



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

May 5, 2011

Parents of -----

Dear -----:

Attached is a copy of the Findings of Fact and Conclusions of Law on your hearing held April 25, 2011. Your hearing request was based on the Department of Health and Human Resources' decision to deny your son's 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 failed to establish that your son exhibits 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 your son's application for MR/DD Waiver services.

Sincerely,

Eric 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: 11-BOR-456

**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 April 25, 2011 on a timely appeal, filed December 29, 2010.

It shall be noted that the hearing was originally scheduled to convene on March 24, 2011 and rescheduled at the request of the Department. The hearing was later rescheduled for March 21, 2011, in which the Claimant's representatives failed to appear. The Claimant's representatives provided good cause for failing to appear and the hearing was subsequently rescheduled and convened on April 25, 2011.

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's step-father and representative
Jennifer Eva, Lead Service Support Facilitator-APS Healthcare
Linda Workman, Psychologist Consultant-Bureau for Medical Services (BMS)

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 September 1, 2010
- D-3 DD-2a-ICF/MR Level of Care Evaluation dated July 8, 2010
- D-4 Comprehensive Psychological Evaluation dated July 20, 2010
- D-5 Notice of Denial dated December 20, 2010
- D-6 Letter from [REDACTED] PA-C. dated August 6, 2010
- D-7 Documentation from [REDACTED] Neurodevelopmental Center dated June 14, 2010
- D-8 Gilliam Autism Rating Scale-Second Edition dated June 14, 2010
- D-9 Developmental Profile 3 dated June, 2010
- D-10 West Virginia Birth to Three Developmental Specialist Annual Summary dated October 22, 2010
- D-11 [REDACTED] INC. Occupational Therapy Progress Summary dated October 21, 2010
- D-12 Functional Behavior Assessment dated July 13, 2010

Claimants' Exhibits:

- C-1 Letter from [REDACTED] PA-C. dated December 3, 2010

VII. FINDINGS OF FACT:

- 1) The Claimant, who at the time of application was one and a half years of age, applied for benefits and services associated with the Medicaid MR/DD Waiver program.
- 2) On September 1, 2010, the Department issued the Claimant's guardians Exhibit D-2, Notice of Denial/Termination. This notice is an initial denial notice in response to the Claimant's application for MR/DD Waiver services. 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-learning, mobility, self-direction, and capacity for independent living.

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

- 3) The Claimant's guardians submitted additional documentation to the Department for reconsideration of the initial denial. On December 20, 2010, the Department issued the Claimant's guardians Exhibit D-5, Notice of Denial/Termination which 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, learning, mobility, self-direction, and capacity for independent living.

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

- 4) There are four components to establishing medical eligibility for the MRDD Waiver Program. These areas include; diagnostic, functionality, level of care and the need for active treatment. Ms. Linda Workman, Bureau for Medical Services Psychologist Consultant offered testimony concerning her review of the Claimant's application for MR/DD services. Exhibit D-3, DD-2a ICF/MR Level of Care Evaluation documents that the Claimant was 1.5 years of age at the time of the evaluation and lists "pervasive developmental delay" as the Claimant's emotional or psychiatric condition. Ms. Workman indicated that the Claimant's diagnosis is considered a potentially eligible diagnosis for program purposes, but there is no indication in the documentation submitted for review concerning the severity of the diagnosis. The physician completing the exhibit recommends that the Claimant requires the level of care and services provided in an "Intermediate Care Facility" for individuals with mental retardation and related conditions.

The Department contends that the Claimant does not demonstrate functional deficits in three or more of the major life areas. Specifically, the Claimant did not achieve the appropriate test scores or exhibit narrative documentation to determine eligibility for the MR/DD Waiver Program. The initial denial documents that functional deficits were awarded in the area of self-care and receptive or expressive language. After review of the narrative descriptions outlined in the additional documentation, the Department determined that a functional deficit could only be awarded in the area of receptive or expressive language.

- 5) Ms. Workman reviewed all documentation submitted for the determination of the Claimant's eligibility and indicated that the examiner who completed Exhibit D-4, Comprehensive Psychological Evaluation dated July 13, 2010 was unable to administer an intellectual assessment of the Claimant. Exhibit D-4 documents in pertinent part:

Due to his young age and lack of adequate communication skills, this examiner did not attempt to administer standardized testing instruments to ----- . Given his diagnosis and lowered adaptive behavior scores, it is this examiner's opinion that he likely functions at some level of mental retardation; however, the severity is not yet determined.

As part of the evaluation, the Claimant, through information provided by his caregivers, was administered an Adaptive Behavior Assessment System-Second Edition (ABS-II), using non-MR norms. Ms. Workman stated that information provided by the caregivers, concerning the Claimant's abilities, was related into a standard score and compared against a random sample of other children the Claimant's age, with various or no diagnoses. Ms. Workman testified that scores of one or two on the standard score portion of the test are considered eligible scores and meet the functionality criteria.

