

STATE OF MICHIGAN
STATE OFFICE OF ADMINISTRATIVE HEARINGS AND RULES

ADMINISTRATIVE HEARINGS FOR THE
DEPARTMENT OF HUMAN SERVICES

IN THE MATTER OF:

██████████

Claimant

Reg. No.: 2008-04632

Issue No.: 2009

Case No.: ██████████

Load No.: ██████████

Hearing Date:

May 14, 2008

Wayne County DHS (35)

ADMINISTRATIVE LAW JUDGE: Judith Ralston Ellison

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, the Claimant and his representative ██████████ appeared at a hearing held on May 14, 2008 at the Department of Human Service (Department) in Wayne County.

The closing date was waived. Additional medical records were ordered with an Interim Order. The State Hearing Review Team (SHRT) denied the application. The Michigan Review Team granted Medical Assistance based on disability November 2007. This matter of disability for the months of January 2007 to October 2007 is now before the undersigned for final decision.

ISSUES

Whether the Department properly determined the Claimant is "not disabled" for purposes of Medical Assistance based on disability (MA-P) for the months of January 2007 to October 2007?

FINDINGS OF FACT

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

- (1) On April 26, 2007 the Claimant applied for MA-P.
- (2) On June 20, 2007 the Department denied the application; and on January 27, 2008 the SHRT denied the application finding the medical records supported a non-severe impairment with alcohol and drugs being material to disability per 20 CFR 416.920(c).
- (3) On September 14, 2007 the Claimant filed a timely hearing request to protest the Department's determination.
- (4) Claimant's date of birth is [REDACTED] and the Claimant was fifty-three years of age for the time period at issue.
- (5) Claimant completed grade 12; two years of college; and can read and write English and perform basic math.
- (6) Claimant last worked in 1988 as a painter, at [REDACTED], material handling and for [REDACTED] and the records indicated construction work in 1997. Department Exhibit (DE) 1, p. 5A
- (7) Claimant has alleged a medical history of acute exacerbations of asthma 2-3 times a month; and shortness of breath. Bronchitis, COPD, peptic ulcer and arthritis with neck, and bilateral shoulder, hand and knee pain.
- (8) January, February, March, April, July and August 2007, in part:

January: Two day Hospitalization. Conditions/Diagnoses: Chronic Obstructive Pulmonary Disease (COPD), Bacterial pneumonia, Alcohol abuse, cocaine abuse.

Presented to ER with shortness of breath. Recently discharged for similar symptoms but did not take prescribed medications. Smokes

½ pack cigarettes/day. Abuses heroine and alcohol. Physical Exam: BP 144/91, HR 133, 92% oxygen on room air. HEENT, Abdominal, Cardiovascular, Extremities, Neurological: [All within normal limits.] Except: mild respiratory distress, prolonged respirations, decreased air movement, positive rhonchi and wheezing, chest wall and abdominal tenderness. Chest X-ray showed opacity over lingual but no leucocytosis consistent with health-care associated pneumonia, asthma exacerbation and hypoxia. Treated medically. EKG, labs and electrolytes are normal. Patient left AMA. Refused substance abuse referral. Should use albuterol, Avelex, Fluticasone, Prednisone and follow with PCP.

██████████ Claimant Exhibit (CE) A, pp.5- 7.

February: C/O of withdrawal symptoms from snorting heroin. Respirations unlabored with wheezing. Walking around, vital signs stable. Left AMA. ██████████ CE A, pp. 10-13.

March: Conditions/Diagnoses: Asthma with acute exacerbation, Opioid withdrawal, Tobacco smoking. C/O shortness of breath for two days ran out of medications. Chest X-ray ruled out congestive heart failure, MI, pneumonia, pneumothorax EKG and tropins were normal. Physical Examination [all within normal limits.] Except shortness of breath and wheezing. Wheezing improved on medical treatment but caught in bathroom smoking. Given methadone for withdrawal. Given information on ██████████ access for treatment. Left the hospital AMA. ██████████

██████████ CE A, pp. 14-20.

April: Conditions/Diagnosis: Asthma. Wheezing on admission. Continues to be non-compliant with treatment. Physical Examination: [all within normal limits.] Except inspiratory/expiratory wheezing treated medically. Chest X-ray normal. Heroin withdrawal from snorting yesterday. Given methodone. Smoking cessation advised. Routine discharge with medications but refused to sign and left AMA. Disability: none.

██████████ . CE A, pp. 21-34 and DE 1, pp. 7-10.

July: C/O shortness of breath for 3 days. Admits to a 30-year smoking habit and daily snorting of heroin and daily drinking of ½ pint of gin per day. Does not appear to be in respiratory distress Chest X-ray was normal Episodes of leaving and disappearing from room. Last disappearance he took clothing and returned on paging. Physical Examination: lungs clear and [all systems within normal limits.] Wants to leave and was advised on complications. Given 5 days medications. To follow with PCP. ██████████ CE A, pp. 35-44.

