



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

January 23, 2009

Dear _____:

Attached is a copy of the findings of fact and conclusions of law on your hearing held January 7, 2009. Your hearing request was based on the Department of Health and Human Resources' proposal to terminate 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 a potentially eligible diagnosis of traumatic brain injury, but fails to support the presence of three (3) or more substantial adaptive deficits in major life areas.

It is the decision of the State Hearing Officer to **uphold** the proposal of the Department to terminate 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: 08-BOR-1332

**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 January 23, 2009 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 convened on January 7, 2009 on a timely appeal filed May 1, 2008. The hearing was originally scheduled for June 30, 2008, but was rescheduled at the request of the Claimant. The hearing was rescheduled for September 22, 2008, but was continued at the Claimant's request. The hearing was then scheduled for November 17, 2008, but was rescheduled by the Hearing Officer due to inclement weather.

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
_____, mother of Claimant
_____, stepmother of Claimant
_____, Manager, Employment Services
_____, Support Provider, _____ Center
_____, Certified Rehabilitation Counselor, _____ Services
_____, Service Coordinator, _____ Center

Jon Sassi, Program Manager, MR/DD Waiver Program (participated telephonically)
Richard 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 proposal to terminate 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 Notice of Denial/Termination dated February 27, 2008
- D-3 Notice of Denial/Termination dated March 6, 2008
- D-4 ICF/MR Level of Care Evaluation
- D-5 Psychological Evaluation (Triennial) dated November 4, 2007

- D-6 Letter from Dr. _____ dated June 19, 2008
- D-7 Psychological Evaluation (dates of evaluation April 10, 2008 and May 22, 2008)
- D-8 Individual Program Plan dated May 28, 2008

Claimant's Exhibits:

- C-1 Medicaid Letter Number 97-10, Guidelines Regarding What Constitutes an ICF-MR Level of Care Under a Home and Community-Based Service Waiver dated March 10, 1997
- C-2 Psychological Evaluation Addendum dated October 24, 2008

VII. FINDINGS OF FACT:

- 1) The Claimant is a recipient of MR/DD Waiver services and the Department conducted an annual reevaluation to determine whether he continues to meet medical/psychological eligibility requirements for the program.
- 2) The Department determined that the Claimant is ineligible for Waiver services and sent him a Notice of Denial/Termination dated February 27, 2008 (D-2), which states:

Your Waiver services have been terminated. Your application was terminated because:

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 fails to demonstrate substantial limitations in the check-marked areas of *self-care, learning, self-direction, receptive/expressive language, mobility and capacity for independent living*.

- 3) The Department sent the Claimant a second Notice of Denial/Termination (D-3) dated March 6, 2008 (D-3). This notice states, in part:

was Terminated because:

Present assessment of adaptive and intellectual functioning do [sic] not support the need for active treatment nor [sic] an ICF/MR level of care. The evaluating psychologist has not endorsed the need for an ICF/MR level of care.

Your Waiver s

The letter continues to state that the Claimant does not demonstrate substantial limitations in any of the six (6) major life areas identified for MR/DD Waiver eligibility.

- 4) The Bureau for Medical Services (BMS) Psychologist Consultant testified that the Claimant has a potentially eligible diagnosis of traumatic brain injury/seizure disorder. The Claimant's brain injury was sustained in an automobile accident in 2004 (prior to the age of 22). While the Department did not dispute the Claimant's potentially eligible diagnosis, reviewers were unable to identify any substantial adaptive deficits in major life areas during the redetermination. It should be noted, however, that the Department conceded one (1) deficit - *capacity for independent living* - during the hearing.

The Claimant's witnesses contended that he exhibits substantial adaptive deficits in the areas of *receptive/expressive language, self-care, learning and mobility*.

- 5) The Psychologist Consultant reviewed the Claimant's medical/psychological reports in regard to the following contested areas:

Receptive/expressive language- The DD-2A Level of Care Evaluation (D-4) completed on December 7, 2007 states that the Claimant's speech is slow, but easily understood. Exhibit D-5, a Psychological Evaluation- Triennial completed by Dr. [REDACTED] on November 4, 2007, states that the Claimant has average language skills for his age and was alert to person, time and place. Section D of this report indicates that the Claimant is able to communicate his basic wants/needs and understand simple commands. The Department's Psychologist Consultant reviewed the Claimant's Adaptive Behavior Scale (ABS) scores and noted that standard scores of 12 and below (below 75th percentile) are considered eligible scores for the MR/DD Waiver Program. The Claimant attained a score of 14 in language development.

Exhibit D-7, a Psychological Evaluation completed in April and May 2008 by Dr. [REDACTED] states that the Claimant is verbal and communicates using complete sentences. Dr. [REDACTED] wrote that the Claimant's "vocabulary appeared appropriate in casual conversation; however, _____ sometimes got off topic and appeared to wander. _____'s speech was of normal volume, but was slow, halting and labored. He had some difficulty with word finding. _____'s receptive and expressive vocabulary appear adequate."

