

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.: 2008-17729

Issue No.: 2009

Case No.:

Load No.:

Hearing Date:

August 13, 2008

Oakland County DHS

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, a hearing was held on August 13, 2008. The Claimant and his representative appeared at the Department of Human Services (Department) in Oakland County.

The record was open for four months for additional medical records. The two pages of additional medical records submitted by the representative were submitted to State Hearing Review Team (SHRT); and the application was denied. This matter is now before the undersigned for final decision and the medical evidence is found sufficient for final decision.

ISSUES

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

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 November 14, 2007 the Claimant applied for MA-P and SDA; a previous application was denied in May 2006.
- (2) On December 12, 2007 the Department denied the application for MA-P and granted SDA in June 2008; and on March 13, 2009 the SHRT denied the MA-P application finding insufficient medical evidence.
- (3) On February 25, 2008 the Claimant filed a timely hearing request to protest the Department's determination.
- (4) Claimant's date of birth is [REDACTED]; and the Claimant is fifty years of age.
- (5) Claimant completed grade 12; three years of university with associates degree in general business; and can read and write English and perform basic math skills.
- (6) Claimant last worked in August 2005 as a toolmaker/lathe operator/welder since 1977 and performed handyman services in 2005; and records indicate work as a driver from 2005 to 2006. Department Exhibit (DE) 1, p. 26.
- (7) Claimant has alleged a medical history of [REDACTED] lumbar surgery, [REDACTED] back injury, a [REDACTED] lumbar laminectomy with decreased range of motion, pain in back/hips; and a history of alcoholism with sobriety for five years.
- (8) [REDACTED], in part:

[REDACTED]: HISTORY: I explained the mild nature of the lumbar findings on MRI and CT scan imaging studies and the lack of any acute radiculopathy on EMG. I advocated non-operative treatment. The patient felt he had exhausted all non-operative treatment and could not longer live with his symptoms; and wished to try surgical intervention even despite possible of a fairly high chance of

persistent pain and potentially worsening pain with surgical intervention. The risks of surgery were discussed including damage to nerves, infection, persistent or worsening pain, weakness, numbness, tingling, bowel/bladder dysfunction; and need for future surgeries; and other potential risks including death.

Discharge diagnosis: Admitted three days ago with spinal listhesis and underwent revision of posterior lumbar L3-L5 laminectomy, posterior spinal fusion with L3-L4 transforaminal lumbar interbody fusion. Tolerated procedure well without complications and post-operatively notes complete resolution of pre-operative radicular symptoms. Stable on discharge. [REDACTED] Follow with [REDACTED]. DE 1, pp. 9-16.

[REDACTED]: CURRENT DIAGNOSIS: S/P L3-5 laminectomy, posterolateral instrumented fusion and L3-4 TLIF—8 weeks.

FINDINGS: Musculoskeletal: [REDACTED] Physical Examination revealed well healed incision, bilateral lower extremities reveal 5 of 5 motor strength with sensation intact to light touch. X-rays: intact hardware from L3-5 including cage. Some bone formation seen in posterolateral gutter anteriorly.

CLINICAL IMPRESSION: Temporary disability expected return to work [REDACTED]

PHYSICAL LIMITATIONS: Restrictions are no bending, stooping, lifting, no excessive walking or standing. Return to work date will be determined. No assistive devices are needed. Medications: Vicodin, hydrocodone. May have required heavy household assistance. [REDACTED]. DE 1, pp. 5-6.

(9) [REDACTED], in part:

[REDACTED]: CURRENT DIAGNOSIS: S/P lumbar revision decompression, instrument fusion and L3-4 TLIF.

FINDINGS: X-rays [REDACTED] of lumbar spine reveal intact hardware and cage. There is still some motion at L3-4 level. There is bone graft that is consolidating in posterolateral gutters bilaterally

CLINICAL IMPRESSION: Doing OK. Temporary disability expected return to work [REDACTED].

PHYSICAL LIMITATIONS: Current Restrictions: no bending, stooping, lifting; and no excessive walking/standing. Medications: Vicodin prn. [REDACTED]. DE A-B.

[REDACTED]: Evaluation for Disability.

HISTORY: C/O severe, constant pain in back for 3 years while sitting, climbing stairs and standing for long periods. Cannot bend over very well after back surgery in [REDACTED]. Takes Tramadol 3-4 times a day.

PHYSICAL EXAMINATION: No acute distress, alert, orientated X 3. HT: 70", 205 pounds, BP 121/83. Skin intact, Head and neck exam revealed normal grossly, non-tender and AROM is WNL. Chest: WNL. Back: scar and physiological spinal curvature without deformity or swelling. No tenderness but stiffness notes at lower back. AROM lumbosacral spine was severely limited. Straight leg raising was negative. Extremities: WNL. Neurological: no focal weakness or sensory deficits. Deep tendon reflexes were symmetrical and normal. Ambulates independently and was able to walk heel and squat. [REDACTED]. DE 3, pp. 1-2.

[REDACTED]: CURRENT DIAGNOSIS: S/P lumbar revision decompression, instrument fusion and TLIF.

FINDINGS: X-rays [REDACTED] of lumbar spine reveal good fusion mass evidence from L3-5 unchanged position of the cage at L3-4.

CLINICAL IMPRESSION: Doing OK. Restrictions: no lifting over 25 pounds. Medications: N/A. [REDACTED]. Claimant Exhibit 1-2

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 2005. Therefore, 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 to support a finding that Claimant had physical limitations that are more than minimal and impact basic work activities. The Claimant’s physical impairments meet the duration period. There was no medical evidence of a mental impairment impacting basic work activities; and the Claimant testified he did not have mental impairments.

In the third step of the sequential analysis of a disability claim, the trier of fact must determine if the Claimant’s impairment is 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 Claimant’s impairment is a “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.

Appendix I, Listing of Impairments (Listing) discusses the analysis and criteria necessary to a finding of a listed impairment. The undersigned's decision was based on Listing 1.00

Musculoskeletal system.

In this case, this Administrative Law Judge finds the Claimant is not presently disabled at the third step for purposes of the Medical Assistance (MA) program because the medical evidence does not meet the intent or severity of the listings. The examination and testing by [REDACTED] in [REDACTED] only restricted lifting to 25 pounds. [REDACTED] found negative straight leg raising; and X-rays which revealed lumbosacral hardware and healing was good. At the hearing the Claimant denied radicular symptoms; and he testified that physical therapy was recommended but not obtained by him. The Claimant denied doing home exercises. 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 him 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.

The Claimant's past relevant work was tool making/lathe operator/ welder and in 2005 to 2006 the record showed he did driving. At hearing the Claimant testified to driving 4-5 times a week. This activity involves use of both upper and lower extremities. But the Claimant testified to no bending, and 30-40 minute ability to sit, stand and walk [REDACTED] did not prescribe use of a

walking aid; and no walking cane was seen at the time of hearing. The undersigned accepts the Claimant testimony to his functional abilities except lifting, which [REDACTED] opined was up to 25 pounds. The undersigned will not return the Claimant to past relevant work.

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 functional capacity," defined simply as "what can you still do despite you 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 limitations.

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 based on the findings of [REDACTED]. 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 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 202.15, for approaching advanced age, age 50-54; education: high school graduate or more; previous work experience, skilled or semi-skilled—skills not transferable; the Claimant is “not disabled” per Rule 202.14.

It is the finding of the undersigned, based upon the medical data and hearing record that Claimant is “not disabled” at the fifth step.

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: 03/31/09

Date Mailed: 03/31/09

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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