



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

January 20, 2009

Dear _____:

Attached is a copy of the findings of fact and conclusions of law on your hearing held December 12, 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 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 Medicaid Regulations, Chapter 513 – Covered Services, Limitations, And Exclusions, For MR/DD Waiver Services, effective 11/1/07).

Information submitted at your hearing fails to demonstrate that you meet the criteria necessary to establish medical eligibility for participation in the 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-2106

**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 20, 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 was convened on December 12, 2008 on a timely appeal filed September 16, 2008.

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 father/representative
Steve Brady, Program Coordinator, MR/DD Waiver, BMS
Richard L. 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 or not 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

West Virginia Medicaid Regulations, Chapter 513 – Covered Services, Limitations, And Exclusions, For MR/DD Waiver Services, effective 11/1/07

VI. LISTING OF DOCUMENTARY EVIDENCE ADMITTED

Department's Exhibits:

- D -1 West Virginia Medicaid Regulations, Chapter 513 – Covered Services, Limitations, And Exclusions, For MR/DD Waiver Services, effective 11/1/07
- D-2 Decision of State Hearing Officer dated August 15, 2007
- D-3 Notice of Denial/Termination dated 8/29/08
- D-4 DD-2A, ICF/MR Level of Care Evaluation dated 12/6/06 (submitted in 2007 appeal)
- D-5 DD-2A, ICF/MR Level of Care Evaluation dated 6/19/08
- D-6 EEG Report dated 10/22/03
- D-7 MRI of the head – May 3, 1999
- D-8 Correspondence from _____ dated 6/20/08
- D-9 Rx pad from _____ Inc. #2633 dated 9/17/08
- D-10 Discharge Summary from _____ Health Department 7/10/02
- D-11 Medical Records from Dr. _____, M.D., Psychiatrist
- D-12 Comprehensive Psychological Evaluation dated 1/22/07 (submitted in 2007 appeal)
- D-13 Comprehensive Psychological Evaluation dated 7/9/08

VII. FINDINGS OF FACT:

- 1) As a matter of record, the Claimant completed an application for benefits and services through the MR/DD Waiver Program in 2007, however, that application resulted in a denial determination that was appealed to the Board of Review. A decision was subsequently rendered by Sharon K. Yoho, State Hearing Officer, on August 15, 2007 (D-2) affirming the Department's denial. The 2007 decision resulted in the following conclusions: The Claimant has a qualifying diagnosis of Mental Retardation, however, there is insufficient documentation to demonstrate the onset of substantial adaptive deficits prior to the age of 22 and; mental illness, an exclusionary diagnosis for participation in the MR/DD Waiver Program, is the primary cause for the Claimant's limitations. Conclusion #3 states – "Regardless of whether mental retardation or related condition could be proven to have been present in the developmental years, this would not negate the evidence pointing to mental illness being the primary cause for her limitations."
- 2) In response to an application completed for benefits and services through the Medicaid MR/DD Waiver Program in August 2008, the Claimant was notified via a Notice of Denial/Termination dated August 29, 2008 (D-3) that Waiver services were denied. This notice states, in pertinent part:

Your Waiver Application is hereby denied.

Your application was Denied because:

Documentation submitted for review does not support the presence of mental retardation or a "related condition" (a condition which is closely related to mental retardation) which is severe and manifested within the developmental period. The physician has not offered an eligible diagnosis on the DD-2A. Substantial adaptive deficits as defined for the Title XIX MR/DD Waiver eligibility which are due to mental retardation or "related condition" is not supported within the documents submitted for review.

- 3) A review of the evidence for the current denial begins with Exhibit D-5, DD-2A dated 6/19/08 reveals that the Claimant is ambulatory, feeds herself, she is independent in personal hygiene/self-care, however, it is noted that she needs close supervision and that she has limited communications. The Department noted that an eligible diagnosis was not provided by the evaluating physician and that a diagnosis of Asperger's (found on page 3 of 3) is not a related condition (related to MR) as there is no correlation between Asperger's and cognitive delays, age appropriate self-help delays, or language and/or adaptive behavior deficits. Exhibit D-9 was submitted subsequent to the denial notice but includes an eligible diagnosis of Mild Mental Retardation.

- 4) A Comprehensive Psychological Evaluation (D-13) was submitted for the August 2008 application and the Department noted that there is still no evidence to demonstrate that substantial adaptive deficits were manifested during the developmental period (prior to age 22). Moreover, the Department's psychologist purports that while the Claimant presents a potentially eligible diagnosis of Mild Mental Retardation, the Claimant limitations are related to her mental illness.

The Department noted that the Claimant has been receiving mental health services since the age of 5. The Claimant was diagnosed with schizophrenia when she was a teenager and has required psychiatric treatment on several occasions. - hospitalized on five different occasions at [REDACTED] and has had two admissions to [REDACTED] with the most recent in 2004. She has also been admitted to the [REDACTED] on a number of occasions and was last discharged in December 2004 after a six-month admission. She continues to have auditory and visual hallucinations and has a past history of attempting to overdose.

The following relevant diagnoses are provided in Exhibit D-13, Section V, on page 6 of 7 -

Axis I: Schizoaffective Disorder, Bipolar type
Axis II: Mild Mental Retardation
Axis III: Seizure disorder
Lesion on temporal lobe

Page 5 of 7, Section E., notes – “Without supervision she is unable to remain stable with her mental illness and requires hospitalization and would not follow through with adaptive skills or caretaking behaviors.” She requires psychiatric services and medications to treat her schizoaffective disorder and has scored in the mild range of mental retardation.” This report goes on to state – “Her father notes that in the past she has been diagnosed with autism and/or Asperger's syndrome though it is this interviewer's opinion that these symptoms fall under the diagnosis of schizoaffective disorder.”

