**STATE OF WEST VIRGINIA**
**OFFICE OF INSPECTOR GENERAL**
**BOARD OF REVIEW**

**Sherri A. Young, DO, MBA, FAAFP**
**Cabinet Secretary**

**Ann Vincent-Urling**
**Interim Inspector General**

March 5, 2024

[redacted]

RE: [redacted] v. WV DoHS
ACTION NO.: 23-BOR-3745

Dear [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 Human Services. 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,

Todd Thornton
State Hearing Officer
Member, State Board of Review

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

cc: Kesha Walton, Department Representative / Terry McGee, II, Department Representative

**WEST VIRGINIA OFFICE OF INSPECTOR GENERAL**
**BOARD OF REVIEW**

[redacted],

**Appellant,**

**v.** **Action Number: 23-BOR-3745**

**WEST VIRGINIA DEPARTMENT OF HUMAN SERVICES BUREAU FOR MEDICAL SERVICES,**

**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 Office of Inspector General Common Chapters Manual. This fair hearing was convened on January 30, 2024, on a timely appeal filed December 21, 2023.

The matter before the Hearing Officer arises from the November 22, 2023 decision by the Respondent to deny medical eligibility for Long Term Care Medicaid (LTC-M).

At the hearing, the Respondent appeared by Terry McGee, II. Appearing as a witness for the Respondent was Melissa Grega. The Appellant was self-represented. Appearing as a witness for the Appellant was [redacted]. All witnesses were sworn and the following documents were admitted into evidence.

## EXHIBITS

**Department's Exhibits**:

| | |
|---|---|
| D-1 | Notice of decision, dated November 22, 2023 |
| D-2 | KEPRO document summarizing or excerpting Department policy |
| D-3 | Pre-Admission Screening (PAS) form, dated November 21, 2023 |
| D-4 | Medication Review Report, dated November 14, 2023 |

**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 is a nursing home resident who was evaluated for Long Term Care Medicaid (LTC-M) in November 2023.

2) An assessment of the Appellant was documented in a Pre-Admission Screening (PAS) document (Exhibit D-3), completed November 21, 2023, by [redacted] and reviewed by Melissa Grega, the Respondent's assessing nurse.

3) The Appellant's November 2023 PAS (Exhibit D-3) revealed no deficits as defined by medical eligibility policy.

4) The Respondent issued a November 22, 2023 (Exhibit D-1) notice to the Appellant, advising that her "…request for Long-Term Care (Nursing Facility) admission has been denied," because "…Documentation does not reflect that you have five (5) deficits at the level required…"

5) This notice (Exhibit D-1) indicates that the Appellant did not have deficits in any "area of care needs" set by LTC-M policy.

6) The Appellant disputed the Respondent's findings in the following areas: *bathing*, *dressing*, *continence* of bowel, *transferring*, *walking*, *wheeling*, *medication administration*, and *professional/technical care* needs.

7) The Appellant is independent, or Level 1, in the area of *bathing*.

8) The Appellant is independent, or Level 1, in the area of *dressing*.

9) The Appellant is continent of bowel, or Level 1, in the area of *continence*.

10) The Appellant is independent, or Level 1, in the area of *transferring*.

11) The Appellant requires supervision or an assistive device in the area of *walking*, or Level 2.

12) The Appellant wheels independently, or Level 2, in the area of *wheeling*.

13) The Appellant is capable of administering her own medications, or Level 1 in the area of *medication administration*.

14) The Appellant does not require sterile dressings in the area of *professional or technical care needs*.

15) With regard to *vacating* a building in the event of an emergency, the Appellant is independent.

## APPLICABLE POLICY

**Bureau for Medical Services (BMS) Manual § 514.5.3 *Medical Eligibility Regarding the PAS* provides in part:**

> To qualify medically for the nursing facility Medicaid benefit, an individual must need direct nursing care 24 hours a day, seven days a week. The BMS has designated a tool known as the Pre-Admission Screening (PAS) form (Appendix B) to be utilized for physician certification of the medical needs of individuals applying for the Medicaid benefit.
>
> An individual must have a minimum of five deficits identified on the PAS. These deficits will be determined based on the review by a BMS/designee in order to qualify for the Medicaid nursing facility benefit.
>
> These deficits may be any of the following (numbers represent questions on the PAS form):
>
> - #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
> - #26: Functional abilities of the individual in the home.
>   - Eating: Level 2 or higher (physical assistance to get nourishment, not preparation)
>   - Bathing: Level 2 or higher (physical assistance or more)
>   - Grooming: Level 2 or higher (physical assistance or more)
>   - Dressing: Level 2 or higher (physical assistance or more)
>   - Continence: Level 3 or higher (must be incontinent)
>   - Orientation: Level 3 or higher (totally disoriented, comatose)
>   - Transfer: Level 3 or higher (one person or two persons assist in the home)
>   - Walking: Level 3 or higher (one person assists in the home)

- Wheeling: Level 3 or higher (must be Level 3 or 4 on walking in the home to use, Level 3 or 4 for wheeling in the home.) Do not count outside the home.

