XXXX XXXX,                                       *  BEFORE THOMAS G. WELSHKO,  
APPELLANT                                         *  AN ADMINISTRATIVE LAW JUDGE      
v.                                                *  OF THE MARYLAND OFFICE           
DEPARTMENT OF HEALTH AND                          *  OF ADMINISTRATIVE HEARINGS       
MENTAL HYGIENE                                    *  OAH NO. DHMH-MCP-11A-05-48120    
*  *  *  *  *  *  *  *  *  *  *  *  *  *  *  *  *  

DECISION

STATEMENT OF THE CASE
ISSUE
SUMMARY OF THE EVIDENCE
FINDINGS OF FACT
DISCUSSION
CONCLUSIONS OF LAW
ORDER

STATEMENT OF THE CASE

On or about May 31, 2005, the Appellant submitted an application for the Older Adults Waiver ("OAW") Program. By a letter dated June 23, 2005, the Department of Health and Mental Hygiene ("Department" or "DHMH") notified the Washington County Commission on Aging that, based on the determination of its utilization reviewer, Delmarva Foundation ("Delmarva"), it had denied the Appellant’s application. DHMH explained that Delmarva had found the Appellant ineligible for the OAW because she did not require nursing facility services. The Appellant’s niece and nephew, who have been handling the Appellant’s financial affairs, also obtained DHMH’s notice. XXXX XXXX, the Appellant’s niece, disagreed with this decision and, on September 14, 2005, filed an appeal with DHMH on the Appellant’s behalf.
A hearing to address the Appellant’s appeal was held on Monday, December 19, 2005 at the Office of Administrative Hearings in Hunt Valley, Maryland, before Thomas G. Welshko, Administrative Law Judge (“ALJ”).

XXXX XXXX, the Appellant’s niece, represented the Appellant. The Appellant was not present at the hearing. Erin Reilly, Assistant Attorney General, represented DHMH.


**ISSUE**

The issue presented is whether DHMH’s decision to deny the Appellant’s application for the Older Adults Waiver Program complied with applicable regulations.

---

1 It is unclear which COMAR regulations should govern the procedures to be used in his type of appeal. COMAR 10.09.54.36 states that Waiver Program’s appeal procedures “are those set forth in COMAR 10.09.36.09.” Nevertheless, COMAR 10.09.36.09 refers only to appeals from administrative decisions made by “providers” and requires the use of 10.01.03’s hearing procedures. On the other hand, COMAR 10.09.54.03C(6) provides that all relevant Medical Assistance provisions applicable to aged, blind, or disabled institutionalized persons (i.e., those contained in COMAR 10.09.24) are applicable to Waiver applicants and participants. Unlike COMAR 10.09.36.09, COMAR 10.09.24.13 provides hearing rights to “applicants” who have been denied medical assistance under the procedures of COMAR 10.01.04. A review of all these COMAR regulations leads me to conclude that the procedures set forth in 10.01.04, rather than those in 10.01.03, should be employed when an applicant appeals the Department’s denial of an application for participation in the Waiver Program.
SUMMARY OF THE EVIDENCE

Exhibits

DHMH submitted four exhibits. The Appellant submitted one exhibit. All exhibits were admitted. (An Exhibit List is attached as an Appendix.)

Testimony

Barbara Best, R.N., a Nurse Reviewer for Delmarva, and Dr. Barry Friedman, Director of DHMH’s Admission and Waiver Services section, testified for DHMH. Dr. Friedman was admitted as an expert in Medicine. The Appellant’s niece testified for the Appellant.

FINDINGS OF FACT

Having considered the evidence presented, I find the following facts by a preponderance of the evidence:

1. The Appellant (D.O.B.: XXXX, 1919) is a resident of XXXX in XXXX, Maryland. (DHMH #1)

2. The Appellant has some degree of dementia. Her other diagnosed disorders include hypertension, coronary artery disease, angina, peripheral vascular disease, transient ischemic attacks (TIAs), peptic ulcer disease, gastritis with hemorrhage, hiatal hernia, pernicious anemia, hypercholesterolemia, degenerative joint disease and cataracts. (Test. Summers; App. #1, DHMH #1 and #3)

3. The Appellant had the following medical care profile as of May 31, 2005:

   a. [The Appellant] needs assistance with activities of daily living ("ADLs") and has a mini-mental score (MMES) of 23/30. She has a history of hypertension and pernicious anemia [and] had a successful transfusion in March 2005.
b. [The Appellant] takes [vitamin] B12 by injection once a month, Centrum, calcium + vitamin D and iron, all for anemia.

c. [The Appellant exhibits] suspicious behavior [and is] somewhat paranoid.

d. [The Appellant's] current assisted living arrangement is the appropriate level of care. She does not need continuous monitoring by licensed health care professionals.

(DHMH #3)

4. The Appellant takes the following medications:

Vitamin B12, 1,000 mg. intramuscularly (IM) once a month for anemia.

Aspirin, 81 mg. once a day for heart/stroke.

Calcium + vitamin D, 600 mg. twice a day (b.i.d.) as a supplement.

Centrum, one tablet per day as a supplement.

