



**State of West Virginia
DEPARTMENT OF HEALTH AND HUMAN RESOURCES
Office of Inspector General**

Board of Review
P.O. Box 1736
Romney, WV 26757

**Earl Ray Tomblin
Governor**

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

January 14, 2011

Dear -----:

Attached is a copy of the Findings of Fact and Conclusions of Law on your hearing held December 20, 2010. Your hearing request was based on the Department of Health and Human Resources' decision to deny your application for benefits and services associated with 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 substantiate each of the following elements: 1) a diagnosis of mental retardation with concurrent substantial deficits which require the level of care and services provided in an Intermediate Care Facility for the Mentally Retarded (ICF/MR); 2) substantially limited functioning in three or more of the major life areas of self-care, receptive or expressive language, learning, mobility, self-direction, and capacity for independent living; 3) the requirement for and ability to derive benefit from continuous active treatment; and 4) the endorsement of the need for an ICF/MR level of care from both a physician and a psychologist. (MR/DD Waiver Manual, Chapter 513 – *Covered Services, Limitations, and Exclusions for MR/DD Waiver Services*, §513.3.1).

The information which was submitted at your hearing fails to establish that you exhibit substantial adaptive deficits in three or more of the major life areas that require the level of care and services provided in an Intermediate Care Facility for individuals with mental retardation or related conditions.

It is the decision of the State Hearing Officer to Uphold the action of the Department to deny the Claimant's application for MR/DD Waiver Services.

Sincerely,

Eric L. Phillips
State Hearing Officer
Member, State Board of Review

cc: Erika Young, Chairman, Board of Review
Jennifer Eva, APS Healthcare

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

-----,

Claimant,

v.

Action Number: 10-BOR-2156

**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 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 20, 2010 on a timely appeal, filed September 17, 2010.

II. PROGRAM PURPOSE:

Medicaid Home and Community-Based MR/DD Waiver Program (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
-----, Claimant's Mother
-----, Claimant's Representative and Sister
Jennifer Eva, Lead Service Support Facilitator, APS Healthcare
Linda Workman, Psychologist Consultant

Presiding at the hearing was Eric L. Phillips, State Hearing Officer and a member of the 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 under the MR/DD Home and Community Based Waiver Program.

V. APPLICABLE POLICY:

Chapter 513-Covered Services, Limitations, and Exclusions for MR/DD Waiver Services

VI. LISTING OF DOCUMENTARY EVIDENCE ADMITTED:

Department's Exhibits:

- D-1 Chapter 513-Covered Services, Limitations, and Exclusions for MR/DD Waiver Services
- D-2 Notice of Denial/Termination dated August 30, 2010
- D-3 DD-2-A-ICF/MR Level of Care Evaluation dated July 14, 2010
- D-4 DD-3, Psychological Evaluation dated July 9, 2010

Claimants' Exhibits:

- C-1 DD-3, Psychological Evaluation dated October 28, 2010*

*This exhibit was entered into the hearing record, but given no weight in the State Hearing Officer's decision because the evaluation was completed after the notice of denial and was not made available to the Department or the State Hearing Officer prior to the appeal.

VII. FINDINGS OF FACT:

- 1) On August 30, 2010, the Department issued the Claimant, Exhibit D-2 Notice of Denial/Termination. This notice documents 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: Self-Care, Receptive or Expressive Language, Learning, Mobility, Self-Direction, Capacity for Independent Living.

You have the right to a second medical exam at the department's expense if decision was based on medical reasons.

- 2) Ms. Workman offered testimony concerning her review of the Claimant's application for MR/DD Waiver services. Ms. Workman indicated that the documentation submitted for review identifies an eligible diagnosis of mental retardation, as well as the Claimant's diagnosis of Down syndrome. Additionally, the physician who completed Exhibit D-3, DD 2-A-ICF/MR Level of Care Evaluation certified that the Claimant required the level of care and services provided in an "Intermediate Care Facility" for individuals with mental retardation and related conditions.
- 3) The Department contends that the eligibility criteria in the area of functionality has not been met, specifically the Claimant is not demonstrating substantial adaptive deficits in three or more of the six major life areas which require active treatment to meet the level of care criteria.

As part of the Claimant's psychological evaluation, an Adaptive Behavior Assessment System-Residential and Community (ABS) was administered to determine the Claimant's adaptive behavior skills in relation to the functionality criteria of policy. Ms. Workman indicated that in order to meet eligibility criteria, a score of 12 or below is required in the subcategories of the assessment.

In the area of Self-Direction, the Claimant achieved a score of 15 in Independent Functioning and achieved a superior rating.

