



State of West Virginia
DEPARTMENT OF HEALTH AND HUMAN RESOURCES
Office of Inspector General
Board of Review
9083 Middletown Mall
White Hall, WV 26554

Earl Ray Tomblin
Governor

Michael J. Lewis, M.D., Ph.D.
Cabinet Secretary

September 16, 2011

----- for

Dear -----:

Attached is a copy of the Findings of Fact and Conclusions of Law on your hearing held September 8, 2011. 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 Medicaid Regulations, Chapter 513 – Covered Services, Limitations, And Exclusions, For MR/DD Waiver Services, effective 11/1/07).

The clinical documentation reviewed for your son fails to demonstrate 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 proposal to deny your application for benefits and services through the Medicaid MR/DD Waiver Program.

Sincerely,

Thomas E. Arnett
State Hearing Officer
Member, State Board of Review

Pc: Chairman, Board of Review

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

-----,

Claimant,

vs.

Action Number: 11-BOR-1418

**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 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 September 8, 2011 on a timely appeal filed June 27, 2011.

All persons giving testimony were placed under oath.

II. PROGRAM PURPOSE:

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

-----, Claimant's Father/Representative

Jennifer Eva, APS Healthcare, Respondent's Representative

Linda Workman, Psychologist Consultant, BMS

Presiding at the hearing was Thomas E. Arnett, State Hearing Officer and a member of the State Board of Review.

IV. QUESTION TO BE DECIDED

The question to be decided is whether or not the Department was correct in its decision to deny the Claimant's application for benefits and services through the Medicaid MR/DD Waiver Program.

V. APPLICABLE POLICY

West Virginia Medicaid Regulations, Chapter 513 – Covered Services, Limitations, And Exclusions, For MR/DD Waiver Services.

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.
- D-2 Notice of Denial/Termination dated April 6, 2011
- D-3 DD-2a, WVDHHR ICF/MR Level of Care Evaluation dated March 2, 2011
- D-4 DD-3, Psychological Evaluation dated January 28, 2011
- D-5 Annual IEP, [REDACTED] County Schools, dated May 6, 2010

VII. FINDINGS OF FACT:

- 1) In response to an application completed for benefits and services through the Medicaid MR/DD Waiver Program, the Claimant was notified via a Notice of Denial/Termination (D-2) that Waiver services were denied. This notice states, in pertinent part:

Your Waiver Application is hereby denied.

Your application was Denied because:

In order to meet diagnostic eligibility criteria for the Title XIX MR/DD Waiver program, individuals must have a diagnosis of mental retardation to the degree which necessitates an institutional level of care or a "related condition" which is severe. -----[sic] scores on the current intellectual assessment are within the Borderline range of intellectual ability and this is reflected within the body of the psychological report. VATER syndrome is not considered to be a "related condition" because it is not associated with the presence of mental retardation. While the psychologist has diagnosed mild intellectual disability in section V of the DD-3, this conflicts with the

body of his own report and the scores reflect a level of cognitive functioning which typically does not result in the need for an institutional level of care. Functional deficits which are present appear to be primarily related to ----- [sic] significant physical problems that are associated with VATER syndrome, which is not an eligible diagnosis.

- 2) The Respondent's representative, Jennifer Eva, introduced policy and called upon Linda Workman, a psychologist consultant with the Bureau for Medical Services (BMS), to review the medical evidence considered for eligibility. Ms. Workman reviewed the denial notice and testified that eligibility could not be established in this case because the clinical documentation does not support a diagnosis of mild mental retardation/mild intellectual disability or a related condition. Ms. Workman testified that the Claimant's functional limitations are due to his diagnosis of V.A.T.E.R. Syndrome - the acronym refers to five different areas in which a child may have abnormalities: Vertebrae, Anus, Trachea, Esophagus, and Renal – and this condition is not considered a “related condition” because V.A.T.E.R. syndrome does not have a high occurrence of mental retardation. Because policy requires an eligible diagnosis, and that the substantial adaptive deficits be derived from the eligible diagnosis, eligibility could not be established.
- 3) The Claimant's representatives contend that their son has had a Traumatic Brain Injury (TBI) and a spinal cord injury – both of which are considered eligible diagnoses. The Claimant's representatives contended that information submitted for previous MR/DD Waiver eligibility reviews included evidence to support those diagnoses, and they would have included this information if someone would have informed them of its relevance.
- 4) A review of Exhibit D-3, ICF/MR Level of Care Evaluation completed on March 2, 2011, reveals a diagnosis of Developmental Delay due to V.A.T.E.R.s. Exhibit D-4, page 4, notes that the Claimant was tested using the Kaufman Brief Intelligence Test 2 and scored a Verbal IO of 78, a Nonverbal IQ of 74, and an overall IQ of 73. The psychologist notes “this falls in the 4th percentile of the population and is in the mild intellectual disability range of intellectual functioning with Andrew's adaptive functioning deficits taken into account.” However, in section III.E. – Developmental Findings/Conclusions (page 6), - the psychologist states, “Results of the psychological assessment indicate that Andrew is functioning within the Borderline Intellectual range of intelligence and has significant adaptive deficits.” In Section VII – Placement Recommendations – the psychologist states, in pertinent part: “Because of the above functional limitations due to VATER syndrome [emphasis added] and an intellectual disability, Andrew requires an ICF/MR level of care.”
- 5) West Virginia Medicaid Regulations, Chapter 513, – Covered Services, Limitations, And Exclusions, For MR/DD Waiver Services, effective 11/1/07, include 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).

VIII. CONCLUSIONS OF LAW:

- 1) Policy that governs the MR/DD Waiver Program states that 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. Policy goes on to indicate that

the individual must have a diagnosis of mental retardation, with concurrent substantial deficits (substantial limitations associated with the presence of mental retardation), and/or a related developmental condition which constitutes a severe and chronic disability with concurrent substantial deficits. A related condition is defined as 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.

- 2) The evidence demonstrates that while the Claimant was diagnosed with mild intellectual disability (mild mental retardation) in the psychological evaluation, the evaluating psychologist concludes that the Claimant is functioning within the Borderline Intellectual range of intelligence and has significant adaptive deficits. According to this information, a diagnosis of mild intellectual disability is not compatible with the psychologist's conclusion, and there is no correlation between the diagnosis (Borderline Intellectual functioning), which is not a severe condition, and the adaptive deficits. The evaluating psychologist goes on to note that the Claimant's functional limitations are due to VATER syndrome, and pursuant to the testimony of the Department's psychologist, VATER syndrome is not a "related condition." While the Claimant's representatives contend that the Claimant also presents a diagnosis of TBI and a spinal cord injury, neither of these diagnoses were provided in the clinical documentation. As a result, the medical evidence submitted for review fails to include an eligible diagnosis and the functional deficits demonstrated by the Claimant appear to be related to VATER syndrome.
- 3) 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 as the Claimant has not demonstrated medical eligibility.

IX. DECISION:

It is the decision of the State Hearing Officer to **uphold** the action of the Department 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 ____ Day of September, 2011

**Thomas E. Arnett
State Hearing Officer**