

BEFORE THE OFFICE OF STATE ADMINISTRATIVE HEARINGS

STATE OF GEORGIA

FILED
OSAH
06/12/2023


Devin Hamilton, Legal Assistant

D [REDACTED] G [REDACTED],

Petitioner,

v.

DEPARTMENT OF BEHAVIORAL HEALTH &
DEVELOPMENTAL DISABILITIES,

Respondent.

Docket No.: [REDACTED]

[REDACTED]-OSAH-DBHDD-NOWCOMP-147-
Walker-Russell

Agency Reference No.: [REDACTED]

FINAL DECISION

Appearances: Petitioner: D [REDACTED] G [REDACTED], Pro Se
Respondent: Chaunte J. Tate, Esq.

I. INTRODUCTION

Petitioner, D [REDACTED] G [REDACTED], appealed the determination by the Department of Behavioral Health & Developmental Disabilities ("DBHDD," or "Respondent") that he does meet eligibility requirements to receive services under the New Options Waiver/Comprehensive Supports Waiver Program (hereinafter, "NOW/COMP Program"). The hearing was held May 26, 2023, before the undersigned Administrative Law Judge. The hearing record was held open until June 9, 2023, for the parties to submit a post-hearing proposed order, including Findings of Fact and Conclusions of Law.¹ After careful consideration of the evidence and the parties' legal arguments, and for the reasons set forth below, Respondent's decision is **AFFIRMED**.

II. FINDINGS OF FACT

The undersigned Judge has considered the entire evidence in this case and, based upon a preponderance of the credible evidence, makes the following specific findings of facts:

1.

Petitioner is twenty-seven (27) years old. He currently resides with his mother and brother. Petitioner and his twin were born 10 weeks prematurely. Nonetheless, developmental milestones such as

¹ Petitioner represented himself at the hearing. However, counsel for Respondent did not object to the presence and assistance of Petitioner's mother, T [REDACTED] D [REDACTED]. Respondent timely filed its proposed order on June 9, 2023. Petitioner failed to submit a proposed order.

walking, talking, and toilet training reportedly occurred within normal limits. Before the Petitioner began kindergarten, he was diagnosed with attention deficit hyperactivity disorder. Petitioner also reportedly has difficulty with focus and attention skill development. Shortly after his diagnosis, Petitioner was placed on medication to help improve symptoms of his attention disorder. (Testimony of Dr. Daniel Fass; Exhibits R-1, R-2, R-7.)

2.

In 2004, Petitioner was weaned from ADHD medication but continued a history of inappropriate and acting-out behaviors during childhood. In 2006, Petitioner was homeschooled to provide a better academic atmosphere and to better control his behavior outbursts. (Exhibit, R-7.)

3.

Beginning in the tenth grade, Petitioner was enrolled at [REDACTED] School and had been previously diagnosed as a special education student. He completed high school. (Exhibit, R-7.)

4.

At age 17, Petitioner was administered the Wechsler Adult Intelligence Scale – Fourth Edition. He obtained a verbal comprehension index score of 76 (borderline), a perceptual reasoning index score of 73 (borderline), a working memory index score of 83 (low average), and a processing speed index score of 89 (low average). Petitioner's full scale I.Q score was determined to be of 75, which is at the 5th percentile and in the borderline range of intellectual functioning. He was diagnosed with a specific learning disability in mathematics. (Testimony of Dr. Daniel Fass, Psychologist with DBHDD; Exhibit R-7.) Petitioner was diagnosed with schizophrenia sometime in his 20s, (Testimony of T [REDACTED] D [REDACTED]).

5.

There was no evidence of adaptive behavior scores entered into the record.

6.

Dr. Daniel Fass is a licensed Psychologist and has worked with DBHDD for eight (8) years. Dr. Fass has conducted over one thousand (1,000) NOW/COMP evaluations and carefully reviewed Petitioner's application and supporting records. Dr. Fass gave credible and undisputed testimony that, upon receipt and review of Petitioner's NOW/COMP application, Petitioner's intellectual functioning was not consistent with a diagnosis of intellectual disability; there was no diagnosis of a closely related condition; and lastly, the records did not support significant deficient behavior, within the

parameters for the NOW/COMP program. Specifically, Petitioner's records prior to 18, did not support an intellectual disability. Moreover, schizophrenia and ADHD are not qualifying conditions under the closely related condition route to meet eligibility under the NOW/COMP Program. (Testimony of Dr. Daniel Fass, Psychologist with DBHDD; Exhibit R-2). Upon careful consideration, I find Dr. Fass' testimony to be credible and persuasive.

7.

After Respondent denied Petitioner's application for the NOW/COMP Program, Petitioner filed an appeal and requested an administrative hearing. Petitioner applied for services under the NOW/COMP Program because he is poor, needs money and help with his disabilities. (Testimonies of Petitioner and T■■■ D■■■; Exhibits R-1, R-2, R-3, R-4, and R-5; OSAH FORM 1).

III. CONCLUSIONS OF LAW

1.

