



**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**

September 8, 2011

RE: -----

Dear -----:

Attached is a copy of the Findings of Fact and Conclusions of Law on your client's hearing held July 29, 2011. The hearing request was based on the Department of Health and Human Resources' decision to deny your client'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 client's hearing failed to establish that your client's diagnosis of mental retardation manifested prior to age 22, during developmental period.

It is the decision of the State Hearing Officer to Uphold the action of the Department to deny your client's application for benefits and services associated with the MR/DD Waiver program.

Sincerely,

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

cc: Erika Young, Chairman, Board of Review
Michael Bevers, Assistant Attorney General

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

IN RE: -----,

Claimant,

v.

ACTION NO.: 11-BOR-862

**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 a timely appeal, filed January 25, 2011.

This hearing was initially held on June 8, 2011 and reconvened and concluded on July 29, 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 attorney
-----, Claimant
-----, Claimant's sister
-----Claimant's witness
-----, Claimant's witness

-----, Claimant's witness

-----, Claimant's witness

Michael Bevers, Assistance Attorney General-Bureau for Medical Services (BMS)

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 Information from [REDACTED] dated August 1966 through June 1980
- D-3 Individual Program Plan dated November 14, 2000
- D-4 Social History dated October 16, 2001
- D-5 DD-2A Annual Medical Evaluation dated December 11, 2001
- D-6 EastRidge Health Services Closing Summary dated September 16, 2004
- D-7 DD-3 Psychological Evaluation dated March 19, 2010 and April 9, 2010
- D-8a DD-2A Annual Medical Evaluation dated March 19, 2010
- D-8b DD-2A Annual Medical Evaluation dated September 7, 2010
- D-8c DD-2A Annual Medical Evaluation dated April 9, 2010 signed by physician
- D-9a Notice of Denial issued June 10, 2010
- D-9b Notice of Denial issued November 4, 2010

Claimants' Exhibits:

- C-1 Letter from [REDACTED] M.A.

VII. FINDINGS OF FACT:

- 1) The Claimant, age 51, who has been hearing impaired since birth and more recently diagnosed with moderate mental retardation, applied for benefits and services associated with the MR/DD Waiver program.
- 2) In response to the Claimant's application for the MR/DD Waiver program, the Department issued the Claimant Exhibit D-9a, Notice of Denial on June 10, 2010. This exhibit documents in pertinent part:

Your Waiver Application is hereby denied.

Your application was denied because: The physician has not offered an eligible diagnosis on the DD-2A. The certification for ICF/MR level of care was not made by a physician (MD&OD) on the DD-2A, the application packet documentation which supports the presence of MR with substantial adaptive deficits within the developmental period. [sic]

This document outlines the Claimant's right to a second medical exam at the Department's expense, if the decision was based on medical reasons.

- 3) The documentation submitted with the Claimant's initial application for the MR/DD Waiver program, specifically the DD-2A (Exhibit D-8a), failed to document an eligible diagnosis, an eligibility requirement for the program. On September 7, 2010, the Claimant resubmitted an additional DD-2A, (Exhibit D-8b), which was completed by a Family Nurse Practitioner, and documents a diagnosis of moderate mental retardation. During the hearing process, the validity of the resubmitted DD-2A (Exhibit D-8b), was questioned because the documentation was not completed by a licensed physician. Testimony revealed that a licensed physician is required to complete and sign corresponding documents submitted with an initial application for benefits and services associated with the MR/DD Waiver program. However, the Claimant, through her attorney, produced a duplicate copy of the September 7, 2010 DD-2A, which was signed by a licensed physician that verified the Claimant's diagnosis (Exhibit D-8c).
- 4) In response to the resubmitted DD-2A dated September 7, 2010, the Department issued a subsequent Notice of Denial to the Claimant on November 4, 2010 (Exhibit D-9b). This exhibit documents in pertinent part:

Your Waiver Application is hereby denied.

Your application was denied/terminated because: Documentation submitted to date does not support the presence of mental retardation with associated substantial adaptive deficits to the degree which typically results in the need for an ICF/MR level of care within the developmental period.

The issuance of the additional Notice of Denial outlined in Exhibit D-9b, renders the initial Notice of Denial moot. Therefore, the issue before the Board of Review is whether or not the Claimant exhibited a diagnosis of mental retardation or a related condition which manifested during the developmental period, more specifically, prior to twenty-two years of age.

- 5) 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 services. Ms. Workman reviewed the submitted DD-2As (Exhibit D-8a and Exhibit D-8b), which documents the Claimant's diagnoses of mild mental retardation. Additionally, these exhibits document the Claimant's requirement for 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's application for the MR/DD Waiver program failed to establish the presence of a severe and chronic disability which manifested within the developmental period.

- 6) The Claimant attended the [REDACTED] in [REDACTED] West Virginia from August, 1966 through June, 1980. Exhibit D-2, Information from the [REDACTED] document that in April, 1966 a Pre-Admission Medical History examination was completed with the Claimant. The examining physician noted the Claimant's hearing loss in this portion of the exhibit and noted that the Claimant was, "slow to develop. Not able to care for self". Additionally, the Claimant's parents answered a multitude of questions concerning her development prior to her admission to the facility. Specifically, the exhibit documents that the Claimant sometimes obeyed commands, could walk alone at 12 months of age, dressed herself without help at times, used the bathroom independently, did not wet the bed or soil her clothes during the daytime, was in normal health, size and weight for her age, and had normal use of her arms, hands, legs and feet, and was of normal mentality with no nervous system derangement. Testimony indicated that these items did not support a finding of mental retardation during the developmental period and there was no indication in the documentation that the Claimant completed a psychological evaluation prior to her admission or during her tenure at the facility.