Based on documentation provided, it is clear that the Claimant's receptive/expressive language skills are not substantially impaired. Therefore, no deficit can be awarded in this area of functionality.

- 6) ***Self-care***- Exhibit D-4 states that the Claimant is able to feed himself and can perform personal hygiene/self-care tasks independently with verbal reminders. Exhibit D-5 states that "_____ is completely independent with regard to his self-help skills, with the exception of requiring assistance to put on a leg brace." The Claimant received an ABS score of 14 in independent functioning and scored in the superior range in personal self-sufficiency. The

report states that the Claimant is able to make decisions requiring informed consent without extreme difficulty.

In a June 19, 2008 letter (D-6), Dr. _____ contended that the Claimant continues to demonstrate a substantial limitation in self-care as he has limited vision in his right eye, no use of his right hand and arm, limited use of his right leg and increased seizure activity. In Exhibit D-7, Dr. _____ noted that the Claimant is able to take care of most personal care needs with assistance, although the Claimant received an ABS score of 11 in independent functioning. The Department's Psychologist Consultant questioned the drop in ABS scores as the Claimant had received higher overall ABS scores in November 2007. Exhibit C-2, a Psychological Evaluation Addendum completed by Dr. _____ in October 2008, also lists lower ABS scores, but cites a recent deterioration in the Claimant's functioning as the result of continued seizure activity. ABS scores of 11 in independent functioning and 10 in domestic activity were recorded during the October 2008 assessment. The prognosis section of the report states that the Claimant's progress "has been hampered by increased seizure activity, he has evidenced multiple symptoms of depression and a decline in self-care, vocational activity, domestic activity and socialization." The Department's Psychologist Consultant pointed out that depression – which is not an eligible diagnosis for the MR/DD Waiver Program - could account for declines in these areas.

While it is apparent that the Claimant requires verbal reminders in regard to self-care, documentation states that he is able to complete self-care tasks independently with prompting. Therefore, the Claimant does not require active treatment to learn new skills and is not substantially deficit in self-care.

- 7) **Learning-** Exhibit D-5 indicates that Dr. _____ administered the Wechsler Adult Intelligence Scale- Third Edition on which the Claimant attained an overall verbal score of 87, which falls in the average range. The Claimant achieved ABS scores of 14 in language development and 14 in numbers and time. Dr. _____ noted that the Claimant is able to learn new skills without aggressive and consistent training.

Under Developmental Findings/Conclusions, Dr. _____ wrote:

_____ is a 21-year-old, single, white male, who scored well within the Average range on the Verbal scale of the Weschler Adult Achievement Test – Third Edition. Although it is this examiner's opinion that the results of the Verbal section of the Wechsler Adult Achievement Test- Third Edition are somewhat of an over-estimate of his I.Q. when considering his adaptive behavior, he most probably possesses average intelligence. It is this examiner's opinion that _____ no longer requires an ICF/MR level of care.

Dr. [REDACTED] wrote the following under the Conclusions and Recommendations section of the report:

[REDACTED] presents as a 21-year-old, white male, who has demonstrated a great deal of improvement across the board in a number of areas, including adaptive behavior, cognitive skills, and perceptual channels. His verbal functioning has improved from the Upper level of the Mild Mental Disabilities range to now falling well within the Average range. Because of this, it is this examiner's opinion that his presentation no longer appears to be consistent with a 24-hour ICF/MR level of care. Again, it is suggested that [REDACTED] be referred for an evaluation through Vocational Rehab to determine his current employability. At the time of his initial evaluation, three years ago, [REDACTED] required intensive speech therapy, occupational therapy, and physical therapy. He has been discharged from all of these services.

Dr. [REDACTED] contended in Exhibit D-6 that the Claimant continues to be substantially deficient in learning and is facing additional difficulties with short and long-term recall, attention span and focus due to his increased seizures and high doses of anti-convulsants.

In Exhibit D-7, Dr. [REDACTED] wrote that the Claimant attempted to take classes at [REDACTED] University, but "struggled tremendously with reading. He is now in a literacy program in Buckhannon and would like to resume college at a later date. [REDACTED] has no formal vocational training and is not employed. In addition to several goals related to physical fitness and rehabilitation, [REDACTED]'s Individual Habilitation Plan also includes several objectives related to reading and math. [REDACTED] identified these as being the most difficult goals to reach and in fact has shown some decline in sight word recognition and reading proficiency since the increase in seizure activity." The Claimant received a Verbal IQ score of 76 (borderline) on the Wechsler Adult Intelligence Scale, Third Edition, administered by Dr. [REDACTED]. He scored a Performance IQ of 65 (mild mental retardation) and a Full-Scale IQ of 69 (mild mental retardation). Under the Discussion section of Exhibit D-7, Dr. [REDACTED] wrote:

The present results indicate [REDACTED] to be functioning in the Borderline to Mild MR range intellectually. Overall, his response pattern tended to be slow and labored; however he was observed to put forth excellent effort and followed directions well. He required quite a bit of prompting on verbal subtests as his answers tended to be vague. It should be noted that without such prompting, [REDACTED]'s performance would likely be significantly lower.