Ferrous sulfate, 325 mg. twice a day (b.i.d.), as a supplement and for pernicious anemia.

Folic acid, 1 mg. every morning for pernicious anemia.

Furosemide, 40 mg. once per day for edema.

KCl (potassium chloride), 20 mg. once a day as a potassium supplement.

Zestil, 10 mg. once per day for hypertension.

Vitamin E, 400 mg. a day for pernicious anemia.

Allegra, 60mg. once per day (for allergies).

Maxain inhaler, two puffs every four to six hours as needed.

Mylanta, two tablespoons every four hours, as needed, for heartburn.
Nexium, 40 mg. every day for gastritis/heartburn.

(DHMH #2)

5. The Appellant’s medical needs can be provided at a lower level than the nursing facility level of care. Personnel without medical training can assist the Appellant with activities such as eating, bathing, personal hygiene, dressing and grooming. Licensed health care professionals do not have to administer medications to her on a regular basis. (Test. Best and Friedman)

DISCUSSION

I conclude that DHMH has shown that it properly denied the Appellant’s application for the Older Adults Waiver Program. The Appellant’s assertion that she should qualify for this program is unsupported by the evidence.

The OAW program provides certain home and community-based services to adults over the age of fifty as an alternative to nursing facility services. COMAR 10.09.54.03. The OAW Program is available to individuals who are being deinstitutionalized or diverted from nursing facilities into services in the community and would be institutionalized but for the waiver services. COMAR 10.09.54.03B(1). To be eligible for services, DHMH or its designee must certify that the applicant is in need of nursing facility services. COMAR 10.09.54.03A(1). The OAW Program then permits a person who would otherwise be living in a nursing facility to receive nursing facility services but in a community setting. Section .03A(1) states the following:
03 Participant Eligibility.

A. Medical Eligibility.

(1) To be eligible for the services covered under this chapter, an applicant shall be certified by the Department or its designee as needing nursing facility services, pursuant to COMAR 10.09.10.

Applicants receiving reimbursement under the OAW Program must be certified by DHMH or its designee as needing nursing facility services, pursuant to COMAR 10.09.10. COMAR 10.09.10.06B notes the following:

B. The Department or its designee will certify as requiring nursing facility services only those financially eligible recipients requiring nursing facility services as defined in Regulation .01B(31) of this chapter.

COMAR 10.09.10.01B(31), in turn, states:

(31) "Nursing facility services" means 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 under the supervision of licensed health care professionals.

DHMH’s own personnel do not determine whether an applicant qualifies for the OAW Program. The Department has contracted with Delmarva, an independent utilization review organization, to determine an applicant's eligibility. A Delmarva computer technician performs the first review of an applicant’s application, which includes supporting documentation. If the technician finds that an applicant has attained a certain score based on his or her medical needs, Delmarva finds the applicant de facto eligible for the waiver and forwards its determination report to DHMH. If the applicant does not attain the necessary score, the technician forwards the application to a nurse reviewer. If the nurse reviewer finds the applicant ineligible, the
The nurse reviewer sends the application to one of its physician reviewers. The physician reviewer makes the ultimate determination of eligibility and forwards a report to DHMH.

Here, the Appellant is an 86-year-old woman who is a resident of an assisted living facility. She suffers from some degree of dementia. Her mini-mental score is 23 out of 30. She also has some degree of paranoia. She does not want anyone else in her room—even to do routine housekeeping—unless she is present. She marks chairs with a scratch to ensure chairs are not taken from her and replaced with similar-looking chairs. She does not like giving up her dirty Depends adult diapers; she wants to reuse them.

The Appellant suffers from hypertension, coronary artery disease, angina, peripheral vascular disease, transient ischemic attacks (TIAs) (“small strokes”), peptic ulcer disease, gastritis with hemorrhage, hiatal hernia, pernicious anemia, hypercholesterolemia, degenerative joint disease and cataracts. She needs assistance with some ADLs, such as dressing, bathing, toileting and eating. She takes medications, and staff must assist her with doing so because of her memory problems.

The Appellant’s niece disagreed with DHMH’s conclusion that the Appellant is ineligible for the OAW Program. She asserted that the Appellant’s condition has worsened since she first applied for the OAW. In fact, she noted that she and her brother filed a new application for the waiver in October 2005 based on these changed circumstances. The Appellant’s niece emphasized that the Appellant has bleeding associated with her gastritis condition. Consequently, she is being monitored by both a gastroenterologist and an oncologist. She intimated that the worsening of the
Appellant’s condition requires that she receive care at the nursing facility level. Therefore, she would be eligible for the OAW Program.

DHMH maintained that the Appellant does not qualify for the OAW Program because her level of care is such that she does not require “nursing facility services” as defined by COMAR 10.09.10.01(B)(31). It called Dr. Barry Friedman, Director of DHMH’s Admission and Waiver Services Section, as an expert witness to interpret this term and explain why the Appellant did not require nursing facility services. Dr. Friedman testified that for an individual to require nursing facility services, he or she must have medical needs that call for the judgment of licensed medical personnel on a “regular” basis (which has been interpreted by DHMH to be as on a “daily” basis). A person needing care for a decubitus ulcer or tracheostomy, for example, needs to have that care supervised by licensed medical care staff and, thus, would qualify as requiring a nursing facility level of care.” Dr. Friedman further explained that physician-ordered rehabilitative services that a licensed therapist must monitor would also constitute nursing facility services. He added that simply having a person engage in an exercise program, however, does not reach this level of care. Additionally, Dr. Friedman noted that if an individual has an unstable medical condition needing the daily judgment of licensed health care professionals, that individual would also be said to require a nursing facility level of care. A person with an unstable myocardial infarction would fall into this category.

