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**STATE OF ALASKA
 DEPARTMENT OF HEALTH AND SOCIAL SERVICES
 OFFICE OF HEARINGS AND APPEALS**

In the Matter of <div style="background-color: black; width: 150px; height: 15px; margin: 5px 0;"></div> Claimant. <hr style="width: 100%; border: 0.5px solid black;"/>)))))))	OHA Case No. 08-FH-896 Div. Case No. <div style="background-color: black; width: 80px; height: 15px; display: inline-block;"></div>
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FAIR HEARING DECISION

STATEMENT OF THE CASE

(Claimant) applied for Medicaid benefits¹ under the Home and Community Based Waiver (hereinafter “HCB Waiver”) program. On October 22, 2008 the Division of Senior and Disabilities Services (Division) sent her notice her application was denied. (Ex. D) The Claimant requested a fair hearing contesting the denial on November 26, 2008. (Ex. C) This office has jurisdiction pursuant to 7 AAC 43.1010(h) and 7 AAC 49.010.

The hearing was originally scheduled for February 3, 2009. It was continued several times at the Claimant’s request.

The hearing was held on March 19, May 21, and June 29, 2009 before Hearing Officer Claire Steffens.

The Claimant appeared telephonically at the March 19, 2009 portion of the hearing. Her mother and court appointed guardian, , appeared telephonically on all three hearing dates; she represented the Claimant and testified on her behalf. Dr. , Ph.D, appeared telephonically on June 29, 2009 and testified on the Claimant’s behalf. with appeared telephonically on June 29, 2009 and testified on the Claimant’s behalf. with appeared telephonically on all three hearing dates. , also with , appeared

¹ The record does not indicate the date of Claimant’s application.

telephonically on March 19 and May 21, 2009. [REDACTED] and [REDACTED] appeared telephonically on June 29, 2009.

[REDACTED], a Health Program Manager III employed with the Division of Health Care Services, appeared in person on all three hearing dates and represented the Division. [REDACTED], a Division employee, appeared in person on all three hearing dates and testified on the Division's behalf. [REDACTED], a Division employee, appeared in person at all three hearing dates.

Following the May 13, 2009 hearing, this case was reassigned to Hearing Officer Larry Pederson, who reviewed the entire hearing record and listened to the recording of the entire hearing before issuing this Decision.

ISSUE

Was the Division correct to deny the Claimant's application for Medicaid HCB Waiver benefits under the MRDD (Mental Retardation and Development Disabilities) category because she did not have a qualifying diagnosis?

FINDINGS OF FACT

The following facts were established by a preponderance of the evidence:

1. Claimant is an [REDACTED] year old woman (date of birth [REDACTED]). She has a medical diagnosis of "static encephalopathy, which is a form of brain damage." (Ex. G, p. 5) She was exposed to "significant amounts of alcohol during gestation." (Ex. E, p. 1) There is evidence that she experiences "significant [central nervous system] damage/dysfunction." *Id.*
2. Dr. [REDACTED], Ph.D, a neuropsychologist and licensed clinical psychologist, performed a neuropsychological examination of the Claimant in February and March 2008. (Ex. E, pp. 8 – 24)
3. The neuropsychological examination performed by Dr. [REDACTED] revealed that the Claimant has a verbal IQ score of 86, placing her at the 18th percentile for verbal IQ, a Performance IQ score of 91, placing her at the 27th percentile for performance IQ, with a full IQ score of 88, placing her at the 21st percentile. (Ex. E, p. 12) Her IQ scores "are in the low average range of intellectual functioning." (Ex. E, p. 13)
4. The neuropsychological examination performed by Dr. [REDACTED] revealed that the Claimant's adaptive functioning² scores placed her at the one percentile rank or less. (Ex. E, p. 19) Her adaptive scores in the conceptual domain, social domain, and practical domain were 57, 58, and 65 respectively. *Id.* This placed her at under the 1st percentile for

² Adaptive behavior testing measures "the ability of mentally retarded and developmentally delayed individuals to live independently." *The American Heritage Stedman's Medical Dictionary* 16 ((2002)

the conceptual and social domains, and at the 1st percentile for the practical domain. *Id.* Her General Adaptive Composite score was 57, which placed her at the under the one percentile rank. *Id.* (██████ testimony) The percentile score of 1 percent means that 99% of the population who are the Claimant's age perform better than the Claimant. (██████ testimony) Her scores "correspond with those of individuals who have mild to moderate developmental delays or mild mental retardation." (Ex. E, p. 20)