Because this matter involves an application for public assistance benefits, the Petitioner bears the burden of proof. Ga. Comp. R. & Regs. 616-1-2-.07(1)(d). The standard of proof is preponderance of the evidence. Ga. Comp. R. & Regs. 616-1-2-.21(4).

2.

The Medicaid program was created in 1965 "for the purpose of providing federal financial assistance to States that choose to reimburse certain costs of medical treatment for needy persons. "Miller v. Wladyslaw Estate, 547 F.3d 273, 277 (5th Cir. 2008) (quoting Harris v. McRae, 448 U.S. 397,201 (1980)); see Social Security Act, 42 U.S.C § 1396 et seq. ("the Act"). If a state elects to participate in the Medicaid program, it must obtain approval from the Secretary of the Department of Health and Human Services ("the Secretary") of a plan specifying the programs and services it will offer using Medicaid funds. See 42 U.S.C. § 1396a; see also Phann, Research & Mfrs. Of Am. v. Walsh, 538 U.S. 644, 650 (2003). Certain programs are mandatory under the Act, and other services may be funded through Medicaid "at the option of the State." 42 U.S.C. §§ 1396a(a)(10)(A)(i), 1396d(a)(1), (3), (4); see Skandalis v. Rowe, 14 F.3d 173, 175 (2d Cir. 1994); Susan J. v. Riley, 254 F.R.D. 439, 446 (M.D. Ala. 2008).

3.

Home and community-based services (HCBS) are optional services and may be reimbursed under a state plan if the state applies for and obtains a "waiver" from the Secretary to provide such services under

section 1915(c) of the Social Security Act. See 42 U.S.C. § 1396n(c); 42 U.S.C. § 1396a(a)(10)(A)(ii)(VI); 42 C.F.R. § 430.25; Susan J., 254 F.R.D. at 446. "The term 'waiver comes from Section 1915(c) of the Social Security Act, enacted in 1981, which gave the Secretary ... the power to waive certain requirements of the Medicaid Act." 254 F.R.D. at 446; see 42 C.F.R. § 441.300 ("Section 1915(c) of the Act permits States to offer, under a waiver of statutory requirements, an array of home and community-based services that an individual needs to avoid institutionalization."). To provide HCBS through a waiver program, states must "submit a proposal prepared in accordance with regulations promulgated by the Secretary." Skandalis, 14 F.3d at 176.

4.

Georgia's NOW/COMP Program provides HCBS to individuals with intellectual and developmental disabilities. See NOW/COMP Waiver Programs Manual (Exhibit R-5) (hereinafter, "Manual"). Pursuant to the Manual, individuals are eligible if they have an "intellectual disability" or a "related condition." An "intellectual disability," as defined in the Manual, requires that an applicant establish that the disability was present before the age of 18, that he has significantly impaired adaptive functioning, and significantly sub-average general intellectual functioning that is generally determined by an IQ score of about 70 or below. In addition, the applicant's adaptive functioning and deficits in intellectual functioning must be the result of the intellectual disability, and "not solely the result of mental/emotional disorders, neurocognitive disorders, sensory impairments, substance abuse, personality disorder, specific learning disability, or attention-deficit/hyperactivity disorder." See Manual, at pp. VII-I and VII-2.

5.

For eligibility through a "related condition," an applicant must have a diagnosis of a condition found to be closely related to an intellectual disability, with an onset before age 22. A closely related condition is defined in the Manual as severe forms of cerebral palsy or epilepsy or "any other condition, **other than mental illness**, found to be closely related to an intellectual disability, because this condition results in substantial impairment of general intellectual functioning or adaptive behavior similar to that of persons with an intellectual disability and requires treatment or services similar to those required for these persons." The disability must result in current substantial deficits in intellectual functioning and adaptive behavior and must be likely to continue indefinitely. See Manual, at p. VII-3.

6.

In this matter, Petitioner has failed to prove, by a preponderance of the evidence, that he is eligible for the NOW/COMP Program under either the intellectual disability criteria or the related condition criteria. With respect to the intellectual disability criteria, the undisputed evidence in the record establishes that Petitioner's full scale I.Q score of 75 is at the 5th percentile and in the borderline range of intellectual functioning before age 18, with no evidence of significant deficient in adaptive functioning. Moreover, the 2013 assessment by Charles Morinello, M.S. did not result in a finding of Intellectual Disability, but a specific learning disability in mathematics. The evidence further establishes that Petitioner does not meet the related condition criteria. Petitioner alleges that he has been diagnosed with schizophrenia in addition to ADHD. However, both schizophrenia and ADHD are not qualifying conditions to meet eligibility under the NOW/COMP Program. Additionally, Petitioner failed to submit into the record any supporting documentation of his schizophrenia diagnosis, which still would be excluded under the program as it is a "mental illness." Accordingly, Petitioner did not meet his burden to prove that he met either of the eligibility categories under the NOW/COMP Program.

IV. FINAL DECISION

Based upon the foregoing, it is concluded that Respondent's determination that Petitioner does not meet the eligibility requirements under the NOW/COMP Program is **HEREBY AFFIRMED**.

SO ORDERED, June 12, 2023

Carol W. Russell

CAROL WALKER-RUSSELL
Administrative Law Judge

