



State of West Virginia
DEPARTMENT OF HEALTH AND HUMAN RESOURCES
Office of Inspector General
Board of Review
4190 Washington Street, West
Charleston, WV 25313

Earl Ray Tomblin
Governor

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

June 8, 2011

-----for

Dear -----:

Attached is a copy of the findings of fact and conclusions of law on your hearing held June 2, 2011. Your hearing request was based on the Department of Health and Human Resources' action to deny your son's 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. The Title XIX MR/DD Home & Community-Based Waiver Program policy provides that 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. (West Virginia Medicaid Regulations, Chapter 513 – Covered Services, Limitations, and Exclusions, For MR/DD Waiver Services).

Information submitted at your hearing fails to demonstrate that you meet the medical criteria necessary to establish your son's medical eligibility for participation in the MR/DD Waiver Program. Although your son has a potentially eligible related developmental condition of Pervasive Developmental Disorder, Not Otherwise Specified (PDD-NOS), the evidence does not support that this diagnosis is severe and chronic as required by policy.

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,

Cheryl Henson
State Hearing Officer
Member, State Board of Review

cc: Chairman, Board of Review
Jennifer Eva, APS Health Care

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

IN RE: -----,

Claimant,

v.

ACTION NO.: 11-BOR-868

**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 was convened on June 2, 2011 on a timely appeal filed April 4, 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 father/representative
Jennifer Eva, Department representative
Linda Workman, Department's witness

Presiding at the hearing was Cheryl Henson, 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 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.

VI. LISTING OF DOCUMENTARY EVIDENCE ADMITTED

Department's Exhibits:

- D-1 West Virginia Medicaid Regulations, Chapter 513.3 through 513.6
- D-2 Notice of Denial/Termination dated November 30, 2010
- D-3 West Virginia Department of Health and Human Resources ICF/MR Level of Care Evaluation dated September 21, 2010
- D-4 [REDACTED] Inc., Comprehensive Psychological Evaluation DD-3 dated May 3, 2010 and May 20, 2010, Updated October 27, 2010
- D-5 Notice of Denial/Termination dated January 25, 2011
- D-6 Report of Psychological Evaluation by [REDACTED] dated December 3, 2010
- D-7 Psycho educational Report by [REDACTED] Ph.D., dated February 29, 1992

Claimant's Exhibits:

- C-1 Circuit Court of [REDACTED] County, West Virginia, Civil Case Information Statement Guardianship/Conservator dated April 2010
- C-2 Order of Appointment of -----and -----as Co-Guardians for -----, Protected Person dated May 2010

VII. FINDINGS OF FACT:

- (1) In response to an application for benefits and services through the Medicaid MR/DD Waiver Program, on or about January 25, 2011 the Claimant was notified via a Notice of Denial/Termination (D-5) that Waiver services were being denied. This notice states, in

pertinent part:

Your Waiver application is hereby denied.

Your application was denied/terminated because:

Documentation has not been submitted which supports the presence of an eligible diagnosis within the early developmental period. In fact, Pervasive Developmental Disorder, NOS [Not Otherwise Specified] was not found among the array of diagnostic considerations offered for -----in previously conducted evaluations. It is unlikely that this diagnosis would have been overlooked if his condition were severe as is required by the eligibility criteria. Thus, diagnostic eligibility cannot be established.

- 2) West Virginia Medicaid Regulations, Chapter 513, – Covered Services, Limitations, and Exclusions, For MR/DD Waiver Services, effective 11/1/07 and revised January 2, 2008, 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).

- 4) The particular area in dispute for this hearing involves whether the Claimant has a diagnosis of mental retardation and/or a related developmental condition which constitutes a severe and chronic disability with concurrent substantial deficits.

The Department contends that, although the Claimant was determined by a licensed Psychologist on October 27, 2010, at the approximate age of eighteen (18) years, to have a potentially eligible diagnosis of Pervasive Developmental Disorder, Not Otherwise Specified (PDD-NOS), the evidence does not support that this diagnosis is severe and chronic in nature with substantial deficits, which is necessary in order to meet the diagnostic criteria in policy.

The Claimant contends that his diagnosis of PDD-NOS meets the eligibility requirements for the Title XIX MR/DD Waiver Program to be determined a qualifying diagnosis.

