

STATE OF MICHIGAN
STATE OFFICE OF ADMINISTRATIVE HEARINGS AND RULES

ADMINISTRATIVE HEARINGS FOR THE
DEPARTMENT OF HUMAN SERVICES

IN THE MATTER OF: [REDACTED],
Claimant

Reg. No: 2007-07426
Issue No: 2009
Case No: [REDACTED]
Load No: [REDACTED]
Hearing Date:
June 6, 2007
Marquette County DHS

ADMINISTRATIVE LAW JUDGE: Jay W. Sexton

HEARING DECISION

This matter is before the undersigned Administrative Law Judge pursuant to MCL 400.9; and MCL 400.37 upon claimant's request for a hearing. After due notice, an in-person hearing was held on June 6, 2007 in Marquette. Claimant personally appeared and testified under oath.

The department was represented by Dale Schneider (FIM).

Claimant requested additional time to submit new medical evidence. The new medical evidence was received and submitted to the State Hearing Review Team on October 16, 2007. Claimant waived the timeliness requirement so her new medical evidence could be reviewed by SHRT. After SHRT's second disability denial, the ALJ issued the decision below.

ISSUE

Did claimant establish a severe physical impairment expected to preclude her from substantial gainful work on a sustained basis for one year (MA-P)?

FINDINGS OF FACT

The Administrative Law Judge, based upon the competent, material and substantial evidence on the whole record, finds as material fact:

(1) Claimant is an MA-P/retro applicant (October 10, 2006) who was denied by SHRT (February 28, 2007) due to claimant's failure to establish an impairment which meets the department's severity and duration requirements. Claimant requests retro MA for July, August, and September 2006.

(2) Claimant's vocational factors are: age--59; education-- attended college in [REDACTED] and received a certificate as a phlebotomist; work experience--manager of shoe department at [REDACTED] sports, licensed insurance agent [REDACTED]), owner/manager of a [REDACTED] restaurant, team leader for [REDACTED] stores shoe department, restaurant hostess, county commissioner for [REDACTED].

(3) Claimant has not performed Substantial Gainful Activity (SGA) since July 2006, when she worked for [REDACTED] sports as the shoe department manager.

(4) Claimant has the following unable-to-work (full time) complaints:

- (a) Reduced ability to lift;
- (b) Spinal pain (lumbar area);
- (c) Fecal incontinence;
- (d) Urinary incontinence;
- (e) Arthritis.

(5) SHRT evaluated claimant's medical evidence as follows:

OBJECTIVE MEDICAL EVIDENCE (February 28, 2007):

Claimant has a history of lower back pain and fecal incontinence. An 8/2006 MRI of the lumbar spine showed very mild degenerative changes and benign schmorl's node. (Pages 10-36) An 8/2006 colonoscopy showed benign colon polyps. (Page 10) According to a 9/2006 examination, she did not have any

neurological deficits and her physical examination was normal. (Pages 10-11) She was diagnosed with a rectocele and surgery to repair this condition was recommended. (Pages 10-11) According to a 4/2006 consultative exam, she had full range of motion of her lumbar spine, walked with a normal gait, and had no neurological abnormalities or muscle weaknesses. (Page 54-57)

ANALYSIS: She has mild degenerative arthritis of the spine with no neurological deficits. There was absolutely no evidence of spinal cancer. Her gait and mobility were within normal limits.

* * *

(6) Claimant performs the following Activities of Daily Living (ADLs): dressing, bathing, cooking, dish washing, light cleaning, mopping (sometimes, but hurts), vacuuming (sometimes, but hurts), laundry (does small loads), and grocery shopping.

(7) Claimant has a valid driver's license and drives an automobile approximately 30 times a month. Claimant is computer literate.

(8) The following medical records are persuasive:

(a) A [REDACTED] Imaging Department report was reviewed.

The radiologist provided the following assessment: Assessment of the lung bases shows no nodules or infiltrates and no pleural fluid. The non-contrast images show a 5 mm right renal calculus. No bowel or bladder calculi are identified.

Contrast-enhanced imaging shows normal-sized heart with no pericardial fluid present. There are a few scattered subcentimeter hypoattenuating lesions in the liver which are too small to characterize. The liver appears to be becoming fat replaced. The stomach is mildly distended with fluid given for the procedure. The spleen is normal as is the pancreas. The common duct is not dilated. Both adrenal glands are normal. The kidneys are normal and unobstructed and the examination again shows a small right renal calculus as noted above. Small bowel pattern is normal with no mucosal enhancement or mucosal thickening or small bowel separation of loops or ascites. The bladder

contour is normal. The perirectal region is normal and there is no pelvic fluid or pelvic adenopathy present. Degenerative changes are present in the spine with spinal stenosis likely. Assessment of the bones shows no lytic or blastic lesions.