Significant deficits were observed in the areas of processing speed, visual memory, multi-step task completion, sequential processing, attention to visual detail, and memory for learned information. Relative strengths were observed in part-to-whole processing and categorical thinking. While he scored somewhat better on verbal tasks, it is important to note that _____ demonstrated significant difficulty with word-finding and explanation of basic social concepts. He frequently utilized concrete examples to get his point across and was quite slow to respond in conversation.

The Claimant attained ABS Part One Domain Scores above 12 in all areas except physical development (7), independent functioning (11) and domestic activity (11). Dr. [REDACTED] noted that the Claimant has made significant progress since the time of his automobile accident, but his physical and cognitive functioning remain in the impaired range. She does not believe the Claimant is able to learn new skills without aggressive training and wrote that the Claimant would likely face serious decline should supports be removed. However, Dr. [REDACTED] wrote that the Claimant's prognosis for independent living is "good" if he receives continued Waiver services.

Exhibit C-2 suggests further declines in ABS scores, however, Dr. [REDACTED] continued to indicate that the decline was likely the result of increased seizure activity and multiple symptoms of depression.

While the Claimant clearly faces learning challenges as a result of his traumatic brain injury, the November 2007 Psychological Evaluation indicates that he has made significant progress since his automobile accident, likely possesses average intelligence and can learn new skills without aggressive and consistent training. The lowered ABS and Weschler test scores on subsequent evaluations were believed to be the result of increased seizure activity/medication therapy and depression. While the Claimant's I.Q. scores indicate a decline in achievement, they fail to represent a severe adaptive deficiency (three standard deviations below the mean) and, therefore, no deficit can be awarded in learning.

- 8) **Mobility**- Exhibit D-4 states that the Claimant is fully ambulatory. Exhibit D-5 indicates that the Claimant has weakness on his entire right side as a result of his automobile accident, but is fully ambulatory without assistance. He has some difficulty with fine motor skills and has limited use of his right arm.

Exhibit D-6 indicates that the Claimant is ambulatory with a slow, unsteady gait and erect posture, but requires assistance in navigating stairs and uneven pavement. The Claimant cannot run and wears a "walk aid" with a stimulator and a knee brace on his right leg due to weakness and limited range of motion. In Exhibit D-6, Dr. [REDACTED] wrote that the Claimant's fine motor skills are "significantly limited as he has limited functional use of his right arm,

even with a supportive brace. In fact, _____ has no use of his hand and can only raise his arm slightly. _____ reported that he was previously right handed and had to 'learn to do everything' with his left hand following the accident. He reported some awkwardness with this and said that there are some things he just can't do,' such as tie his shoes, secure fasteners, and prepare meals. _____ has a regular exercise routine that he enjoys." Dr. _____ also wrote that the Claimant is "unable to stand alone for more than 5 minutes or walk for more than 30 minutes without collapse due to right side weakness."

In Exhibit D-6, Dr. _____ wrote that the Claimant has no use of his right hand and arm and requires the use of electronic stimulus in an attempt to gain function of the arm. He also indicated that the Claimant wears a brace on his right leg with electrical stimulation.

Reports indicate that the Claimant has limited use of his right limbs as a result of injuries sustained in the automobile accident. Although the Claimant's right-side mobility is limited and he requires assistance in certain situations, reports state that he is fully ambulatory and is, therefore, not substantially deficient in mobility.

- 9) The Claimant's mother testified that she enrolled her son in college because the insurance company has stopped paying for his therapies and she did not want his progress to decline. She testified that the Claimant has short-term memory loss, did not read, and studied using voice recordings of his classes. The Claimant's mother stated that her son had to listen to the recordings for hours and that he failed his last college course. The Claimant's Service Coordinator stated that the Claimant overstates his abilities. She believes his earlier ABS results were based on what he had told the evaluator, not on what he can actually do. The Service Coordinator stated that the Claimant has made remarkable gains since his accident, but that he will be able to make additional progress through the Waiver Program.

The Employment Services Manager provided Exhibit C-1 and contended that persons receiving community-based services should not be compared to individuals residing in ICF-MR facilities. He stated it would be a mistake to conclude that higher functioning individuals do not require services merely because their functional abilities exceed the levels ordinarily seen in ICF/MR facilities.

- 10) 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 individual must exhibit substantial adaptive deficits in three (3) or more major life areas.
- 2) The Department established that the Claimant has a potentially eligible diagnosis of traumatic brain injury which manifested prior to the age of 22, but determined that the Claimant has only one (1) substantial adaptive deficit in *capacity for independent living*.
- 3) Based on information provided during the hearing, no additional substantial adaptive deficits can be identified.
- 4) While it is apparent that the Claimant faces many challenges as a result of his traumatic brain injury, evidence does not corroborate the presence of substantial adaptive deficits in three (3) of the six (6) major life areas. Therefore, the Department correctly determined that the Claimant does not require an ICF-MR level of care and 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 terminate 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 23rd Day of January, 2009.

**Pamela Hinzman
State Hearing Officer**