- 5) The Department's witness, Linda Workman, is a licensed psychologist, as well as a licensed school psychologist, in the State of West Virginia. She testified that she conducts eligibility determinations for the Department's Title XIX MR/DD Waiver program. She testified that she reviewed the eligibility packet submitted on behalf of the Claimant and found that he has a potentially eligible diagnosis of PDD-NOS; however, she added that PDD-NOS is considered to be a "mild" diagnosis, and that most individuals who have this diagnosis do not qualify for the program unless the condition is determined to be severe and chronic. She stated that prior to the final denial notice dated January 25, 2011 the Department sent the Claimant a separate denial notice on or about November 30, 2010 (D-2) in an attempt to obtain additional supportive documentation of the Claimant's PDD-NOS diagnosis. The letter included the following pertinent information:

There are diagnostic inconsistencies within the documents submitted for

review. The physician has not provided a definitive eligible diagnosis (ADHD is not an eligible diagnosis and Developmental Delays is not a definitive diagnosis) and there is no history of supportive documentation for the Axis I diagnosis offered by the psychologist. Please submit documentation which supports the presence of PDD, NOS [Pervasive Developmental Disorder, Not Otherwise Specified] within the early childhood period as this is a diagnosis which is not typically rendered for the first time at the age of 18.

Ms. Workman stated that, in reviewing the documents utilized in making her determination, she is confining her testimony to focus mainly on the diagnostic criteria since she determined this to be the area where the Claimant was found ineligible. She explained that, "the way the eligibility criteria works is almost like dominos; you have to have the eligible diagnosis before you can really proceed to the next step which is whether or not there are functional deficits; before you can proceed to the next step as to whether someone requires active treatment or whether they require the level of care." She went on to say that, "first in place, there must be the presence of an eligible diagnosis; and so, that is why the substantial delays were not addressed on the notice of denial, because the policy requires that if there are adaptive deficits, they have to be related to the eligible diagnosis; and since, so far, we really don't have an eligible diagnosis with -----, those deficits were not considered for this determination."

Ms. Workman stated in making her determination she reviewed the last page of the DD-2 A (D-3) and found that the physician who completed the report indicated that the Claimant is continent, alert, ambulatory, and that he feeds himself and is independent with self care and personal hygiene. She added that none of these findings are consistent with an individual who would require an institutional level of care. Additionally, the physician recommended that the Claimant receive occupational and physical therapy, and certified the need for ICF/MR level of care. Ms. Workman clarified that the physician's certification of need is not enough, by itself, to support medical eligibility for the program.

Ms. Workman stated that in the diagnostic section of the report, in the section marked "Axis I: (List all Emotional and/or Psychiatric Conditions)," the physician listed that the Claimant is diagnosed with "Developmental Delays." Ms. Workman stated that Developmental Delays is not a diagnosis, but a description of what someone may have. She added that in the section marked "Axis II: (List all Cognitive, Developmental Conditions and personality disorders)," the physician listed "ADD," which is Attention Deficit Disorder. Other diagnoses listed on the report speak to medical conditions unrelated to mental retardation. She stated that she found no eligible diagnosis offered on the DD-2A by the physician, and added that policy requires that the physician offer an eligible diagnosis.

Ms. Workman testified that she next reviewed the Psychological Evaluation(D-4), also referred to as the DD-3, dated May 3, 2010 and May 20, 2010, which was updated on

October 27, 2010. She stated that although this document lists a diagnosis of Pervasive Developmental Disorder, Not Otherwise Specified (PDD-NOS), the psychologist “doesn’t lay any ground work for this diagnosis.” She elaborated by saying that because the diagnosis is a developmental condition and because the report notes that the Claimant was not identified to need special education until the third (3rd) grade, it suggests that if the diagnosis was present and severe it would have been diagnosed earlier by either the school system or some of the earlier physicians. She further stated that it is rare for someone eligible for ICF/MR level of care to not receive services until the third (3rd) grade. She offered this as her reasoning for requesting that the Claimant provide some of those earlier documents in an attempt to substantiate that the offered diagnosis of PDD-NOS has been present and is severe and chronic. She stated that this disorder is a “childhood disorder” that is evident early on in someone’s development.