IMPRESSION: Right renal calculus, degenerative changes in the spine with no specific abnormalities noted otherwise.

* * *

- (b) A [REDACTED] report was reviewed. The radiologist provides the following results:

A L4-5 posterior facet hypertrophic changes are seen with hypertrophy of the ligamentum flavum as well, and is causing somewhat more compromise of the lumbar subarathnoid space.

The L5-S1 level shows some posterior facet hypertrophic changes with no evidence of stenosis.

IMPRESSION: Superior end plate compression fracture of L4 with interbody disc herniation.

- (c) A [REDACTED] report was reviewed. The radiologist provided the following impression:

Total body bone scan reveals a fracture involving the L4 vertebra as previously described on CT scan of the lumbar spine. There appears to be degenerative changes involving the shoulder, sternoclavicular juncture, the right and left hips, as well as right and left knees. Finally, there appears to be increased uptake confined to the right ankle, medial malleolar region. Patient has a history of recent trauma.

* * *

- (d) A September 11, 2006 GI consultation report was reviewed.

The specialist provided the following history: 59-year-old woman who complains of fecal incontinence. She has 1-2 loose stools usually in the morning and then

during the day she may have 1 or 2 episodes of some unpredictable seepage. It usually occurs every other day. Rarely, she may have some constipation. Interestingly enough, she frequently requires to perform some digital manipulation such as pressing on the perineum or the posterior wall of the vagina in order to effect a bowel movement. She also complains of flatus incontinence. She has a significant gynecological history with hysterectomy, tubal ligation and rectocele repair.

Recently, I performed a colonoscopy on this patient due to the elevated CEA, but only 2 small polyps were identified and both were hyperplastic.

* * *

The specialist provided the following impression:

- (1) Change in bowel habits and fecal and flatus incontinence. I feel that the patient's symptoms are due to a rectocele of which the patient gives a pretty convincing description. The presence of a rectocele inhibits complete evacuation of the rectum which can perpetuate the presence of fecal incontinence. I think that an evaluation and possible surgical repair by [REDACTED] who has seen the patient in the past, would be of benefit. Fiber supplementation would also be helpful. Once the rectocele is repaired, a combination of fiber supplementation and daily Miralax at bedtime would affect a good evacuation of the rectal vault every morning which would minimize fecal incontinence accidents during the day.
- (2) Elevated CEA: A colonoscopy has not revealed the presence of any colon cancer.

* * *

(9) The probative medical evidence, standing alone, does not establish an acute physical condition expected to prevent claimant from performing all customary work functions for the required period of time. The examining physicians provided the following diagnoses: Apparent degenerative changes involving the shoulder, sternoclavicular juncture, the right and

left hips, as well as the right and left knees; fecal and flatus incontinence; and suspected rectocele.

(10) Claimant is currently employed as a chore service provider for DHS clients. She currently works 15 hours per week. Recently, claimant attempted to perform in an event-planning capacity. She was not able to continue this work.

(11) Claimant's most prominent complaint is her spinal pain/spinal dysfunction which is especially prominent in the lumbar portion of the spine. .

(12) Claimant has applied for federal disability benefits; her application was recently denied. She did not file a timely appeal.

(13) At claimant's request, SHRT reviewed claimant's supplemental medical evidence and denied MA-P eligibility based on insufficient medical evidence.

CONCLUSIONS OF LAW

CLAIMANT'S POSITION

Claimant thinks she is entitled to MA-P/retro based on the impairments listed in paragraph #4, above. The medical records provided by claimant verify the following physical diagnoses: lower back pain, fecal incontinence, mild degenerative changes in the lumbar spine, benign colon polyps, mild degenerative arthritis, arthritis of the spine with no neurological deficits.

DEPARTMENT'S POSITION

The department acknowledges that claimant has mild degenerative arthritis of the spine and a history of low back pain and fecal incontinence.

However, the department thinks that claimant retains the Residual Functional Capacity (RFC) to perform medium work. Since claimant's past work was sedentary (retail management and retail sales), claimant retains the capacity to perform her past relevant work.

LEGAL BASE

The Medical Assistance (MA) program is established by Title XIX of the Social Security Act and is implemented by Title 42 of the Code of Federal Regulations (CFR). The Department of Human Services (DHS or department) administers the MA program pursuant to MCL 400.10, *et seq.*, and MCL 400.105. Department policies are found in the Program Administrative Manual (PAM), the Program Eligibility Manual (PEM) and the Program Reference Manual (PRM).