5. Dr. ██████'s 2008 report stated the Claimant "has low average cognitive functioning and no physical disability that would account for her low scores. It is suspected that her lower adaptive functioning has an emotional/psychological origin." (Ex. E, p. 20) Dr. ██████ explained that the Claimant is physically capable of performing basic activities. She, however, has problems with brain function. She appears competent on the surface, but functions as though she is mentally retarded. (██████ testimony) In her opinion, the Claimant was not capable of working "independently bagging groceries." *Id.*

6. The Claimant has severe psychological problems arising from a horrific childhood. (██████ testimony) It is difficult to separate whether her adaptive functioning difficulty arises from her brain damage or her psychological condition. *Id.* Her brain damage has both cognitive and behavioral manifestations. *Id.* Her brain damage compounds any mental health problems that she has. *Id.*

7. The Claimant went into residential treatment center placement on May 5, 2008. (Ex. G, p. 2) On April 1, 2009, when she had been in treatment for approximately 11 months, her adaptive functioning was tested by Dr. ██████████, Ph.D, a licensed psychologist. (Ex. F, p. 1) Her "overall adaptive behavior rating was 63, which is at the first percentile. This score places her in the low or deficit range of adaptive functioning." *Id.* Dr. ██████ stated that her "poor adaptive functioning score is likely related to her limited cognitive reasoning abilities associated with her low average IQ score." *Id.*

8. The Claimant's adaptive functioning has not improved despite having been in residential treatment for a year. (██████ testimony) Dr. ██████ agreed that the Claimant's functioning was limited and that she required assistance, stating:

Static encephalopathy can certainly vary in degree. And I would say in this particular case and especially because her behavior adaptively has not improved within the time that she's been in residential treatment nor has she gained from any of the other educational intervention and structure that she's received in her home and elsewhere.

(Bock testimony)

9. The Claimant applied for Medicaid Waiver services under the specific category that provides Medicaid coverage for persons who experience Mental Retardation and Developmental Disabilities (MRDD). The Division denied the Claimant's application because she did not have a qualifying diagnosis as follows:

- a. The Claimant did not qualify for the MRDD program with a mental retardation diagnosis because she was not mentally retarded as defined by the applicable regulation;
- b. The Division also looked at whether the Claimant could possibly qualify for the MRDD program under the “other” category which required the Claimant to satisfy each of the three following conditions:
 - i. the condition could not be a mental illness (psychiatric impairment, etc.);
 - ii. an intellectual impairment that tested within the mental retardation score level; and
 - iii. impaired adaptive behavior.
- c. The Division agreed that the Claimant had impaired adaptive behavior, but determined she did not qualify for the “other” category because her IQ scores were too high to qualify, and that her problems with adaptive functioning were due to her mental health problems.

(██████ testimony)

10. Because the Claimant did not have a qualifying diagnosis, the Division did not process the Claimant’s application further to find out if she met the level of care required by the state Medicaid regulations. (██████ testimony)

PRINCIPLES OF LAW

This case involves the denial of an application for benefits. When an application is denied, the applicant has the burden of proof³ by a preponderance of the evidence.⁴

A person who requires a “level of care provided in a nursing facility or ICF/MR” and experiences “mental retardation and developmental disabilities” is entitled to receive Medicaid Home and Community Based Waiver services. 7 AAC 43.1010(d)(1)(C) and

³ “Ordinarily the party seeking a change in the status quo has the burden of proof.” *State, Alcohol Beverage Control Board v. Decker*, 700 P.2d 483, 485 (Alaska 1985)

⁴ Preponderance of the evidence is defined as follows:

Evidence which is of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not.

Black’s Law Dictionary 1064 (5th Ed. 1979)

(d)(2).⁵ Pursuant to 7 AAC 43.1010(d)(2), the Division is required to “determine eligibility under . . . (B) 7 AAC 43.300, if the applicant falls within the recipient category of individuals with mental retardation and developmental disabilities.”

State Medicaid regulation 7 AAC 43.300⁶ sets out the requirements for determining whether a person qualifies for Medicaid coverage under the MRDD category:

(c) In determining whether a recipient qualifies under this section for ICF/MR services, the department will base its decision on the determination of a qualified mental retardation professional within the department that the recipient meets the functional criteria in (d) of this section and that the recipient has at least one of the following criteria:

(1) mental retardation that meets the diagnostic criteria for code 317 or 318, as set out in American Psychiatric Association’s *Diagnostic and Statistical Manual of Mental Disorders*, 4th edition, Text Revision, 2000 (*DSM-IV-TR*), pages 41 – 49, adopted by reference; the recipient must have an intelligence quotient of 70 points or less as determined by an individual, standardized psychological evaluation, plus up to five points to account for measurement error;