- #27: Individual has skilled needs in one 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

## DISCUSSION

The Appellant requested a hearing to appeal the Respondent's decision to deny Long Term Care Medicaid (LTC-M) based on medical findings. The Respondent must show, by a preponderance of the evidence, that it correctly denied the Appellant's LTC-M on this basis.

The Appellant is a resident in a nursing facility and was assessed for LTC-M in November 2023. The findings from this assessment were recorded on a PAS document (Exhibit D-3) completed by a physician from the facility identified as [redacted] This document was reviewed by the Respondent's assessing nurse to determine the number of "area of care needs," or deficits, that meet the LTC-M policy severity criteria. Five deficits are required to establish medical eligibility for LTC-M, and the Appellant was assessed with zero deficits. At the hearing, the Appellant disputed Respondent findings in nine areas.

Testimony from the Appellant was unconvincing in nearly all areas. The large number of proposed deficits at hearing is implausible given the fact the nursing facility was providing the care for the Appellant at the time. The Appellant testified that [redacted] had not seen her, and later changed her testimony to include an exception. The Appellant vaguely testified that other people from the nursing facility had not 'seen her', but nursing facility staff would be providing the assistance in nearly all areas she claimed to require.

The Appellant testified that she needed physical assistance in the areas of bathing and dressing. This is unconvincing given the PAS assessment that she was independent in these areas and that the nursing facility staff would be responsible for providing the physical assistance and documenting those needs. The Appellant testified that she is incontinent of bowel, with two to three accidents per week. This testimony does not meet the threshold of *at least* three accidents per week to establish incontinence, and it is unconvincing given that nursing facility staff would be responsible for cleaning and providing care afterwards. The Appellant claimed to need hands-on assistance with transferring, but this assistance would come from nursing facility staff. The Appellant testified she did not 'feel safe' administering her own medications, but the standard in this area is the capacity to administer medications and the Appellant is capable. The Appellant claimed to need sterile dressings for cellulitis. The Appellant is not a medical expert and did not have expert testimony or other evidence to support this claim. In all of these areas, the PAS findings are more convincing than the Appellant's testimony because the nursing facility staff would be providing the necessary assistance and regularly documenting it.

In the area of walking, the Appellant was assessed as independent, or Level 1. The Appellant alternately testified that she cannot walk, that she can walk with physical assistance, and that she can walk with an assistive device. It is unconvincing that the Appellant would be entirely unable to walk – or to walk with one-person (or greater) assistance – without facility awareness, but the Appellant should have been assessed at Level 2 because the Appellant uses an assistive device to walk. Because the Appellant is a Level 2 in the area of walking, by policy she cannot be awarded the Level 3 in the area of wheeling needed to obtain a deficit. Because the Appellant's Level 2 in walking does not reach the threshold of hands-on physical assistance, the Appellant was correctly assessed as 'independently' capable of vacating a building in the event of an emergency. The only change to PAS findings revealed through convincing evidence and testimony is that the Appellant should have been assessed at Level 2 in walking, due to requiring the use of an assistive device. However, this change does not affect the Appellant's deficit count because Level 3 in walking is the severity threshold for a deficit by policy, and a sole deficit would not meet the medical eligibility policy requirement for three (3) deficits.

The Respondent correctly assessed the Appellant with zero (0) deficits and was correct to deny Long Term Care Medicaid to the Appellant based on the medical findings on her November 2023 PAS.

## CONCLUSIONS OF LAW

1) Because reliable evidence and testimony revealed no additional deficits, the Appellant was correctly assessed with zero (0) deficits, or area of care needs.

2) Because the Appellant did not have at least three (3) deficits, medical eligibility criteria for LTC-M was not met.

3) Because medical eligibility for LTC-M was not met, the Respondent correctly denied LTC-M benefits to the Appellant.

## DECISION

It is the decision of the State Hearing Officer to **UPHOLD** the action of the Respondent to deny the Appellant's Long Term Care Medicaid benefits based on medical eligibility findings.

**ENTERED this _____ day of March 2024.**

_____

**Todd Thornton**
**State Hearing Officer**