under the Title XIX MRDD Waiver Services 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 May 2008.

Sharon K. Yoho
State Hearing Officer