Section C on Page 2 of 7 states – “_____’s current behavioral difficulties include temper tantrums in which she cries and screams and may stamp her feet while banging an object or slamming doors. She swears, curses or uses obscene language. She waves or shakes part of her body repeatedly and paces the floor. She talks loudly to herself and does not seem to react to anything. She is difficult to reach or contact, apathetic and unresponsive in feeling, has a bland stare and a fixed expression.” She is noted to have mood changes without apparent reason.

While the evaluator's opinion is that the Claimant meets the eligibility criteria for Community Based Waiver services through her diagnosis of mild mental retardation (a potentially eligible diagnosis), she goes on to say – “She has ongoing and active hallucinations despite medication compliance and is currently determined to be stable.”

- 5) In Exhibit D-8, the Claimant's father/representative drafted correspondence to include with the August 2008 application. This correspondence states in the third paragraph – “This shows that although most of _____'s symptoms are mental, ie Schizophrenic, aspergers [sic] etc, there is an underlying physical condition within her brain.” The Department's psychologist acknowledged the existence of the Claimant's lesion on her temporal lobe (Exhibits D-6 & D-7), but indicated the Department was unable to conclude that this condition is causing the Claimant's symptoms. The Department maintains that Mental Illness is the Claimant's primary diagnosis. Exhibits D-10 and D-11 provided a diagnostic history of “Psychosis NOS” and “Schizoaffective Disorder” dating back to 1995. While a diagnosis of Autism was provided in September 1995, Mild Mental Retardation does not appear until the January 2007 Comprehensive Psychological Evaluation (D-12).
- 6) West Virginia Medicaid Regulations, Chapter 513, – Covered Services, Limitations, And Exclusions, For MR/DD Waiver Services, effective 11/1/07, includes the following pertinent medical eligibility criteria:

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 monitoring, supervision, training, and supports.

MR/DD State Waiver Office determines the level of care (medical eligibility) based on the Annual Medical Evaluation (DD-2A), the Psychological Evaluation (DD-3) and verification if not indicated in the DD-2A and 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 an 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. To be eligible, the member:

- 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, the member who has a diagnosis of mental retardation and/or related conditions and associated concurrent adaptive deficits must have the following:

- Manifested prior to the age of 22, and

- Likely to continue indefinitely.

- Must have the presence of a least three (3) substantial deficits out of five of the major life areas (term is defined in Title 42, Chapter IV, Part 435.1009 of the

Code of Federal Regulations or CFR.

Refer to 503.1, Functionality section for a list of the major life areas.

Functionality

• Substantially limited functioning in three (3) or more of the following major life areas; (“substantially limited” is defined on standardized measures of adaptive behavior scores as three (3) standard deviations below the mean or less than one (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).

For applicable major life functioning areas, refer to Code of Federal Regulation (CFR): 42 CFR435.1009.

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:
 - o A need for intensive instruction, services, assistance, and supervision in order to learn new skills, maintain current level of skills, and increase independence in activities of daily living,
 - o A need for the same level of care and services that is provided in an ICF/MR institutional setting.

The applicant or legal representative will 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 at the time of application (Informed Consent, DD-7).

Conditions Ineligible

- Substantial deficits associated with a diagnosis other than mental retardation or a related diagnosis do not meet eligibility criteria.
- Additionally, any individual needing only personal care services does not meet the eligibility criteria.
- Individuals diagnosed with mental illness whose evaluations submitted for medical eligibility determination indicate no previous history of co-occurring mental retardation or developmental disability prior to age 22. The member's clinical evaluators 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).

- 7) The Federal Code of Regulation - 42 CFR 435.1009(a)(2) *Persons with related conditions* means 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 or adaptive behavior similar to that of mentally retarded persons, and requires treatment or services similar to those required for these persons. Section (b) states – It is manifested before the person reaches age 22.

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 in three (3) or more of the major life areas. The individual must require and benefit from continuous active treatment and need the same level of care and services that is provided in an ICF/MR institutional setting. Policy goes on to state that the member's clinical evaluators 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).
- 2) The Code of Federal Regulations found at 42 CFR 435.1009 indicates that mental illness does not qualify as a related condition. Further, policy requires that the evaluations must

- demonstrate that the individual's diagnosis of a related condition, with associated concurrent adaptive deficits, must be manifested prior to the age of 22.
- 3) The evidence reveals that the Claimant's potentially eligible diagnosis of Mild Mental Retardation is found only on current evaluations completed exclusively for MR/DD Program eligibility at the age of 28. The Claimant was provided a diagnosis of Autism in 1995, but this diagnosis has since been replaced with Asperger's Disorder, an autism spectrum disorder that is not considered a related condition for program eligibility. Based on the evidence, the documentation fails to support the presence of mental retardation or a "related condition" (a condition which is closely related to mental retardation) which is severe and manifested within the developmental period. Moreover, the evidence overwhelmingly supports the finding that the Claimant's primary diagnosis of mental illness, an exclusionary diagnosis, is the primary cause for her limitations.
 - 4) Based on the evidence presented at the hearing, the Department was correct in denying the Claimant's application for participation in the Medicaid 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 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 20th Day of January, 2009

Thomas E. Arnett
State Hearing Officer