August: Final Impression: Diagnosis: COPD exacerbation. Present with 3 days of shortness of breath. Continues to smoke and use heroin daily. Physical Examination: [Within normal limits.] Except bilateral wheezing, no rhonchi, no rales, able to talk in complete sentences. Given breathing treatments and medications and patient feeling much better. Given prescriptions for prednisone and doxycycline. Stable for discharge in good condition. [REDACTED]
[REDACTED] CE A, pp. 45-47.

(9) January 2008, in part:

Presents with shortness of breath began yesterday. Positive for tobacco, occasional alcohol and use of heroin twice weekly. Chest X-ray negative. Physical Exam: Ears, Nose, throat, Hearing, Neck, Lungs, Cardiovascular, Abdomen, Musculoskeletal, Neurological: [All within normal limits.] Except Lungs have bilateral inspiratory/expiratory wheezing with no accessory muscles used and talking in complete sentences. Treated medically and feeling much better. Prescribed prednisone, albuterol, Atrovent, aspirin, doxycycline. Bronchitis is related to his smoking. Discharged home in fair condition. [REDACTED] CE A, pp. 1-4.

CONCLUSIONS OF LAW

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 400.1 *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).

Federal regulations require that the department use the same operative definition for “disabled” as used for Supplemental Security Income (SSI) under Title XVI of the Social Security Act. 42 CFR 435.540(a).

“Disability” is:

. . . 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 CFR416.905

In determining whether an individual is disabled, 20 CFR 416.920 requires the trier of fact to follow a sequential evaluation process by which current work activity; the severity of impairment(s); residual functional capacity, and vocational factors (i.e., age, education, and work experience) are assessed in that order. A determination that an individual is disabled can be made at any step in the sequential evaluation. Then evaluation under a subsequent step is not necessary.

First, the trier of fact must determine if the individual is working and if the work is substantial gainful activity (SGA). 20 CFR 416.920(b). In this case, under the first step, Claimant testified to not performing SGA since 1988 but records state 1997. The Claimant's credibility is an issue. But Claimant is not disqualified for MA at step one in the evaluation process.

Second, in order to be considered disabled for purposes of MA, a person must have a "severe impairment" 20 CFR 416.920(c). A severe impairment is an impairment which significantly limits an individual's physical or mental ability to perform basic work activities. Basic work activities mean the abilities and aptitudes necessary to do most jobs. Examples 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)

The purpose of the second step in the sequential evaluation process is to screen out claims lacking in medical merit. The court in *Salmi v Sec’y of Health and Human Servs*, 774 F2d 685 (6th Cir 1985) held that an impairment qualifies as “non-severe” only if it “would not affect the claimant’s ability to work,” “regardless of the claimant’s age, education, or prior work experience.” *Id.* At 691-92. Only slight abnormalities that minimally affect a claimant’s ability to work can be considered non-severe. *Higgs v Bowen*, 880 F2d 860, 862 (6th Cir. 1988); *Farris v Sec’y of Health & Human Servs*, 773 F2d 85, 90 (6thCir 1985)

In this case, the Claimant has presented medical evidence that support episodes of shortness of breath and active polysubstance abuse. See finding of facts 8-9. The medical evidence has established that Claimant has episodic shortness of breath and polysubstance abuse that has more than a minimal effect on basic work activities. It is necessary to continue to evaluate the Claimant’s impairments under step three.

In the third step of the sequential analysis of a disability claim, the trier of fact must determine if the Claimant’s physical and mental impairments are listed in Appendix 1 of Subpart P of 20 CFR, Part 404. Based on the hearing record, the undersigned finds that the Claimant’s medical record will not support findings that the mental and physical impairments are “listed impairment(s)” or equal to a listed impairment. 20 CFR 416.920(a) (4) (iii). According to the medical evidence, alone, the Claimant cannot be found to be disabled.

The only physical impairment established in the medical records was episodic shortness of breath and polysubstance abuse. Substance abuse is not an impairment under the Listings. Appendix I, Listing of Impairments (Listing) discusses the analysis and criteria necessary to a finding of a listed impairment. In this matter, the medical records establish episodic shortness of breath, with resolution on hospital treatment and unresolved polysubstance abuse.

The medical records establish the Claimant has been non-compliant with medical advice, left treatment several times AMA; and continues polysubstance and tobacco use against medical advice. 20 CFR 416.930 discusses the need to follow prescribed treatment.

(a) What treatment you must follow. In order to get benefits, you must follow treatment prescribed by your physician if this treatment can restore your ability to work, can reduce your functional limitations so that they are no longer marked and severe.