(2) a condition that is

(A) other than mental illness, psychiatric impairment, or a serious emotional or behavioral disturbance; and

(B) found to be closely related to mental retardation because that condition results in impairment of general intellectual functioning and adaptive behavior similar to that of individuals with mental retardation; the condition must be diagnosed by a licensed physician and require treatment or services similar to those required for individuals;

* * *

(d) Each condition identified in (c) of this section must

(1) have originated before the age of 22 years;

(2) be likely to continue indefinitely; and

(3) constitute a substantial disability to the individual’s ability to function in society, as

(A) measured by the *Inventory for Client and Agency Planning (ICAP)*, as revised as of 1986 and adopted by reference; and

(B) evidenced by a broad independence domain score equal to or less than the cutoff scores in the department’s *Table of ICAP Scores by Age*, as revised as of February 12, 2004 and adopted by reference.

⁵ There are other eligibility criteria, however, those are not at issue in this case. See 7 AAC 43.1010(a) and (b).

⁶ Individuals with cerebral palsy, autism, and seizure disorders are also potentially eligible for Medicaid HCB Waiver coverage under the MRDD category. 7 AAC 43.300(c)(3) – (5).

The acronym “ICF/MR” refers to an “intermediate care facility for the mentally retarded or persons with related conditions.” 7 AAC 43.300(a).

ANALYSIS

The Claimant’s position is that the Division erred when it found the Claimant did not have a necessary diagnosis to qualify for the Medicaid HCB Waiver MRDD category. Because this is an application, the Claimant has the burden of proof by a preponderance of the evidence.

It is undisputed that the Claimant’s IQ is 88, which is below average. However, she is not mentally retarded as defined by Alaska regulation 7 AAC 43.300(c)(1) which requires her IQ to be 75 or less (70 points plus 5 points to allow for measurement error). Because her IQ is greater than 75, she does not qualify for Medicaid HCB Waiver coverage under the MRDD category as mentally retarded.

Her only other MRDD eligibility category would be the “other” category which requires the following:

(2) a condition that is

(A) other than mental illness, psychiatric impairment, or a serious emotional or behavioral disturbance; and

(B) found to be closely related to mental retardation because that condition results in impairment of general intellectual functioning and adaptive behavior similar to that of individuals with mental retardation; the condition must be diagnosed by a licensed physician and require treatment or services similar to those required for individuals;

7 AAC 43.300(c)(2).

It is undisputed that the Claimant meets one of the requirements for the “other” category. She has impaired adaptive behavior: her adaptive functioning scores place her in the bottom one percent of the population. *See* Findings of Fact 4 and 7 above. It is also undisputed that the Claimant has a medical diagnosis of static encephalopathy, which is brain damage. *See* Finding of Fact 1 above. It is further undisputed that the Claimant has severe psychological problems. *See* Finding of Fact 6 above.

The issue that arises in this case is whether the Claimant meets the all the requirements of the “other” category. The Division’s rationale for its denial of the Claimant’s application is that she is mentally ill, i.e. she does not satisfy the requirement of 7 AAC 43.300(c)(2)(A) that her condition be “other than mental illness, psychiatric impairment, or a serious emotional or behavioral disturbance”, and that her IQ of 88 is low average and does not satisfy the requirement of 7 AAC 43.300(c)(2)(B) that she have an “impairment of general intellectual functioning and adaptive behavior similar to that of individuals with mental retardation.”

The Division's first reason for denial, that the Claimant's problems are psychological in nature, is not supported by the evidence. The Claimant has a medical diagnosis of static encephalopathy (brain damage). In 2008, Dr. [REDACTED], an examining psychologist, speculated the Claimant's poor adaptive functioning might be due to psychological problems. *See* Finding of Fact 5 above. However, in June 2009, she stated that the Claimant's brain damage affects her cognitive abilities and compounds her mental health problems. *See* Finding of Fact 6 above. Further, Dr. [REDACTED], an examining psychologist, who examined the Claimant in April 2009, stated that the Claimant's "poor adaptive functioning score is likely related to her limited cognitive reasoning abilities associated with her low average IQ score." *See* Finding of Fact 7 above. This conclusion is supported by Dr. [REDACTED]'s testimony that the Claimant's adaptive behavior "has not improved within the time that she's been in residential treatment nor has she gained from any of the other educational intervention and structure that she's received in her home and elsewhere." *See* Finding of Fact 8 above.