In regards to mobility, the ABS evaluated the Claimant's Physical Development. The Claimant achieved a score of 12 on this aspect of the evaluation. Ms. Workman testified that additional information in the report does not support a limitation in the area. Specifically, Exhibit D-4 documents that the Claimant, "has adequate gross and fine motor skills. She has no difficulty with mobility and has legible handwriting."

The ABS evaluated the Claimant's Language Development, in which the Claimant achieved a score of 14, which does not constitute an eligible score for assessment purposes.

Ms. Workman testified that the Self-Direction portion of the evaluation refers to an individual's ability to initiate activities and sustain the desired activity. Ms. Workman provided various examples of Self-Direction activities and noted that the Claimant achieved a score of 14 on the ABS, which did not meet eligibility criteria.

Ms. Workman testified that Capacity for Independent Living scores are derived from multiple subcategories of the ABS. The subcategories evaluated on the ABS and the Claimant's associated scores in each category are as follows-domestic activity (14), pre-vocational activity (13), responsibility (13), socialization (12), economic activity (10), and numbers and time (12). The scores of Socialization, Economic Activity and Numbers and Time are all considered

eligible scores, however, Ms. Workman indicated that additional information included in the documentation did not support the presence of deficit in the area of Capacity for Independent Living. Ms. Workman indicated that the documentation describes the Claimant as “social and she likes to be around others.” Additionally, Ms. Workman noted that the documentation indicated that the Claimant was sometimes “shy and dependent.” Ms. Workman testified that this portion of the assessment measures how “socially appropriate” an individual is or if they would frighten someone in the community. Ms. Workman opined that the Claimant did not meet such criteria and stated that the documentation indicates that the Claimant has difficulties in the area of economic activity, but overall the Claimant does not meet the requirements for a deficit in the area of Capacity for Independent Living.

- 4) -----, the Claimant’s representative and sister, testified that the Claimant suffers from mental retardation and she would benefit from a program in which she could learn to function in the community, in order to become employable and self-sufficient. ----- indicated that a second psychological evaluation (Exhibit C-1) was completed after the initial denial and she assumed the evaluation was forwarded to the Department for review. Ms. Workman indicated that the second medical evaluation was not received by the Department and was not evaluated in the determination of the Claimant’s eligibility for the August 2010 denial. Ms. Workman indicated that the Claimant may submit a reapplication for benefits, in which the October 2010 psychological evaluation could be evaluated.

The Department’s Notice of Denial/Termination (Exhibit D-2) affords the Claimant the opportunity to obtain a second medical evaluation. On November 16, 2010, the State Hearing Officer issued a Scheduling Order of the appeal which informs the Claimant that all evidence and exhibits to be presented during the hearing shall be submitted five days prior to the scheduled hearing. The second psychological evaluation was not received by the State Hearing Officer in a timely manner and was not forwarded to the Department prior to the scheduled hearing for an appropriate evaluation. The noted exhibit was entered into the hearing record, but was given no weight in the determination of the appeal. The matter before the State Hearing Officer was the August 30, 2010 denial and the State Hearing Officer cannot evaluate information that was completed after the established denial and not submitted in the consideration of the initial determination of the Claimant’s eligibility for benefits.

- 5) 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 (5) 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:

-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,

-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 and regulations that govern the MR/DD Waiver Program require eligible individuals to have a diagnosis of Mental Retardation or a related condition, which is severe and chronic. Additionally, the individual must present three (3) substantial deficits out of the major life areas. Substantially limited functioning in three (3) or more of the major life areas 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. Substantial deficits must be supported by relevant test scores, as well as narrative descriptions contained in the documentation submitted for review.
- 2) Testimony and evidence presented during the hearing revealed that the Claimant's diagnosis was considered in the evaluation of her eligibility, but she exhibited no substantial deficits in any of the required functionality areas. The documentation provided for review failed to establish three (3) qualifying deficits to meet the requirements set forth by policy. While the Claimant's physical development scores concerning mobility were considered eligible scores, narrative documentation and other medical information indicated that the Claimant does not possess a substantial deficit in the area. While the Claimant's scores in some aspects in the area of Capacity for Independent Living are weak, exploring such area is moot as a deficit in this area would only bring the Claimant's deficits to one (1); therefore, failing to meet the functional requirements of the program.
- 3) The Department was correct in its decision to terminate the Claimant's eligibility for MR/DD Waiver Services.

IX. DECISION:

It is the decision of the State Hearing Officer to uphold the decision of the Department to deny the Claimant's medical eligibility for MR/DD Waiver Services.

X. RIGHT OF APPEAL:

See Attachment

XI. ATTACHMENTS:

The Claimant's Recourse to Hearing Decision

Form IG-BR-29

ENTERED this ____ day of January 2011.

Eric L. Phillips
State Hearing Officer