STATE OF MICHIGAN
STATE OFFICE OF ADMINISTRATIVE HEARINGS & RULES
FOR THE DEPARTMENT OF HUMAN SERVICES
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IN THE MATTER OF:

SOAHR Docket No. 2008-22600 REHD
DHS Req. No: 2008-22592

[redacted]

Claimant
_____/

RECONSIDERATION DECISION

This matter is before the undersigned Administrative Law Judge pursuant to MCL 24.287(1) and 1993 AACS R 400.919 upon the request of the Claimant.

ISSUE

Did the Administrative Law Judge err in his denial of Claimant's eligibility for Medical Assistance (MA-P) and Retro Medical Assistance (Retro MA-P)?

FINDINGS OF FACTS

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

1. On April 28, 2008, Administrative Law Judge Marlene Magyar issued a Hearing Decision in which the ALJ upheld the Department of Human Services' (DHS) denial of the Claimant's September 27, 2006, application for MA-P and Retro MA-P.

2. On May 27, 2008, the State Office of Administrative Hearings and Rules (SOAHR) for the Department of Human Services received a Request for Rehearing/Reconsideration submitted by the Claimant's representative [redacted]

3. On June 26, 2008, SOAHR granted the Claimant's Request for Rehearing/Reconsideration and issued an Order for Reconsideration.

4. Findings of Fact 1-18 from the Hearing Decision, mailed on April 29, 2008, are hereby incorporated by reference.

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 Family Independence Agency (FIA or agency) administers the MA program pursuant to MCL 400.10, *et seq*., and MCL 400.105; MSA 16.490 (15). Agency 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 435.50, the Family Independence Agency 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 a 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.

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 does 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 aptitude necessary to do most jobs. Examples of these include –

> (1) Physical functions such as walking, standing, sitting, lifting, pushing, 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 Residual Functional Capacity (RFC) is what an individual can do despite limitations. All impairments will be considered in addition to ability to meet certain demands of jobs in the national economy. Physical demands, mental demands, sensory requirements and other functions will be evaluated…20 CFR 416.945 (a).

To determine the physical demands (exertional requirements) of work in the national economy, we classify jobs as sedentary, light, medium, and heavy. These terms have the same meaning as they have in the Dictionary of Occupational Titles, published by the Department of Labor…20 CFR 416.967.

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 reflects 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).

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).

If an individual fails to follow prescribed treatment which would be expected to restore their ability to engage in substantial gainful activity without good cause, there will not be a finding of disability… 20 CFR 416.994 (b)(4)(iv).

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).

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 <u>not</u> 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, §§ 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).

The ALJ correctly found that the Claimant is not ineligible for disability because he was not substantially gainfully employed. (*See Finding of Fact 2 of the April 28, 2008, Hearing Decision)*. The ALJ correctly considered the Claimant's disability at Step 2.

On September 27, 2006, the Claimant applied for MA-P and Retro MA-P. On November 17, 2006, the Medical Review Team (MRT) reviewed the Claimant's application and medical file and found the Claimant was not disabled. The MRT denied MA-P because the Claimant did not have a severe impairment which had lasted or was expected to last 12 months or more. Retro MA-P was also denied. On May 9, 2007, the State Hearing and Review Team (SHRT) found the Claimant was not disabled and denied the Claimant's application for MA-P because the medical evidence of the record did not document a mental/physical impairment(s) that would last or were expected to last for 12 continuous months or more. Retro MA-P was reviewed and denied. On May 27, 2008, SOAHR received the Claimants request or Rehearing/Reconsideration. On June 26, 2008, SOAHR granted the Claimant's Request for Rehearing/Reconsideration and issued an Order for Reconsideration.

The Claimant alleges the following impairments: gun shot to the left leg with comminuted fracture of the left femur.

On September 26, 2006, the Claimant drove himself to [redacted] after sustaining a gun shot to the left leg. [redacted]., indicated in his admission summary dated September 26, 2006 that the Claimant reported that he was shot in the left leg and hip with a shotgun. The Claimant's admission summary was gun shot wound to left upper thigh and right wrist and left femur fracture. Department Exhibit, pp. 22 -33.

On September 260 2006, [redacted] performed an irrigation and debridement of the Claimant's wounds and a reconstruction intramedullary nail of the left femur. The Operative report indicates that the surgery was successful Department Exhibit pp 24-25.

On September 27, 2006, the Claimant was discharged from [redacted]. [redacted] indicated in his discharge report that the Claimant's discharge diagnosis was blunt trauma, status post gun shot wound to left thigh with femur fracture, status post surgical repair, stable; gun shot wound to right wrist, stable; folliculitis, stable; impaired activities of daily living, stable; left foot drop. [redacted] indicated that the Claimant should follow up with [redacted] in four weeks. The staples in the Claimant left leg could be removed on October 3, 2006; non weight bearing on the left leg and the Claimant should wear his AFO. Department exhibit pp 31-33..

