

9/19/2017 QA



APPELLANT

v.

DEPARTMENT OF HEALTH
AND MENTAL HYGIENE

* BEFORE JOHN J. LEIDIG,
* AN ADMINISTRATIVE LAW JUDGE
* OF THE MARYLAND OFFICE
* OF ADMINISTRATIVE HEARINGS
* OAH No.: DHMH-MCP-11-17-11733

* * * * *

DECISION

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STATEMENT OF THE CASE

On February 27, 2017, the Department of Health and Mental Hygiene (Department)¹ informed [REDACTED] (Appellant) that she was no longer qualified for benefits through the Medical Day Care Services Waiver because she no longer met nursing facility level of care criteria. On March 22, 2017, the Appellant submitted an appeal to the Department. On April 13, 2017, the Department transmitted the appeal to the Office of Administrative Hearings (OAH) for a hearing.²

¹ On July 1, 2017, the Department of Health and Mental Hygiene (DHMH) became the Maryland Department of Health. In order to avoid confusion, that agency will be referred to simply as the Department from this point forward.

² The Department also transmitted two other appeals by the Appellant: an appeal from the Department's denial of eligibility for the Community First Choice program (OAH No. DHMH-MCP-11G-17-07040), and an appeal from the Department's denial of eligibility for the Community Personal Assistance Services program (OAH No. DHMH-MCP-11G-17-07042). These appeals were consolidated for purposes of conducting a hearing, but I am issuing three separate decisions for the appeals.

I held a hearing on September 1, 2017, at the OAH in [REDACTED] Maryland. Code of Maryland Regulations (COMAR) 10.01.04.02; COMAR 10.01.04.06. The Appellant was present and was represented by her mother, [REDACTED] Erin Reilly, Assistant Attorney General, represented the Department.

The contested case provisions of the Administrative Procedure Act, the procedures for Fair Hearing Appeals under the Maryland State Medical Assistance (MA) Program, and the Rules of Procedure of the OAH govern procedure in this case. Md. Code Ann., State Gov't §§ 10-201 through 10-226 (2014 & Supp. 2016); COMAR 10.01.04; COMAR 28.02.01.

ISSUE

Did the Department properly determine that the Appellant is ineligible for the Medical Day Care Services Waiver because she does not meet the criteria of a nursing facility level of care?

SUMMARY OF THE EVIDENCE

Exhibits

The Department offered the following exhibits, which I admitted into evidence:

- DHMH Ex. 1 - Maryland MA Program, Medical Day Care Transmittal No. 61, July 1, 2008
- DHMH Ex. 2 - Maryland MA Program, Medical Day Care Transmittal No. 80, January 1, 2012
- DHMH Ex. 3 - Maryland MA Program, Personal Care Services Transmittal No. 53, December 31, 2014
- DHMH Ex. 4 - interRAI Home Care Assessment Form (interRAI),³ [REDACTED] 2016
- DHMH Ex. 5 - interRAI Results Summary, [REDACTED] 2016
- DHMH Ex. 6 - Level of Care – Summary, February 13, 2017

³ The interRAI is an assessment tool used to evaluate a person's need for care and services; it is used as part of the reassessment.

DHMH Ex. 7 - Letter from Norvine Cobb, Medical Care Program Specialist, to Appellant, February 27, 2017

DHMH Ex. 8 - Hearing Summary regarding Case No. DHMH-MCP-11-17-11733, undated

DHMH Ex. 9 - Letter from Jenay Scribner-Brown, Participant Enrollment Specialist, to Appellant regarding the Community First Choice Program, January 19, 2017

DHMH Ex. 10 - Hearing Summary regarding Case No. DHMH-MCP-11G-17-07040, undated

DHMH Ex. 11 - Letter from Jenay Scribner-Brown, Participant Enrollment Specialist, to Appellant, January 19, 2017

DHMH Ex. 12 - Hearing Summary regarding Case No. DHMH-MCP-11G-17-07042,⁴ undated

The Appellant did not offer any exhibits for admission into evidence.

Testimony

The Department presented testimony from Kathryn Morici, M.D., who testified as an expert in family practice, public health, preventive medicine, and utilization review.