Dr. Friedman averred that based on his review of the Appellant’s application, the Adult Review and Services (“AERS”) report and Delmarva’s evaluation of the Appellant’s medical profile, the Appellant does not require the judgment of licensed
medical personnel on a daily basis and, hence, she does not require nursing facility services. He explained that the Appellant can walk. She can bathe, dress and feed herself with minimal assistance from the assisted living facility’s non-health care staff. Dr. Freidman acknowledged that the Appellant needs assistance with taking her medications because of her memory issues. Nevertheless, he stated that non-medically trained staff can assist her with taking her medications. Dr. Friedman concluded that the daily judgment of licensed health care professionals is not needed in this regard.

Dr. Friedman also noted that it is DHMH’s policy not to consider updated applications or changes in an applicant’s condition subsequent to the date of his or her initial application for the OAW Program. He explained that eligibility, in part, is established through a waiting list because there is a limit to the number of applicants who can qualify. It is DHMH’s procedure to evaluate an applicant’s eligibility only when his or her name comes up on the list. He noted that if DHMH found applicants eligible based on a worsening of their condition, it would put them ahead of applicants who have been on the waiting list longer, which, in turn, would lead to an unfair result. Dr. Freidman emphasized that DHMH did not even consider the new application for the OAW submitted on the Appellant’s behalf because of this policy.

Moreover, Dr. Friedman testified that even if DHMH considered the Appellant’s worsening of her bleeding associated with her gastritis condition, it would still have found her ineligible for the OAW. He noted that the Appellant has been prescribed 81 mg. of Aspirin per day for her heart and TIA conditions. Based on this fact alone, he concluded that the Appellant’s bleeding must be a “slow leak” as opposed to a
significant hemorrhage. Otherwise, she would not have been prescribed Aspirin, which is known for either causing or exacerbating gastric bleeding.

Dr. Friedman concluded that, overall, Delmarva Foundation’s reviewers correctly determined that the Appellant only requires custodial care and that she does not require nursing facility services. Because an applicant must require nursing facility services to be eligible for the OAW Program, he asserted that DHMH correctly denied her application for that program.

Based on a review of all of the testimony and documentary evidence presented, I find the Appellant does not need care “which can be made available only through institutional facilities under the supervision of licensed health care professionals.” In other words, she does not require nursing facility services, and, consequently, is not eligible for the OAW Program. Based on the evidence presented by DHMH, I conclude that the Appellant’s medical condition is stable. Most of the assistance that she needs relates to her routine ADLs, such as reminding her to take her medications, and assisting her with eating, dressing, toileting and bathing. Individuals without medical training or licensure can help the Appellant with these activities.

With regard to the Appellant’s medical care needs related to the bleeding associated with her gastritis, I find Dr. Friedman’s unrefuted expert testimony credible. Dr. Friedman explained a person with severe bleeding associated with gastritis would not be prescribed Aspirin. Given that the Appellant continues to take Aspirin, he logically inferred that her bleeding could not be excessive. Thus, Dr. Friedman concluded that her gastritis is manageable with treatment that does not have to be provided daily by licensed health care professionals.
I also find that DHMH properly applied its policy with respect to considering updated applications or changes in an applicant’s condition. Because of limited resources, DHMH must administer the OAW program so that all applicants are treated fairly. To move individuals up or down the list based on changes in their condition would not promote fair administration of this program.

An applicant for the OAW Program must demonstrate that he or she requires a nursing facility level of care. The Appellant does not require a nursing facility level of care. Consequently, I will uphold DHMH’s decision to deny the Appellant’s application for the OAW Program.

CONCLUSION OF LAW

Based upon the foregoing finds of fact and discussion, I conclude, as a matter of law, that the Appellant is not eligible for the Older Adults Waiver Program, because she does not have needs which can only be met in an institutionalized setting under the supervision of licensed health care professionals. COMAR 10.09.54.03B; 10.09.10.01B(31) and 10.09.10.06B.

ORDER

I ORDER that the decision of the DHMH to deny the Appellant’s application for the Older Adults Waiver Program be UPHELD.

January 12, 2006
Date

Thomas G. Welshko
Administrative Law Judge
REVIEW RIGHTS

If you are not satisfied with this decision, you may appeal it to the Board of Review of the Department of Health and Mental Hygiene within thirty (30) days of the date of this decision. To do so, you must write to the Secretary of the Board of Review, Department of Health and Mental Hygiene, 201 West Preston Street, Baltimore, MD 21201. COMAR 10.01.04.08B(3) and COMAR 10.01.05. The Office of Administrative Hearings is not a party to any review process.