Pursuant to Federal Rule 42 CFR 435.540, the Department of Human Services uses the federal Supplemental Security Income (SSI) policy in determining eligibility for disability under the Medical Assistance program. Under SSI, disability is defined as:

...the inability to do any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months.... 20 CFR 416.905.

A set order is used to determine disability. Current work activity, severity of impairments, residual functional capacity, past work, age, or education and work experience is reviewed. If there is a finding that an individual is disabled or not disabled at any point in the review, there will be no further evaluation. 20 CFR 416.920.

If an individual is working and the work is substantial gainful activity, the individual is not disabled regardless of the medical condition, education and work experience. 20 CFR 416.920(c).

If the impairment or combination of impairments do not significantly limit physical or mental ability to do basic work activities, it is not a severe impairment(s) and disability does not exist. Age, education and work experience will not be considered. 20 CFR 416.920.

Statements about pain or other symptoms do not alone establish disability. There must be medical signs and laboratory findings which demonstrate a medical impairment.... 20 CFR 416.929(a).

...Medical reports should include –

- (1) Medical history.
- (2) Clinical findings (such as the results of physical or mental status examinations);
- (3) Laboratory findings (such as blood pressure, X-rays);
- (4) Diagnosis (statement of disease or injury based on its signs and symptoms).... 20 CFR 416.913(b).

In determining disability under the law, the ability to work is measured. An individual's functional capacity for doing basic work activities is evaluated. If an individual has the ability to perform basic work activities without significant limitations, he or she is not considered disabled. 20 CFR 416.994(b)(1)(iv).

Basic work activities are the abilities and aptitudes necessary to do most jobs. Examples of these include --

- (1) Physical functions such as walking, standing, sitting, lifting, pushing, pulling, reaching, carrying, or handling;
- (2) Capacities for seeing, hearing, and speaking;
- (3) Understanding, carrying out, and remembering simple instructions;
- (4) Use of judgment;

- (5) Responding appropriately to supervision, co-workers and usual work situations; and
- (6) Dealing with changes in a routine work setting. 20 CFR 416.921(b).

Medical findings must allow a determination of (1) the nature and limiting effects of your impairment(s) for any period in question; (2) the probable duration of the impairment; and (3) the residual functional capacity to do work-related physical and mental activities. 20 CFR 416.913(d).

Medical evidence may contain medical opinions. Medical opinions are statements from physicians and psychologists or other acceptable medical sources that reflect judgments about the nature and severity of the impairment(s), including your symptoms, diagnosis and prognosis, what an individual can do despite impairment(s), and the physical or mental restrictions. 20 CFR 416.927(a)(2).

All of the evidence relevant to the claim, including medical opinions, is reviewed and findings are made. 20 CFR 416.927(c).

The Administrative Law Judge is responsible for making the determination or decision about whether the statutory definition of disability is met. The Administrative Law Judge reviews all medical findings and other evidence that support a medical source's statement of disability.... 20 CFR 416.927(e).

A statement by a medical source finding that an individual is "disabled" or "unable to work" does not mean that disability exists for the purposes of the program. 20 CFR 416.927(e).

When determining disability, the federal regulations require that several considerations be analyzed in sequential order. If disability can be ruled out at any step, analysis of the next step is not required. These steps are:

1. Does the client perform Substantial Gainful Activity (SGA)? If yes, the client is ineligible for MA. If no, the analysis continues to Step 2. 20 CFR 416.920(b).
2. Does the client have a severe impairment that has lasted or is expected to last 12 months or more or result in death? If no, the client is ineligible for MA. If yes, the analysis continues to Step 3. 20 CFR 416.920(c).
3. Does the impairment appear on a special listing of impairments or are the client's symptoms, signs, and laboratory findings at least equivalent in severity to the set of medical findings specified for the listed impairment? If no, the analysis continues to Step 4. If yes, MA is approved. 20 CFR 416.290(d).
4. Can the client do the former work that he/she performed within the last 15 years? If yes, the client is ineligible for MA. If no, the analysis continues to Step 5. 20 CFR 416.920(e).
5. Does the client have the Residual Functional Capacity (RFC) to perform other work according to the guidelines set forth at 20 CFR 404, Subpart P, Appendix 2, Sections 200.00-204.00? If yes, the analysis ends and the client is ineligible for MA. If no, MA is approved. 20 CFR 416.920(f).