The Appellant testified on her own behalf and presented testimony from the following witnesses: [REDACTED] LCSW; [REDACTED] Acting Administrator of [REDACTED] Adult Medical Day Care; and [REDACTED]

FINDINGS OF FACT

I find the following facts by a preponderance of the evidence:

1. The Appellant is a forty-year-old woman who resides with her mother in the community. She has a mild cognitive impairment.
2. For more than two years prior to 2017, the Appellant was attending [REDACTED] Medical Adult Day Care [REDACTED]
3. On or about [REDACTED] 2016, the Appellant was reassessed to determine her continuing eligibility for the Medical Day Care Services Waiver.

⁴ The exhibit shows the word "PENDING" in place of the final five digits of the case number, 07042. Ms. Reilly clarified at the hearing which case this Summary pertained to.

4. The Appellant can independently perform all of the following activities of daily living (ADLs): bathing, personal dressing, mobility, toileting/continence, and eating.

5. The Appellant requires some assistance with several instrumental activities of daily living (IADLs), including meal preparation, ordinary housework, shopping, transportation, and money management.

6. The Appellant scored 15 out of 15 on the Brief Interview for Mental Status (BIMS) exam.

7. The Appellant does not require any of the following skilled nursing or rehabilitation services: suctioning; IV therapy; pressure ulcer care for Stage 3 or 4 ulcers or wound care; enteral or parenteral feeding; ventilator care or other complex respiratory services; or extensive physical therapy.

8. There is no current physician's order for the Appellant for nursing facility care, skilled nursing services, or rehabilitative therapy.

9. The Appellant does not exhibit any of the following behaviors in the frequency noted: wandering several times a day; hallucinations or delusions at least weekly; aggressive/abusive behavior several times a week; disruptive/socially inappropriate behavior several times a week; or self-injurious behavior several times a month.

DISCUSSION

There is no clear statutory or regulatory authority establishing which party bears the burden of proof in this type of administrative hearing. See COMAR 10.09.24.13; COMAR 10.01.04.01 through 10.01.04.10. In *Commissioner of Labor & Industry v. Bethlehem Steel*, 344 Md. 17 (1996), the Court of Appeals held "that the burden of proof is generally on the party asserting the affirmative of an issue before an administrative body." *Id.* at 34. When an agency seeks to terminate benefits for a *recipient*, as opposed to an *applicant*, the agency is seeking to

change the status quo. The Appellant was receiving benefits under the Medical Day Care Services Waiver when the Department denied her continuing eligibility as a result of an annual reassessment. Accordingly, I conclude that the Department bears the burden of proof.

The standard of proof is by a preponderance of the evidence. Md. Code Ann., State Gov't. §10-217 (2014); *Bethlehem Steel*, 344 Md. at 34. To prove something by a "preponderance of the evidence" means "to prove that something is more likely so than not so" when all of the evidence is considered. *Coleman v. Anne Arundel County Police Dep't*, 369 Md. 108, 125 n.16 (2002); *see also Mathis v. Hargrove*, 166 Md. App. 286, 310 n.5 (2005). Under this standard, if the supporting and opposing evidence is evenly balanced on an issue, the finding on that issue must be against the party who bears the burden of proof. *Coleman*, 369 Md. at 125 n.16.

The Medical Day Care Services Waiver provides services to eligible persons by reimbursing health care providers such as medical directors, nurses, physical therapists, occupational therapists, personal care assistants, social workers, activity program providers, and transportation providers for a wide array of services. *See* COMAR 10.09.07.05A. "Medical day care" means medically supervised, health-related services provided in an ambulatory setting to medically handicapped adults, who, due to their degree of impairment, need health maintenance and restorative services supportive to their community living. COMAR 10.09.07.01B(11).

Medical Day Care Services Waiver program providers are reimbursed as follows:

B. The Department shall reimburse for a day of care when this care is:

- (1) Authorized in the participant's waiver service plan;
- (2) Medically necessary;
- (3) Adequately described in progress notes in the participant's medical record, signed and dated by the individual providing care;
- (4) ***Provided to a participant certified annually by the Department as requiring nursing facility care*** as specified under COMAR 10.09.10; and
- (5) Provided to participants certified present at the medical day care center a minimum of 4 hours a day by an adequately maintained and documented participant register.

