

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: 2008-11990
Issue No: 2009
Case No: [REDACTED]
Load No: [REDACTED]
Hearing Date:
September 30, 2008
Calhoun County DHS

ADMINISTRATIVE LAW JUDGE: Marlene B. Magyar

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, a telephone hearing was held on September 30, 2008. Claimant personally appeared and testified. She was assisted by [REDACTED], Attorney.

ISSUE

Did the department properly determine claimant is not disabled by Medicaid (MA) eligibility standards?

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 a divorced, right-handed, 50-year-old pack per day smoker with a high school education who lives with her long-term partner in [REDACTED].

(2) Claimant has not been substantially gainfully employed since she was injured performing patient care duties (medium/heavy exertional activity) in 1991, although she has maintained her certified status since then.

(3) By 1999, claimant had two cervical surgeries without success in pain reduction or improvement in cervical range of motion (Department Exhibit #1, pg 151).

(4) Pain clinic notes from July 6, 1999 reference well-healed posterior and anterior laminectomy scars on claimant's right neck, but also note claimant constantly held her right upper extremity in an antalgic posture; consequently, her pain medication was stepped-up to a more long lasting narcotic ([REDACTED]) because the current medication was not working (intractable daily pain at 7 on a 1-10 pain scale)(Department Exhibit #1, pg 149).

(5) Updated pain clinic notes from March 23, 2000 indicate claimant was one week post-cervical C4-C6 fusion at that time with neck brace in place (Department Exhibit #1, pgs 138 and 190).

(6) Claimant's chronic pain level was 6, with severe neck/back pain continuing and intermittent severe muscle spasms reported; consequently, the specialist added [REDACTED] to claimant's medication schedule (Department Exhibit #1, pgs 138 and 139).

(7) Claimant continued treatment at the pain clinic with little success in pain reduction despite full compliance with her medication schedule, as well as trying nerve blocks and a TENS unit.

(8) Updated pain clinic notes from February, 2004 state in relevant part:

...I would recommend that her short-acting narcotic medication be terminated, but she will need to continue on a long-acting narcotic medication, at least at this time, as she has had three prior spine surgeries and continues to have a great deal of discomfort.

However, she does continue with physical therapy and is soon to begin aquatic therapy. I believe therapy combined with home exercises and, potentially work hardening, will give her the best chance of success. Her pain is very chronic, and that is certainly frustrating to the patient and to her caregivers. We would like to see her make more progress, if possible.

As I indicated earlier, other than her three prior surgeries on the spine, she also has fairly significant myofascial discomfort. There are multiple trigger points present. The management of this pain really requires significant input from the patient along with therapy and home exercises. Hopefully, the aquatic therapy she is going to start will soon help her. She may also benefit from psychologic intervention, as I do believe there are elements of depression present...

We will continue to work with [claimant] to try to reduce her narcotic medication, and we will try to encourage her to remain as active as possible...However, there is no simple treatment that will simply eliminate all of her pain complaints, particularly her myofascial pain (Department Exhibit #1, pgs 60 and 61).

- (9) Updated pain clinic notes from April 10, 2007 state in relevant part:

As you know, [claimant] has been a long-time patient at the [REDACTED] who has a history of cervicalgia, bilateral trapezius myofascial discomfort, status post cervical fusion and she has depression...

...We recently started her on [REDACTED] to try to help with depression and sleep. She tried to get up to 60 mg but stated that she could not tolerate the 60 mg and returned to taking 30 mg which she is on currently.

I am concerned because we seem to have plateaued with [claimant]. I spent a lot of time explaining to her the importance of working on conditioning, as I feel much of this is myofascial back pain and cervicalgia...

...We have done have trigger point injections in the past. I am not going to recommend any further trigger point injections because she is not really seeming to make any significant progress...

I do not mind seeing her for her medications. I am concerned that she continues to have a lot of myofascial pain, and it is not clear to me how much good this medication is doing for that myofascial

pain particularly as she does not engage in exercises on a regular basis and work towards controlling those things that she can control. In other words, she should work on strengthening and conditioning to try and help with her pain (Department Exhibit #1, pgs 12 and 13).

(10) Four months later, on August 17, 2007, claimant applied for disability-based MA based on her orthopedic impairments and the chronic myofascial pain syndrome stemming from them, as well as on the exertional and non-exertional symptoms which accompany this syndrome.

(11) Claimant appealed the department's denial of her application and her hearing was held on September 30, 2008.

(12) The department's witness noted claimant exhibited a slow and severely ataxic gait; additionally, claimant's neck appeared off center and was permanently crooked to the side.

(13) Claimant still takes [REDACTED] and [REDACTED] daily with negligible improvement in her pain levels (See also Finding of Fact #4 and #6 above).

(14) Claimant's pain worsens with minimal exertion; her ability to sit, stand, walk, bend, squat, push/pull, navigate stairs, etc. has been severely compromised by her cervical impairments.

(15) Claimant's daily non-exertional symptoms include headaches, loss of appetite, sleeplessness, fatigue, mood swings, inability to concentrate and chronic depression.

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 400.10, *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

The person claiming a physical or mental disability has the burden to establish it through the use of competent medical evidence from qualified medical sources such as his or her medical history, clinical/laboratory findings, diagnosis/prescribed treatment, prognosis for recovery and/or medical assessment of ability to do work-related activities or ability to reason and to make appropriate mental adjustments, if a mental disability is being alleged, 20 CFR 416.913. An individual's subjective pain complaints are not, in and of themselves, sufficient to establish disability. 20 CFR 416.908 and 20 CFR 416.929. By the same token, a conclusory statement by a physician or mental health professional that an individual is disabled or blind is not sufficient without supporting medical evidence to establish disability. 20 CFR 416.929.