Claimant has the burden of proof to show by a preponderance of the medical evidence in the record that her physical impairments meet the department's definition of disability for MA-P purposes. PEM 260. "Disability," as defined by MA-P standards is a legal term which is individually determined by a consideration of all factors in each particular case.

STEP 1

The issue at Step 1 is whether claimant is performing Substantial Gainful Activity (SGA). If claimant is working and is earning substantial income, she is not eligible for MA-P.

SGA is defined as the performance of significant duties over a reasonable period of time for pay, or engaging in work of a type generally performed for pay. PRM, Glossary, page 34.

The vocational evidence of record shows that claimant is not currently performing SGA. However, the Administrative Law Judge is persuaded that claimant's current employment as a chore services provider for DHS clients does show some capacity to work.

STEP 2

The issue at Step 2 is whether claimant has impairments which meet the SSI definition of severity/duration.

A severe impairment is defined as a verified medical condition which precludes substantial employment. Duration means the severe impairment is expected to last for 12 continuous months or result in death. SHRT did not make a specific finding that claimant meets the severity and duration requirements.

However, SHRT did conclude that claimant is able to perform her past relevant work as a retail manager and a retail sales representative.

STEP 3

The issue at Step 3 is whether claimant meets the Listing of Impairments in the SSI regulations. Claimant does not allege that she meets any of the listings.

Therefore, the Administrative Law Judge concludes that claimant does not meet the Step 3 disability requirements.

STEP 4

The issue at Step 4 is whether claimant is able to do her previous work. Claimant currently works as a [REDACTED] for several DHS clients. She works approximately 15 hours a week and earns approximately \$391 per month.

Claimant's current work can be considered light work.

Light work may be defined as follows:

Light work. Light work involves lifting no more than 20 pounds at a time with frequent lifting or carrying of objects weighing up to 10 pounds. Even though the weight lifted may be very little, a job is in this category when it requires a good deal of walking or standing, or when it involves sitting most of the time with some pushing and pulling of arm or leg controls.... 20 CFR 416.967(b).

Based on the vocational and medical evidence of record, claimant is able to perform her current work as a chore services provider on a part time basis.

The vocational record also establishes that claimant is able to do sedentary work, which includes retail sales, which claimant recently performed as the manager of a shoe department at [REDACTED] sports.

STEP 5

The issue at Step 5 is whether claimant has the Residual Functional Capacity (RFC) to do other work. For purposes of this analysis, we classify jobs as sedentary, light, medium and heavy. These terms are defined in the [REDACTED], published by the [REDACTED] at 20 CFR 416.967.

The vocational evidence of record establishes that claimant is able to perform light/sedentary work. Claimant's vocational profile shows an individual approaching advanced age (59) with a high school education and additional education which resulted in a certificate as a phlebotomist and as a licensed insurance agent.

Based on the medical and vocational evidence of record, claimant is able to perform Substantial Gainful Activity at this time.

During the hearing, claimant testified that the major impediment to her ability to perform Substantial Gainful Activity at 40 hours a week is the lumbar pain which she experiences. Evidence of pain, alone, is insufficient to establish disability for MA-P purposes.

The Administrative Law Judge concludes that claimant's testimony about her pain is credible, but out of proportion to the objective medical evidence as it relates to claimant's ability to work.

In short, the Administrative Law Judge is not persuaded that claimant is totally unable to work based on her lumbar dysfunction in combination with her low back pain. Claimant's rectal dysfunction has been successfully treated. At this time, the rectal dysfunction would not be the basis for MA-P disability. This is especially true since claimant is currently working part time. Under current SSI regulations, part time work can be considered Substantial Gainful Activity.

DECISION AND ORDER

The Administrative Law Judge, based upon the above findings of fact and conclusions of law, decides that claimant does not meet the MA-P disability requirements under PEM 260 because she is able to perform light and sedentary work on a part time basis and possibly on a full time basis.

Accordingly, the department's denial of claimant's MA-P application is, hereby,
AFFIRMED.

SO ORDERED.

/s/ _____
Jay W. Sexton
Administrative Law Judge
For Ismael Ahmed, Director
Department of Human Services

Date Signed: July 27, 2009

Date Mailed: July 27, 2009

NOTICE: Administrative Hearings may order a rehearing or reconsideration on either its own motion or at the request of a party within 30 days of the mailing date of this Decision and Order. Administrative Hearings will not order a rehearing or reconsideration on the Department's motion where the final decision cannot be implemented within 90 days of the filing of the original request.

The Claimant may appeal the Decision and Order to Circuit Court within 30 days of the mailing of the Decision and Order or, if a timely request for rehearing was made, within 30 days of the mailing date of the rehearing decision.

JWS/cv

cc:

