STATE OF WEST VIRGINIA
DEPARTMENT OF HEALTH AND HUMAN RESOURCES
OFFICE OF INSPECTOR GENERAL

Bill J. Crouch
Cabinet Secretary

BOARD OF REVIEW
Raleigh County District
407 Neville Street
Beckley, WV 25801

Jolynn Marra
Interim Inspector General

May 29, 2020

[redacted]

RE: [redacted] v. WV DHHR
ACTION NO.: 20-BOR-1372

Dear Ms. [redacted]

Enclosed is a copy of the decision resulting from the hearing held in the above-referenced matter.

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.

You will find attached an explanation of possible actions you may take if you disagree with the decision reached in this matter.

Sincerely,

Kristi Logan
State Hearing Officer
Member, State Board of Review

Encl: Appellant's Recourse to Hearing Decision
Form IG-BR-29

cc: Bureau of Senior Services

WEST VIRGINIA DEPARTMENT OF HEALTH AND HUMAN RESOURCES
BOARD OF REVIEW

[redacted],

Appellant,

v. **Action Number: 20-BOR-1372**

WEST VIRGINIA DEPARTMENT OF HEALTH AND HUMAN RESOURCES,

Respondent.

DECISION OF STATE HEARING OFFICER

INTRODUCTION

This is the decision of the State Hearing Officer resulting from a fair hearing for [redacted]. This hearing was held in accordance with the provisions found in Chapter 700 of the West Virginia Department of Health and Human Resources' Common Chapters Manual. This fair hearing was convened on May 27, 2020, on an appeal filed March 4, 2020.

The matter before the Hearing Officer arises from the February 26, 2020, decision by the Respondent to deny Level 2 services under the Personal Care Program.

At the hearing, the Respondent appeared by Tamra Grueser, RN with the Bureau of Senior Services. Appearing as a witness for the Respondent was Rebecca Monroe, RN with KEPRO. The Appellant appeared *pro se*. All witnesses were sworn and the following documents were admitted into evidence.

Department's Exhibits:

D-1 Bureau for Medical Services Provider Manual §517.13.5
D-2 Personal Care Pre-Admission Screening (PAS) dated February 20, 2020
D-3 Notice of Decision dated February 26, 2020
D-4 Medication List
D-5 Personal Care PAS dated January 9, 2019
D-6 Personal Care PAS Summary dated January 9, 2019
D-7 Personal Care PAS Summary dated January 31, 2018 and February 27, 2017
D-8 Plan of Care dated March 6, 2020

Appellant's Exhibits:

None

After a review of the record, including testimony, exhibits, and stipulations admitted into evidence at the hearing, and after assessing the credibility of all witnesses and weighing the evidence in consideration of the same, the Hearing Officer sets forth the following Findings of Fact.

FINDINGS OF FACT

1) The Appellant was a recipient of Level 2 services under the Personal Care Program.

2) The Appellant underwent an annual medical assessment to determine continued eligibility for the Personal Care Program.

3) The Pre-Admission Screening (PAS) completed for the Appellant on February 20, 2020 determined that the Appellant met the medical criteria for Personal Care Services (Exhibit D-2).

4) The Appellant was awarded eleven (11) service level points as derived from the PAS, which equates to Level 1 services (Exhibit D-2).

5) The Respondent notified the Appellant on February 26, 2020 that she was medically eligible for the Personal Care Services but that her request for Level 2 services had been denied (Exhibit D-3).

6) The Appellant requested a hearing regarding the denial of Level 2 services on March 4, 2020. The Appellant continues to receive Level 2 services pending a hearing decision.

APPLICABLE POLICY

Bureau for Medical Services Provider Manual §517.13.5 states an individual must have three deficits as described on the PAS form to qualify medically for the Personal Care Program. These deficits are derived from a combination of the following assessment elements on the PAS.

Section		Observed Level
#26	Functional abilities observed in the home	
a)	Eating	Level 2 or higher (physical assistance or more)
b)	Bathing	Level 2 or higher (physical assistance or more)
c)	Dressing	Level 2 or higher (physical assistance or more)
d)	Grooming	Level 2 or higher (physical assistance or more)
e)	Continence, Bowel,	Level 3 or higher (must be incontinent)
f)	Bladder	

g)	Orientation	Level 3 or higher (totally disoriented or comatose)
h)	Transferring	Level 3 or higher (one-person or two-person assistance in the home)
i)	Walking	Level 3 or higher (one-person or two-person assistance in the home)
j)	Wheeling	Level 3 or higher (must be Level 3 or Level 4 on walking to use Level 3 or 4 for wheeling. Do not count outside of the home)

An individual may also qualify for Personal Care Services if he or she has two functional deficits identified as listed above (items refer to PAS) and any one or more of the following conditions indicated on the PAS:

Section	Observed Level
#24	Decubitus, Stage 3 or 4
#25	In the event of an emergency, the individual is c) mentally unable or d) physically unable to vacate a building. a) independently and b) with supervision are not considered deficits
#27	Individual has skilled needs in one or more of these areas: g) suctioning, h) tracheostomy, i) ventilator, k) parenteral fluids, l) sterile dressings or m) irrigations
#28	Individual is not capable of administering his/her own medications