(b) When you do not follow prescribed treatment. If you do not follow the prescribed treatment without a good reason, we will not find you disabled or blind or, if you are already receiving benefits, we will stop paying you benefits.

In this case, due to the lack of medical records establishing severe impairments; this Administrative Law Judge finds the Claimant is not presently disabled at the third step for purposes of the Medical Assistance (MA) program. Sequential evaluation under step four or five is necessary. 20 CFR 416.905

In the fourth step of the sequential evaluation of a disability claim, the trier of fact must determine if the Claimant's impairment(s) prevent Claimant from doing past relevant work. 20 CFR 416.920(e) Residual functional capacity (RFC) will be assessed based on impairment(s), and any related symptoms, such as pain, which may cause physical and mental limitations that affect what you can do in a work setting. RFC is the most you can still do despite your limitations. All the relevant medical and other evidence in your case record applies in the assessment. See 20 CFR 416.945.

There was no functional physical impairment established in the medical records. See finding of facts 8-9. Claimant's past relevant work was in 1997; construction. See finding of fact 6. The medical records do not establish that shortness of breath is caused by exertion activities. The medical records relate the shortness of breath to snorting heroin and smoking cigarettes. There was no evidence establishing a causation of pain of the neck, shoulder blades, hands or

knees. Range of motion in both upper and lower extremities was full in January 2008. The undersigned decides the Claimant's impairments must be evaluated under step five due to the length of time since last work in 1997.

In the fifth step of the sequential evaluation of a disability claim, the trier of fact must determine: if the claimant's impairment(s) prevent him/her from doing other work. 20 CFR 416.920(f). This determination is based on the claimant's:

- (1) "Residual function capacity," defined simply as "what you can still do despite your limitations," 20 CFR 416.945.
- (2) Age, education and work experience, and
- (3) The kinds of work which exist in significant numbers in the national economy which the claimant could perform despite his/her impairments.

20 CFR 416.960. *Felton v DSS*, 161 Mich App 690, 696-697, 411 NW2d 829 (1987)

It is the finding of the undersigned, based upon the medical evidence, objective physical findings, and hearing record that Claimant's RFC for work activities on a regular and continuing basis is functionally limited to light work. Appendix 2 to Subpart P of Part 404—Medical-Vocational Guidelines 20 CFR 416.969:

202.00 *Maximum sustained work capability limited to light work as a result of severe medically determinable impairment(s).* (a) The functional capacity to perform a full range of light work includes the functional capacity to perform sedentary as well as light work. Approximately 1,600 separate sedentary and light unskilled occupations can be identified in eight broad occupational categories, each occupation representing numerous jobs in the national economy. These jobs can be performed after a short demonstration or within 30 days, and do not require special skills or experience.

(b) The functional capacity to perform a wide or full range of light work represents substantial work capability compatible with making a work adjustment to substantial numbers of unskilled jobs and, thus, generally provides sufficient occupational mobility even

for severely impaired individuals who are not of advanced age and have sufficient educational competences for unskilled work.

(c) However, for individuals of advanced age who can no longer perform vocationally relevant past work and who have a history of unskilled work experience, or who have only skills that are not readily transferable to a significant range of semi-skilled or skilled work that is within the individual's functional capacity, or who have no work experience, the limitations in vocational adaptability represented by functional restriction to light work warrant a finding of disabled. Ordinarily, even a high school education or more which was completed in the remote past will have little positive impact on effecting a vocational adjustment unless relevant work experience reflects use of such education.

(d) Where the same factors in paragraph (c) of this section regarding education and work experience are present, but where age, though not advanced, is a factor which significantly limits vocational adaptability (*i.e.*, closely approaching advanced age, 50-54) and an individual's vocational scope is further significantly limited by illiteracy or inability to communicate in English, a finding of disabled is warranted.

Claimant at fifty-three [Age at time periods January 2007 to October 2007] is considered *approaching advanced age*; a category of individuals age 50-54. Under Appendix 2 to Subpart P: Table No. 1—Residual Functional Capacity: Maximum Sustained Work Capability Limited to Light Work as a Result of Severe Medically Determinable Impairment(s), Rule 202.13, for approaching advanced age, age 50-54; education: high school graduate or more; previous work experience, unskilled or none; the Claimant is “not disabled” per Rule 202.13.

DECISION AND ORDER

The Administrative Law Judge, based on the findings of fact and conclusions of law, decides that the Claimant is “not disabled” for purposes of the Medical Assistance program.

It is ORDERED; the Department’s determination in this matter is AFFIRMED.

/s/

Judith Ralston Ellison
Administrative Law Judge
For Ishmael Ahmed, Director
Department of Human Services

Date Signed: 04/08/09

Date Mailed: 04/09/09

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 receipt of the Decision and Order or, if a timely request for rehearing was made, within 30 days of the receipt date of the rehearing decision.

JRE/jlg

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