COMAR 10.09.07.05B (emphasis added). Thus, the Department may authorize reimbursement for medical day care services to a recipient of MA who is certified as needing nursing facility care. Md. Code Ann., Health-Gen. § 15-111(a) (2015); COMAR 10.09.61.03A(1) (to be eligible for the Medical Day Care Services Waiver, the participant must need nursing facility services).

Nursing facility services are defined as follows:

services provided to individuals who do not require hospital care, but who, because of their mental or physical condition, require skilled nursing care and related services, rehabilitation services, or, on a regular basis, health-related care and services (above the level of room and board) which can be made available to them only through institutional facilities.

COMAR 10.09.10.01B(49). *See also* 42 U.S.C. § 1396r(a)(1) (2012); 42 C.F.R. § 440.155 (2016).

Departmental rules specify that nursing facility services are provided to individuals who, because of their mental or physical condition, require: 1) skilled nursing care and related services; 2) rehabilitation services; or 3) on a regular basis, health-related services above the level of room and board. DHMH Ex. 1. An individual meets the medical eligibility for nursing facility services if a skilled nursing service or rehabilitation service is required on a daily basis. *Id.* These are nursing and rehabilitation services ordered by a physician and requiring the skills of technical professional personnel such as registered nurses, licensed practical nurses, physical therapists, occupational therapists, speech pathologists, or audiologists on a daily basis. Such services include suctioning, intravenous therapy, pressure ulcer care, wound care for surgical wounds or open lesions, enteral or parenteral feeding, ventilator care or other complex respiratory services, and extensive physical therapy for restoration of physical functioning. *Id.*; *see also* 42 C.F.R. § 409.33 (listing services that qualify as skilled nursing services and skilled rehabilitation services).

Individuals who do not require skilled nursing services or rehabilitation services may still be eligible for nursing facility services if they require, on a regular basis, health related services above the level of room and board. "Health related services above the level of room and board" are categorized as follows:

1. Care of an individual who requires hands-on assistance to adequately and safely perform two or more activities of daily living (ADLs) as a result of a current medical condition or disability; or
2. Supervision of an individual's performance of two or more ADLs for an individual with cognitive deficits, as indicated by a score of **less than 10 on the Brief Interview for Mental Status exam from the Minimum Data Set 3.0**, and who is in need of assistance with at least three instrumental activities of daily living (IADLs); or
3. Supervision of an individual's performance of two or more ADLs combined with the need for supervision/redirection for an individual exhibiting at least two of the following behavior problems: wandering several times a day, hallucinations/delusions at least weekly, aggressive/abusive behavior several times a week, disruptive/socially inappropriate behavior several times a week and/or self-injurious behavior several times a month.

DHMH Ex. 2 (emphasis in original) (footnotes omitted).

Dr. Morici explained that the Department conducted an interRAI assessment as part of the Appellant's reassessment for the Medical Day Care Services Waiver. The interRAI assessment was performed on [REDACTED] 2016 by [REDACTED] for the Department. DHMH Ex. 4. The interRAI form consists mostly of information that was self-reported by the Appellant and her mother. Ms. [REDACTED] also conducted a BIMS exam to determine the Appellant's cognitive status. *See* DHMH Ex. 3. Dr. Morici observed that the Appellant scored 15 points on the BIMS exam, and there was no documentation of any behavioral issues, such as hallucinations, wandering, or aggressive behavior. In addition, the interRAI assessment

indicates that the Appellant does not require hands-on assistance to adequately and safely perform two or more ADLs. None of the witnesses presented by the Appellant rebutted this point, although they did indicate that the Appellant sometimes needs cues and prompting for bathing, as well as assistance with some IADLs. Dr. Morici testified that she reviewed the [REDACTED] 2016 interRAI and observed the Appellant on the day of the hearing, and that based on her analysis, the Appellant did not require a nursing facility level of care.

