

STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

FILED
April 4, 2011

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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

SHAWN SHUMBERA, Plaintiff Below,
Appellee

vs.) No. 35671 (Kanawha County No. 07-C-1807)

PATSY A. HARDY, in her capacity as Secretary,
West Virginia Department of Health and Human
Resources, Defendant Below, Appellant

MEMORANDUM DECISION

This is an appeal by Patsy A. Hardy, in her capacity as Secretary of the Department of Health and Human Resources (hereinafter “DHHR”), from a final order of the Circuit Court of Kanawha County denying the DHHR’s Rule 59(e) Motion to Alter or Amend Judgment. The circuit court’s underlying order held that Mr. Shawn Shumbera (hereinafter “Appellee” or “Mr. Shumbera”) was eligible to receive services through the Medical Home and Community-Based Mentally Retarded/Developmentally Disabled Waiver Program (hereinafter “Waiver Program”). Having thoroughly reviewed the record, briefs, arguments of counsel, and applicable precedent, this Court concludes that the trial court committed no error. This Court further finds that this case presents no new or significant questions of law. Thus, this case will be disposed through a memorandum decision as contemplated under Rule 21 of the Revised Rules of Appellate Procedure.¹

This case was initiated at the circuit court level as a class action, seeking injunctive and declaratory relief and challenging the policies and procedures of the DHHR

¹Pursuant to Rule 1(d) of the Revised Rules of Appellate Procedure, this court is of the opinion that this matter is appropriate for consideration under the Revised Rules.

in determinations of eligibility for the Waiver Program. Subsequent to a December 11, 2007, evidentiary hearing, the circuit court found that the Appellee, one of the plaintiffs in the underlying class action,² was eligible for participation in the Waiver Program. The Waiver Program allows the State of West Virginia to provide in-home and community-based services, at the level of care provided in an intermediate care facility (hereinafter “ICF/MR facility”), for certain individuals diagnosed with mental retardation and/or related developmental disabilities.

An individual must satisfy designated medical eligibility requirements to qualify for services through the Waiver Program. First, the applicant must have a medical diagnosis of mental retardation and/or a related condition³ and must demonstrate that such medical diagnosis constitutes a severe chronic disability that manifested before the applicant reached twenty-two years of age and is likely to continue indefinitely. Second, the applicant must show that the medical diagnosis substantially limits functioning in three or more of six designated major life areas. Those six major life areas include self-care; receptive and express language (communication); learning (functional academics); mobility; self-direction; and capacity for independent living. Third, the applicant must demonstrate a requirement for active treatment, qualifying for a level of care that similarly diagnosed persons would receive in an intermediate care facility.

The record indicates that Mr. Shumbera, currently age thirty-one, has been institutionalized at the Mildred Mitchell-Bateman Hospital (hereinafter “Bateman Hospital”) for over ten years. He has also been designated as a *Medley* class member.⁴ The Appellee’s application for the Waiver Program was denied based upon the DHHR’s conclusion that his deficits were related to mental illness rather than mental retardation. Evidence presented at

²The circuit court found that individual plaintiffs, other than Mr. Shumbera, should re-apply for benefits and follow the administrative eligibility determination process. Neither the DHHR nor those other plaintiffs have appealed that determination.

³Related conditions include autism, cerebral palsy, epilepsy, or any condition, other than mental illness, found to be closely related to mental retardation based upon impairment of functioning or adaptive behavior.

⁴In *Medley v. Ginsberg*, 492 F.Supp. 1294 (S.D. W.Va. 1980), the United States District Court for the Southern District of West Virginia entertained a class action lawsuit on behalf of mentally handicapped individuals. The court ultimately required state and county boards of education to implement programs to assist handicapped students. Participation as a *Medley* class member is based upon a finding of mental retardation, and the Appellee in this case does have such designation as a *Medley* class member.

the circuit court hearing indicated that the Appellee had been diagnosed with a mixed developmental and behavioral disorder by the age of four. He had received services in the State of Florida and has also received services in West Virginia through Highland Hospital, Beckley Appalachian Regional Hospital, River Park Hospital, the Barboursville School, Pressley Ridge Group Home, and the Bateman Hospital.

Mr. Charles Painter, the Appellee's treating psychologist at the Bateman Hospital, testified that he had administered a psychological evaluation to the Appellee in 1999 and had initially diagnosed him with mental retardation. Mr. Painter subsequently altered his diagnosis, finding that the Appellee was not mentally retarded.⁵ Mr. Painter explained that a diagnosis based upon IQ testing involves a level of discretion and that he had entered the original diagnosis of mental retardation in order to provide the Appellee with adequate services. Mr. Painter further explained that the Appellee is in need of the therapeutic services that would be provided through the Waiver Program.

The record also contains an extensive array of other psychological evaluations conducted by various licensed psychologists throughout the Appellee's life.⁶ After having reviewed those documents and considering other evidence presented, the circuit court found that "[e]very evaluation completed during this time period has confirmed a diagnosis of mild mental retardation, manifested during the developmental period, with significant accompanying adaptive deficits." Moreover, the circuit court found that the evaluations recommend "an ICF/MR level of care for Mr. Shumbera with aggressive training in basic life skills." Finally, the circuit court recognized that the Appellee had "undergone numerous medical evaluations and has repeatedly been certified as ICF/MR eligible by licensed physicians."

This Court reviews the circuit court's findings of fact under a clearly erroneous standard. *See Tennant v. Marion Health Care Foundation, Inc.*, 194 W. Va. 97, 104, 459

⁵The Appellee contends that it was properly within the circuit court's discretion to discount Mr. Painter's testimony that he had changed his initial diagnosis, particularly when the weight of the evidence established that the Appellee had been diagnosed with mental retardation by several other psychologists.

⁶The record reveals several reports by psychologists, including multiple reports by Mr. Painter and Sandi Kiser-Griffith, which conclude with a specific diagnosis of mild mental retardation. The DHHR contended that low IQ scores did not reflect any impact the Appellee's hearing impairment may have had upon the testing. This was a matter of disputed evidence and interpretation at the evidentiary hearing. The multiple diagnoses of mild mental retardation are well-documented by the record.

S.E.2d 374, 381 (1995). The circuit court's ultimate determination is reviewed under an abuse of discretion standard. Upon thorough review of the record, this Court does not find clear error in the circuit court's factual determinations regarding the Appellee's satisfaction of the specific eligibility requirements for the Waiver Program. First, the Appellee had multiple diagnoses of mild mental retardation and had been designated as a *Medley* class member. Although the DHHR contended that his deficits were caused primarily by his mental illness, the record does not reflect clear error in the circuit court's conclusion that the mental retardation was the source of the Appellee's severe and chronic disabilities. Second, evidence presented to the circuit court revealed that the Appellee's mental retardation caused substantial limited functioning in at least three major life areas, particularly his capacity for independent living, self-direction, and self-care. Third, the evidence established support for the circuit court's finding that the Appellee has the need for active treatment and the need for an ICF/MR level of care.

Upon review, this Court finds that the evidence supports the circuit court's conclusions. The circuit court's factual findings are not clearly wrong, and there was no abuse of discretion in determining that the Appellee is eligible for services through the Wavier Program. Thus, the circuit court's holding will not be disturbed by this Court.

Affirmed.

ISSUED: April 4, 2011

CONCURRED IN BY:

Chief Justice Margaret L. Workman
Justice Robin Jean Davis
Justice Brent D. Benjamin
Justice Menis E. Ketchum
Justice Thomas E. McHugh