Ms. Workman testified that, as a result of the November 30, 2010 letter to the Claimant (D-2), she received additional documentation for consideration. She stated that she was looking for evidence that the diagnosis was present “early on” and she did not find it in the documentation. The additional documentation contained a Psychological Evaluation (D-6) which was completed on December 3, 2010 by [REDACTED] M.A., M.A., Ed.S, and Clinical Psychologist. She stated that this report documents that in 2003 the Claimant’s father was told by another psychologist that the Claimant was “on the cusp of Aspergers” and that it couldn’t be ruled out. Ms. Workman stated that Aspergers is also of the Autism spectrum, and is specifically not an eligible diagnosis for the Waiver program because it is not associated with mental retardation and typically does not present with adaptive deficits in areas like self care. She added that this narrative supports that the Claimant’s condition, whatever it may be, is not severe. In the report, the psychologist notes that the PDD-NOS diagnosis is based on the Claimant’s pervasive impairment in the development of reciprocal social interaction which is of insufficient degree to warrant a more specific diagnosis. Ms. Workman noted that the report also documents that the Claimant’s social functioning during the evaluation was within normal limits, and the entirety of the report indicated to her that the Claimant’s condition is not severe.

Ms. Workman stated that she also reviewed a Psychoeducational Report completed on March 9, 2004 and March 12, 2004, and concluded on March 24, 2004 by [REDACTED] Ph.D., a Licensed Psychologist. She stated that this document showed her that the Claimant’s early developmental milestones were “on target,” and that his developmental speech milestones were somewhat delayed. The Claimant’s gross motor coordination was described as good, and his fine motor coordination was described as “only fair.” The Claimant is also noted as having speech articulation difficulties and having received services through speech and language services by means of an Individualized Education Program (IEP) through the fifth (5th) grade. She added that this documentation suggests that the IEP for the Claimant was in place solely for speech therapy; however, she noted that the IEP was not submitted for review. She added that speech articulation difficulties, unless they render an individual unintelligible, are not considered to be a substantial delay in terms of language. Further, she stated that for someone in ICF/MR level of care, an individual would be unable

to make their wants and needs known in any way. Ms. Workman stated that the report is (D-7) a very thorough school evaluation for the Claimant at age twelve (12), and there is no indication in the document that suggests the Claimant has any diagnosis of the autism spectrum. The psychologist does note that he believes the Claimant, at the age of twelve (12), has a language based learning disability.

Ms. Workman completed her testimony by saying that after having carefully reviewed all the documents submitted for review, she was unable to find evidence that the Claimant meets the medical criteria for the Title XIX MR/DD Waiver program. She further stated that the documentation that was submitted for review, although it offers a potentially eligible diagnosis of PDD/NOS, does not support that the offered diagnosis is severe.

- 6) -----is the Claimant's father and representative. He testified that he believes the Department did not properly evaluate his son's medical eligibility for the MR/DD program. He testified that two (2) of the three (3) psychologists who submitted reports indicated that the Claimant has PDD/NOS in some form. He added that the Claimant scored "really low" in the areas of math, reading, and written expression during testing. He stated that he home schooled his son and, "he never made it out of a fourth (4th) grade math book. He added that his son is very childlike in his behavior, playing with stuffed animals and watching children's television programs. He stated that the Claimant has the mind of an eight (8) year old, with learning disabilities. He added that the Claimant "falls" in the high range of mental retardation and that he will never live by himself or have a life away from his parents because of his problems.

The Claimant submitted documents which were previously submitted to the [REDACTED] County, West Virginia Circuit Court in order to obtain guardianship of the Claimant (C-1 and C-2). These documents were not submitted to the Department for consideration in determining the Claimant's medical eligibility for the Title XIX MR/DD Waiver program; however, they will be given some weight in support of the Claimant's position regarding the severity of his condition. The documents contain a medical evaluation report (C-1) completed by the Claimant's physician, in which the physician states that the Claimant is mentally challenged and unable to care for or provide for himself. She states that the Claimant has been in this condition since birth with no known diagnosis, and that he has the mentality of an eight (8) year old child. She adds that he can walk and talk, but is limited mentally, having difficulty processing things, and he does not have good decision making skills.

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 nature.

- 2) The Claimant presents a potentially eligible diagnosis of Pervasive Development Disorder, Not Otherwise Specified (PDD/NOS); however, the clinical evidence fails to show the Claimant is demonstrating this condition in a severe form.
- 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.

IX. DECISION:

It is the decision of the State Hearing Officer to **uphold** the action of the Department in terminating the Claimant's application for continued 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 8th Day of June, 2011.

**Cheryl Henson
State Hearing Officer**