The Appellant and her mother testified that the Appellant enjoys and benefits from the socialization opportunities that the medical day care program provides, specifically the fact that she can attend [REDACTED].⁵ Ms. [REDACTED], who works at [REDACTED] testified that the Appellant was initially quiet and timid, cried easily, and had limited engagement with peers, but that over time the Appellant has “come out of her shell.” Ms. [REDACTED] stated that the Appellant is on a waiting list for services through Developmental Disabilities Administration, but that in the meantime [REDACTED] is a very good program for the Appellant because it provides a supportive and structured environment for social interactions. According to Ms. [REDACTED] [REDACTED] has helped the Appellant build self-confidence. Ms. [REDACTED] echoed these opinions. She also noted that the Appellant sometimes needs cues and promptings for bathing (but not hands-on assistance), requires assistance with most IADLs, and cannot reliably travel independently using public transportation.

⁵ At the hearing, the Appellant’s mother questioned whether Ms. [REDACTED] had actually conducted the interRAI assessment because the Appellant’s mother had no personal recollection of ever having met or spoken with Ms. [REDACTED]. Based on the evidence presented, I conclude that Ms. [REDACTED] did conduct an interRAI assessment, and that both the Appellant and her mother were present for the assessment. My conclusion is based on the detailed notes contained in DHMH Ex. 4, which is the interRAI assessment form completed by Ms. [REDACTED]. In particular, Ms. [REDACTED] included detailed comments in the responses to items A10, B7, C1, C10, D5, E4, F6, G8, J9, and N7 on the interRAI form.

I am sympathetic to the circumstances in which the Appellant and her mother find themselves. However, I am required to follow the regulations and guidance indicating that a nursing level of care is needed to participate in the medical day care program. Moreover, Dr. Morici testified that although the Appellant may benefit from the socialization that her attendance at [REDACTED] provides, those benefits do not warrant a determination that the Appellant is eligible for the Medical Day Care Services Waiver.

In this case, there is no evidence that a physician has directed that the Appellant receive skilled nursing care or rehabilitative services. Moreover, there was no evidence presented at the hearing that the Appellant receives or requires any such services.

In addition, based on the record, I conclude that the Appellant does not require hands-on assistance with respect to two ADLS and does not require health related services above the level of room and board under the first category.

The Appellant scored a maximum of 15 out of 15 on the BIMS exam. Also, there is no evidence she frequently wanders, has hallucinations, is aggressive or abusive, is socially inappropriate, or is self-injurious. Therefore, I conclude that the Appellant does not qualify for health related services above the level of room and board under the second and third categories.

CONCLUSION OF LAW

Based on the Findings and Discussion above, I conclude as a matter of law that the Department properly determined the Appellant is ineligible for the Medical Day Care Services Waiver because she does not require nursing facility level of care. Md. Code Ann., Health-Gen. § 15-111(a) (2015); COMAR 10.09.10.01B(49); Maryland Medical Day Care Transmittals No. 61 & 80.

ORDER

I ORDER that the Department of Health and Mental Hygiene's February 27, 2017 decision to deny the Appellant's continuing eligibility for the Medical Day Care Services Waiver be, and hereby is, AFFIRMED.

Signature Appears on Original

September 19, 2017
Date Decision Mailed

John J. Leidig
Administrative Law Judge

JJL/dlm
#169819

REVIEW RIGHTS

This is the final decision of the Department. A party aggrieved by this final decision may file a written petition for judicial review with the Circuit Court for Baltimore City, if any party resides in Baltimore City or has a principal place of business there, or with the circuit court for the county where any party resides or has a principal place of business. Md. Code Ann., State Gov't § 10-222(c) (Supp. 2016). The original petition must be filed in the circuit court within thirty (30) days of the date of this decision, with a copy to David Lapp, Office of the Attorney General, Suite 302, 300 W. Preston St., Baltimore, MD 21201. Md. Rules 7-201 through 7-210.

A separate petition may be filed with the court to waive filing fees and costs on the ground of indigence. Md. Rule 1-325. No fees may be charged to Medical Assistance Program recipients, applicants, or authorized representatives for transcription costs or for preparation or delivery of the record to the circuit court.

The Office of Administrative Hearings is not a party to the judicial review process.

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