The Claimant was administered a battery of tests during her tenure at the [REDACTED] from April, 1969 through May, 1980. Upon graduation from the facility, the Claimant was administered a Stanford Achievement Test in which she achieved a level of 2.4 in reading-average, 1.0 in word meaning and 2.8 in arithmetic.

- 7) In March, 2010 and April, 2010, the Claimant completed Exhibit D-7, DD-3 Psychological Evaluation with -----Supervised Psychologist. As part of the evaluation, the Claimant was administered the Kaufman Brief Intelligence Test which yielded results of a nonverbal IQ score of 40. Ms. Workman indicated that this achieved score does not support the fact that the Claimant was diagnosed with mental retardation during the developmental period. The psychological evaluation documents that the Claimant was previously administered an Adaptive Behavior Scale Second Edition (ABS-2) in December, 2001 and the test was re-administered in April, 2010. The exhibit demonstrates that the Claimant has regressed in her abilities in adaptive behavior since 2001. At the time of the evaluation, the Claimant was diagnosed with moderate mental retardation and -----documented Placement Recommendations for the Claimant in the exhibit as:

1. ----- has a diagnosis of moderate mental retardation. Her diagnosis of mental retardation was diagnosed prior to age 22. This condition is permanent. She shows substantial limitations across all areas of

habilitative functioning. She requires a need for ICF/MR level of care and training, which she can receive through the Title XIX Waiver program in the home environment of a family member or through an ISS placement. ----- is likely to show further regression and deterioration in health if she continues to reside in a non-supported independent living environment.

2. I recommend that ----- work off of a structured day habilitation schedule. ----- would likely benefit from a community based day program where her community/social skills can be thoroughly assessed. This may also be done in conjunction with a center based day program where the focus would be the acquisition of prevocational skills. This type of program will offer her opportunities to socialize with peers in a work environment.

3. I recommend that ----- receive targeted case management services.

Ms. Workman indicated that there was no documentation presented for review that supported the finding in the exhibit that the Claimant was diagnosed with mental retardation.

-----Supervised Psychologist, testified to the evaluations completed and outlined in Exhibit D-7 -----stated based on the information obtained during the evaluation, he believed that the overall assessment of Claimant revealed functionality in the moderate range of mental retardation. ----indicated that he reviewed the achievement testing from the (Exhibit D-2), but did not review any psychological testing that was completed during the Claimant's timeframe at the facility. -----confirmed that there was no record in the information from that supported the presence of mental retardation. ----- reviewed the academic scores listed in Exhibit D-2 and indicated that the Claimant had some learning difficulties.

8) The Department presented Exhibit D-3, Individual Program Plan for from November 14, 2000 which documents the Claimant's psychological strengths and her need for a psychological evaluation every three years. Exhibit D-5, DD-2A Annual Medical Evaluation dated December 11, 2001, documents that the Claimant was approximately 40 years of age with no neurological conditions, other than hearing and speech. The physician did not document a diagnosis of mental retardation or any other mental condition in the evaluation. Exhibit D-6, Health Systems Closing Summary dated September 16, 2004 documents that the Claimant received treatment plans, targeted case management and job coaching through shelter workshop. The Claimant's services were closed on September 16, 2004 and Ms. Workman opined that this action was no indicative of an individual who requires an ICF/MR level of care.

9) -----, -----, and -----were all employed at the during the Claimant's tenure at the facility. Testimony indicated that none of the individuals were aware of any psychological testing that had been administered on the Claimant during her tenure at the facility. Testimony indicated that the Claimant was a "slow learner" who required additional direction, supervision, guidance, and participated in adjustment classes, which were considered for students who were mentally challenged.

- 10) -----, the Claimant's sister indicated that her sister had communication barriers when she was a child and was dependent on her mother until she developed. -----testified that the Claimant met her husband, who has since passed away, at the [REDACTED] ----- indicated that the Claimant's husband provided care to the Claimant and that the Claimant is dependent on others for assistance and care especially in budgeting, money management and self-care.
- 11) Representatives for the Claimant contend that the Claimant has been diagnosed with mental retardation as documented in the psychological evaluation (Exhibit D-7), in which the Claimant achieved a non-verbal IQ score of 40, which is in the moderate range of mental retardation. Testimony and documentation indicated that the Claimant achieved low academic scores during her tenure at the [REDACTED] The Claimant's representatives contend that the Claimant's mental retardation and disabilities were evident to family members and employees of the [REDACTED] during the Claimant's childhood. The Claimant's representatives contend that the Claimant is substantially limited in three or more of the functional areas as outlined by departmental policy, specifically language, self-care, self-direction, learning, and capacity for independent living and requires an ICF/MR level of care.
- 12) 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 that was manifested prior to the age of 22, and is likely to continue indefinitely. 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) The matter before the Board of Review is whether or not the Claimant exhibited a diagnosis of mental retardation that was evident and manifested during the developmental period. According to policy, this developmental period is interpreted to mean prior to age 22. While the Claimant presented an eligible diagnosis of moderate mental retardation in completed psychological evaluations after the developmental period, there was no information to support that such a diagnosis was manifested and present during the required developmental period. Evidence and testimony revealed that the Claimant achieved low achievement scores during the development period and required additional guidance and support with participation in alternative schooling. However, there was no evidence to support that any psychological evaluations had been completed and the Claimant presented an eligible diagnosis during the developmental period as required by policy.
- 3) Based on documentation presented for review, there was no evidence to support a manifested diagnosis of mental retardation or a related condition during the developmental period. Therefore, the Department was correct in its decision to deny the Claimant's application for benefits and services associated with the MR/DD Waiver program.

IX. DECISION:

It is the decision of the State Hearing Officer to uphold the decision of the Department to deny the Claimant's application for benefits and services associated with 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.

Eric L. Phillips
State Hearing Officer