Bureau for Medical Services Provider Manual §517.13.6 states there are two Service Levels for Personal Care services. Points will be determined as follows based on the following sections of the PAS:

Section	Description of Points
#24	Decubitus – 1 point
#25	1 point for **b**, **c**, or **d** (vacating in an emergency)
#26	Functional abilities: Level 1 – 0 points Level 2 – 1 point for each item **a** through **i** Level 3 – 2 points for each item **a** through **m**, **i** (walking) must be Level 3 or Level 4 in order to get points for **j** (wheeling) Level 4 – 1 point for **a**, 1 point for **e**, 1 point for **f**, 2 points for **g** through **m**
#27	Professional and Technical Care Needs – 1 point for continuous oxygen
#28	Medication Administration – 1 point for **b** or **c**

Bureau for Medical Services Provider Manual §517.13.7 lists the Service Level limits as reflected on the PAS are:

Service Level	Points Required	Range of Hours per Month
1	Less than or equal to 13	Up to 60
2	14 – 30	61 – 210

The Families First Coronavirus Response Act (FFCRA), Public Law No. 116-127 enacted on March 18, 2020, provides a temporary increase in states' Medicaid Federal Medical Assistance Percentage (FMAP) of 6.2 percentage points for expenditures that are ordinarily paid at the state's

regular FMAP rate. This FMAP increase applies until the end of the quarter when the coronavirus public health emergency declaration ends. To be eligible for the increased FMAP states are not permitted to disenroll anyone enrolled in Medicaid as of March 18, 2020, or who enrolls during the period of the public health emergency, unless the person voluntarily requests their coverage be terminated or the person is no longer a state resident. This requirement applies regardless of any changes in circumstances that would otherwise have resulted in coverage termination. States can move an individual to an eligibility group with increased benefits during the national emergency if they experience a change in circumstances. However, the state may not decrease an individual's benefits.

States seeking to claim the temporary FMAP increase are required to maintain an individual's eligibility for benefits (through the end of the month in which the public health emergency ends) for which an individual attained eligibility under the state plan or a waiver of the state plan. This means that the state should maintain an individual's participation in a 1915(c) waiver for which the individual is enrolled during the emergency period, even if the individual is determined to no longer meet the level of care (LOC) or other requirements for waiver participation, such as receiving a service within the last 30 days. Moreover, if a state determined after enactment of the FFCRA that an individual had not received services within the previous 30 day time period and terminated the individual, the state should reinstate the individual to ensure that the state can receive the 6.2 percentage point FMAP increase. However, states should continue to apply any criteria that is used in determining the services included in the individual's 1915(c) person-centered service plan. Services would only be provided if they are reflected in the person-centered service plan and based on an assessment of functional need, per regulations at 42 CFR 441.301(c)(2). An individual's person-centered care plan can be updated to reflect updated assessments of functional need during the period of the public health emergency. Services should not be provided that are not based on an assessed need.

DISCUSSION

Pursuant to policy, an individual must receive a minimum of 14 service level points as derived from the PAS to receive Level 2 services under the Personal Care Program. The Appellant received 11 points from the February 2020 PAS.

West Virginia accepted the increased federal Medicaid assistance funding that was enacted as part of the Families First Coronavirus Response Act. As a condition of receiving the increased federal funding, states cannot terminate Medicaid coverage or decrease Medicaid benefits for individuals who were active recipients as of March 18, 2020, until the emergency healthcare crisis has come to an end.

The Respondent proposed a reduction in the Appellant's service level hours under the Personal Care Program based upon her annual medical assessment. However, the Respondent cannot reduce the Appellant's services during the emergency healthcare crisis pursuant to the Families First Coronavirus Response Act. The Appellant's Level 2 services under the Personal Care Program will continue until the termination of the public healthcare emergency.

CONCLUSIONS OF LAW

1) The Respondent proposed a reduction in the Appellant's service level hours under the Personal Care Program based upon an annual medical evaluation conducted in February 2020.

2) The Families First Coronavirus Response Act provided increased federal Medicaid funding during the COVID-19 healthcare emergency.

3) As a condition of receiving the increased Medicaid funding, states cannot terminate or reduce Medicaid benefits for individuals receiving Medicaid as of March 18, 2020.

4) West Virginia accepted the increased Medicaid funding and must therefore adhere to the conditions as set forth in the Families First Coronavirus Response Act.

5) Whereas the Appellant was receiving Level 2 service level hours under the Personal Care Program as of March 18, 2020, the Respondent cannot reduce her service level until the emergency healthcare crisis declaration has ended.

DECISION

It is the decision of the State Hearing Officer to **reverse** the Respondent's proposal to reduce the Appellant's service level hours under the Personal Care Program.

ENTERED this 29th day of May 2020.

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Kristi Logan
State Hearing Officer