Dr. [REDACTED] and Dr. [REDACTED]'s opinions as examining psychologists show that it is more likely than not true that there is a biological basis, as well as a psychological basis, for the Claimant's mental health problems. If the Claimant's condition was purely psychological in nature, then the Division's position would be well taken. However, because the Claimant has both brain damage and psychological problems, which are caused in part by the brain damage, the Claimant satisfies the first element for the "other" category: her brain damage which contributes to her mental health problems is a condition "other than mental illness, psychiatric impairment, or a serious emotional or behavioral disturbance." 7 AAC 43.300(c)(2)(A).

The Division's second reason for denial is that the Claimant's IQ score of 88 is too high to allow her to qualify for the "other" category. It should first be noted that the Claimant's IQ score, while too high to qualify her as mentally retarded as defined in Alaska regulation 7 AAC 43.300(c)(1), is below average, i.e. she does have impaired intellectual functioning.⁷ The Division's argument is based upon a reading of the regulation that essentially requires the Claimant to be mentally retarded to qualify.

The Division's argument fails to take the entire regulatory scheme into account. The MRDD category allows qualification for both (1) persons who are mentally retarded, as measured solely on the basis of their IQ, and for (2) persons who have a condition similar to mental retardation. 7 AAC 43.330(c)(1) and (c)(2). If the Division's argument were correct, then there would be no need for the second category. The regulations clearly provide MRDD category coverage for persons who do not meet the strict IQ based definition of mental retardation.

Instead, the "other" category provides MRDD coverage for persons who experience a combination of impaired intellectual functioning and adaptive behavior, who are have a

⁷ Her IQ score is 88, which is in the 21st percentile. *See* Finding of Fact 3 above. A 21st percentile ranking means that 79 percent of the population has a higher IQ score than the Claimant.

condition “found to be closely related to mental retardation because that condition results in impairment of general intellectual functioning and adaptive behavior similar to that of individuals with mental retardation.” 7 AAC 43.300(c)(2)(B). It is undisputed that the Claimant has brain damage, impaired general intellectual functioning, and very low adaptive behavior scores. Dr. [REDACTED] stated the Claimant appears competent but functions as though she is mentally retarded. *See* Finding of Fact 5 above. This satisfies the criteria that the Claimant have a condition (brain damage) that results in an “impairment of general intellectual functioning” (low average IQ of 88) and “adaptive behavior similar to that of individuals with mental retardation.”

In summary, the Claimant has met her burden of proof that she has a necessary qualifying diagnosis for the Medicaid HCB Waiver MRDD coverage category despite experiencing psychological problems and not being mentally retarded as defined in 7 AAC 43.300(c)(1) (IQ of 75 or less). Her psychological problems are, in part, a symptom of her brain damage. Her psychological problems are not the sole cause of her condition. Her brain damage causes impaired intellectual functioning and severely impaired adaptive functioning that together cause her to function as though she is mentally retarded. The Division was therefore not correct when it denied the Claimant’s application for Medicaid HCB Waiver coverage under the MRDD category because she did not have a qualifying diagnosis.

The Claimant, however, is cautioned that this Decision does not find she qualifies for Medicaid HCB Waiver coverage. There is one further step the Division must undertake. It must determine whether the Claimant “meets the functional criteria in [7 AAC 43.300(d)].” 7 AAC 43.300(c).

CONCLUSIONS OF LAW

1. The Claimant met her burden of proof by a preponderance of the evidence and demonstrated that she had a qualifying diagnosis for the MRDD category of Medicaid Home and Community Based Waiver services under 7 AAC 43.300(c)(2).
2. The Division was therefore not correct when it denied the Claimant’s application for Medicaid Home and Community Based Waiver services on October 22, 2008.

DECISION

Based upon a preponderance of the evidence, the Agency was not correct to deny the claimant’s application for Medicaid Home and Community Based Waiver services on October 22, 2008.

APPEAL RIGHTS

If for any reason the Claimant is not satisfied with this decision, the Claimant has the right to appeal by requesting a review by the Director. To do this, send a written request directly to:

Director of the Division of Senior and Disabilities Services
Department of Health and Social Services
PO Box 110680
Juneau, AK 99811-0680

If the Claimant appeals, the request must be sent within 15 days from the date of receipt of this Decision. Filing an appeal with the Director could result in the reversal of this Decision.

DATED this 30th day of July 2009.

Larry Pederson
Hearing Authority

CERTIFICATE OF SERVICE

I certify that on this 30th day of July 2009, true and correct copies of the foregoing were sent to:

Claimant via USPS First Class Certified Mail, Return Receipt Requested.

And to the following by email:

[REDACTED], Hearing Representative
[REDACTED], Director
[REDACTED], Policy & Program Development
[REDACTED], Policy & Program Development
[REDACTED], Staff Development & Training

J. Albert Levitre, Jr., Law Office Assistant I