When determining disability, the federal regulations require several factors to be considered, including: (1) the location/duration/frequency/intensity of an applicant's pain; (2) the type/dosage/effectiveness/side effects of any medication the applicant takes to relieve pain; (3) any treatment other than pain medication that the applicant has received to relieve pain; and (4) the effect of the applicant's pain on his or her ability to do basic work activities. 20 CFR 416.929(c)(3). The applicant's pain must be assessed to determine the extent of his

or her functional limitations in light of the objective medical evidence presented. 20 CFR 416.929(c)(94).

...In determining whether you are disabled, we will consider all of your symptoms, including pain, and the extent to which your symptoms can reasonably be accepted as consistent with objective medical evidence, and other evidence.... 20 CFR 416.929(a).

...Pain or other symptoms may cause a limitation of function beyond that which can be determined on the basis of the anatomical, physiological or psychological abnormalities considered alone.... 20 CFR 416.945(e).

...Since symptoms sometimes suggest a greater severity of impairment than can be shown by objective medical evidence alone, we will carefully consider any other information you may submit about your symptoms.... 20 CFR 416.929(c)(3).

...Because symptoms such as pain, are subjective and difficult to quantify, any symptom-related functional limitations and restrictions which you, your treating or examining physician or psychologist, or other persons report, which can reasonably be accepted as consistent with the objective medical evidence and other evidence, will be taken into account...in reaching a conclusion as to whether you are disabled.... 20 CFR 416.929(c)(3).

...We will consider all of the evidence presented, including information about your prior work record, your statements about your symptoms, evidence submitted by your treating, examining or consulting physician or psychologist, and observations by our employees and other persons.... 20 CFR 416.929(c)(3).

...We will consider your statements about the intensity, persistence, and limiting effects of your symptoms, and we will evaluate your statements in relation to the objective medical evidence and other evidence in reaching a conclusion as to whether you are disabled.... 20 CFR 416.929(c)(4).

...Your symptoms, including pain, will be determined to diminish your capacity for basic work activities...to the extent that your alleged functional limitations and restrictions due to symptoms, such as pain, can reasonably be accepted as consistent with the objective medical evidence and other evidence. 20 CFR 416.929(c)(4).

If you have more than one impairment, we will consider all of your impairments of which we are aware. We will consider your ability to meet certain demands of jobs, such as physical demands, mental demands, sensory requirements, and other functions as described in paragraphs (b), (c) and (d) of this section. Residual functional capacity is an assessment based upon all of the relevant evidence. This assessment of your capacity for work is not a decision on whether you are disabled but is used as a basis for determining the particular types of work you may be able to do despite your impairment. 20 CFR 416.945.

...We will consider whether there are any inconsistencies in the evidence and the extent to which there are any conflicts between your statements and the rest of the evidence, including your medical history, medical signs and laboratory findings, and statements by your treating or examining physician or psychologist or other persons about how your symptoms affect you.... 20 CFR 416.929(c)(4).

[As Judge]...We are responsible for making the determination or decision about whether you meet the statutory definition of disability. In so doing, we review all of the medical findings and other evidence that support a medical source's statement that you are disabled.... 20 CFR 416.927(e).

In claimant's case, the pain and other non-exertional symptoms she describes are consistent with the objective medical evidence presented. Consequently, great weight and credibility must be given to her testimony in this regard.

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 is not disqualified from receiving MA at Step 1, because she is not currently employed and she has not been gainfully employed since 1991 (See Finding of Fact #2 above).

At Step 2, the objective medical evidence clearly shows claimant's chronic, intractable pain and range of motion limitations have lasted the necessary durational periods required to continue this inquiry into her alleged disability.

At Step 3, claimant's impairments do not appear to rise to the level necessary to be specifically disabling by law; consequently, an analysis of her ability to engage in her past relevant work is required.

At Step 4, it is clear claimant cannot perform those heavy/medium exertional activities associated with patient care. This conclusion is based not only on the objective medical evidence, but also on the credible testimony received at hearing. Certainly, a return to this type of work would most likely exacerbate claimant's already chronic pain levels and could result in additional injury. Consequently, an analysis of Step 5 is required.

At Step 5, an individual's age, education, work experience and residual functional capacity are assessed in relation to the documented impairments and/or the permanent residuals stemming from them. However, these rules do not apply in cases where an individual is found to have no residual functional capacity because he or she cannot perform even sedentary work as that term is defined at 20 CFR 416.967(a).

Under the facts and circumstances presented by this case, claimant has shown, by clear and convincing documentary evidence and credible testimony, her exertional and non-exertional limitations are severe enough to prevent her from engaging in even sedentary work. Consequently, claimant meets the MA durational criteria and disability standards cited above. The department's finding to the contrary simply cannot be upheld.

DECISION AND ORDER

The Administrative Law Judge, based upon the above findings of fact and conclusions of law, decides the department erred in determining claimant is not currently disabled for MA disability purposes.

Accordingly, the department's decision is REVERSED and it is Ordered that:

- (1) The department shall process claimant's August 17, 2007 MA application, and shall award her all of the benefits to which she may be entitled as long as she meets the remaining financial and non-financial eligibility factors.
- (2) The department shall review claimant's condition for improvement in September, 2010.
- (3) The department shall obtain updated medical evidence from claimant's treating physician, orthopedic specialist, physical therapist, pain clinic notes, etc. regarding her continued treatment, progress and prognosis at review.

(4) The department shall also schedule claimant for an independent consultative psychiatric evaluation at the time of review.

/s/

Marlene B. Magyar
Administrative Law Judge
for Ismael Ahmed, Director
Department of Human Services

Date Signed: July 23, 2009

Date Mailed: July 23, 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 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.

MBM/db

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