Ms. Workman testified that the ABS-II yielded an eligible score of 1 in the area of self-care, meeting the functionality criteria. However, additional documentation submitted by the Claimant's caregivers, specifically Exhibit D-9, Developmental Profile 3 or DP-3 completed in June, 2010, did not support the presence of a substantial adaptive deficit in the area of self-care. Ms. Workman testified that eligible scores on the adaptive behavior section, which relates to self-care, of Exhibit D-9, are scores of 55 and below or three deviations below the mean. The Claimant achieved a score of 84 on the adaptive behavior section of the test and such score was considered in the low average range. Narrative documentation from Exhibit D-11, Functional Therapy Solutions, INC. Occupational Therapy Progress Summary completed October 21, 2010 indicates that the Claimant's skill set is age appropriate and he is not at risk for developmental delay. This exhibit documents in pertinent part:

----- mainly uses a spout sippy cup to drink from. He also gets a water bottle before bed time. ----- is able to drink from a straw cup. ----- prefers to finger feed. He is able to use a fork to stab and eat some food, but is not using a spoon at this time. ----- eats a variety of foods from all food groups. He does not like to sit for meal time. ----- is able to remove his own socks and shoes. He moves his arms and legs appropriately to help with dressing and undressing. He tolerates all bathing, grooming, diaper changing, and teeth brushing.

Ms. Workman testified that the documentation available for review did not indicate that the Claimant had a substantial delay in mobility. Exhibit D-11 documents that the Claimant's gross and fine motor skills were assessed as age appropriate and the Claimant is able to walk climb, jump, and walk upstairs independently with the use of a stair rail.

Ms. Workman purported that the life area of learning relates to functional academics, which the Claimant is not of the age to have developed appropriately in the area. As part of the ABS-II, a pre-academic domain (functional academics) was evaluated and the Claimant achieved a score of 5 (Borderline), which did not represent an eligible score of 2 or below. In the area of Self-Direction, the Claimant achieved a standard score of 5 (Borderline) which fails to indicate an eligible score.

Ms. Workman testified that the domain of capacity of independent living consists of multiple sub-components. The Claimant achieved an eligible score of 1, in the area of health and safety; however, the Claimant scores of 3 in home living, 4 in social skills, and 5 in community use did not represent substantial delay in the totality of the components.

- 6) -----, the Claimant's stepfather and representative provided testimony concerning the Claimant's self-care indicating that the Claimant is unable to put on his shoes, socks, and dress himself. Further testimony concerning the life area indicated that the Claimant relies on his parents for most self-help and that he does not like to be bathed, requires assistance when brushing his teeth, and requires assistance in washing his hands and face. ----- purported that the Claimant has no self-direction skills, does not listen, does not have eye contact, will not respond to directions, and throws temper tantrums. Testimony indicated that the Claimant has no fear, will throw himself when upset, bangs his head with no response to pain, and attempts to eat inedible objects. ----- indicated that household items must be removed from the child's reach in order to avoid injury and the Claimant requires a strict outline of daily activities. In regards to mobility, ----- testified that the Claimant is clumsy, walks on his "tippy toes" when excited, and has balance and coordination difficulties. ----- stated that the Claimant's physicians have indicated that the Claimant's condition will not improve and most recently the Claimant has isolated himself from playmates and only interacts with his step-sister and step-father.

----- testified that the Claimant suffers from seizures and provided Exhibit C-1, to document that the Claimant has a "40% pervasive developmental delay, which is slowly progressing with birth to three [sic]". ----- stated that the Claimant's scores were low and he is in need of the program's services and will require training and support. ----- stated that the Claimant is able to learn, through repetition, but he will lose what he has learned when he experiences a seizure.

- 7) 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 or equal to or below the seventy fifth percentile when derived from 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) Policy states that the presence of substantial adaptive deficits must be supported not only by the relevant test scores, but by narrative descriptions contained in the documentation submitted for review. This policy is interpreted to mean that an eligible score, on administered tests, must first be identified and then supported by the narrative documentation. Based on a review of the Claimant's evaluations and testimony provided during the hearing, the Claimant met the eligibility standard in the area of receptive or expressive language. Testimony revealed that

scores of 2 or below, on the administered Adaptive Behavior Test (ABS-II), are considered eligible scores and meet the functionality criteria for the program. Based on a review of the test scores and documentation, the Claimant failed to meet the eligibility standard in the areas of mobility, learning, self-direction, and capacity for independent living. While the Claimant achieved an eligible score in the area of health and safety in the consideration of a deficit for capacity for independent living, scores in other assessed domains related to the area including home living and community use, failed to meet the eligibility standard as it relates to the functionality criteria. While the Claimant achieved an eligible score in the area of self-care, the totality of additional narrative documentation failed to support a finding that the Claimant is substantially limited in the area of self-care as evidenced by the October 2010 Occupational Therapy report. Therefore, the Claimant does not meet functionality criteria as set forth by governing policy and medical eligibility for participation in the Medicaid MR/DD Waiver Program cannot be established.

IX. DECISION:

It is the decision of the State Hearing Officer to uphold the action of the Department to terminate the Claimant's benefits and services under the Medicaid 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 May, 2011.

Eric L. Phillips
State Hearing Officer