Also on September 27, 2006, the Claimant was admitted to [redacted] for in patient rehabilitation services. [redacted] indicated in his September 27, 2006 report, that the Claimant's treatment plan included physical, occupational, and recreational therapy.

On November 20, 2006, the Claimant was examined at the [redacted]. The Claimant was using a bone stimulator and was non-weight bearing on his left leg.

On February 19, 2007, the Claimant was examined at the [redacted]. The Claimant's left leg w as x-rayed. The physician ordered some weight bearing.

On March 1, 2007, [redacted] completed a DHS FIA-49. [redacted] indicated that the Claimant's diagnosis was healing fracture. [redacted] indicated that the Claimant should be weight bearing on his left leg and was using a bone stimulator. On page 2 of the FIA-49, [redacted] indicated that the Claimant's condition was stable, that the Claimant could occasionally lift 10 lbs or less, could stand or walk less than 2 hours in an 8 hour day, could use neither his hands/arms for pushing pulling, and could us both his feet and legs for the operation of foot or leg controls

On March 28, 2007, the Claimant was examined at the [redacted]. The Claimant's left leg was x-rayed. The physician ordered progressive weight bearing on the Claimant's left leg.

On July 6, 2007, the Claimant was examined at the [redacted]. The Claimant was ordered for some weight bearing on his left leg.

On [redacted] completed a DHS FIA-49. [redacted] indicated that the Claimant's diagnosis at that time was: healing fracture, rodding in good position/foot drop. [redacted] indicted that the Claimant's condition was stable. With regard to the Claimant physical limitations [redacted] indicated that the Claimant could occasionally lift 10 lbs or more, could stand and/or walk less the 2 hours in an 8 hour day, could use his hands and arms for simples grasping, reaching, pushing/pulling, and fine manipulation. [redacted] also indicated that the Claimant could use both his feet and legs to operate foot controls. Claimant's exhibit C- 1-2.

There is no medical evidence in the record which shows the status of the Claimant's left leg fracture after July 17, 2007. [redacted] indicated in his [redacted] issued on July 17, 2007, that he believe that the Claimant physical limitations would last for 12 months or more Claimant's exhibit D-1 pp 1-3.

The ALJ did not give controlling weight to [redacted] the Claimant's treating physician opinion regarding the duration of the Claimant's physical limitations. Controlling weight may not be given to treating source's medical opinion unless the opinion is well supported by medically acceptable clinical and laboratory diagnostic techniques. *(SSR 96-2p: Policy Interpretation Ruling, #3)*. Even if a treating source's medical opinion is well-supported, controlling weight may not be given to the opinion unless it also is '"not inconsistent" with the other substantial evidence in the case record. *(SSR-96-2p: Policy Interpretation Ruling, #4)*. 20 CFR 416.927(d)(2) defines a "treatment relationship" as follows:

> 2) *Treatment relationship.* Generally, we give more weight to opinions from your treating sources, since these sources are likely to be the medical professionals most able to provide a detailed, longitudinal picture of your medical impairment(s) and may bring a unique perspective to the medical evidence that cannot be obtained from the objective medical findings alone or from reports of individual examinations, such as consultative examinations or brief hospitalizations. If we find that a treating source's opinion on the issue(s) of the nature and severity of your impairment(s) is well-supported by medically acceptable clinical and laboratory diagnostic techniques and is not inconsistent with the other substantial

evidence in your case record, we will give it controlling weight. When we do not give the treating source's opinion controlling weight, we apply the factors listed in paragraphs (d)(2)(i) and (d)(2)(ii) of this section, as well as the factors in paragraphs (d)(3) through (d)(6) of this section in determining the weight to give the opinion. We will always give good reasons in our notice of determination or decision for the weight we give your treating source's opinion (emphasis added).

(i) *Length of the treatment relationship and the frequency of examination.* Generally, the longer a treating source has treated you and the more times you have been seen by a treating source, the more weight we will give to the source's medical opinion. When the treating source has seen you a number of times and long enough to have obtained a longitudinal picture of your impairment, we will give the source's opinion more weight than we would give it if it were from a non-treating source.

(ii) *Nature and extent of the treatment relationship.* Generally, the more knowledge a treating source has about your impairment(s) the more weight we will give to the source's medical opinion. We will look at the treatment the source has provided and at the kinds and extent of examinations and testing the source has performed or ordered from specialists and independent laboratories. For example, if your ophthalmologist notices that you have complained of neck pain during your eye examinations, we will consider his or her opinion with respect to your neck pain, but we will give it less weight than that of another physician who has treated you for the neck pain. When the treating source has reasonable knowledge of your impairment(s), we will give the source's opinion more weight than we would give it if it were from a non-treating source.

(3) *Supportability.* The more a medical source presents relevant evidence to support an opinion, particularly medical signs and laboratory findings, the more weight we will give that opinion. The better an explanation a source provides for an opinion, the more weight we will give that opinion. Furthermore, because non-examining sources have no examining or treating relationship with you, the weight we

> will give their opinions will depend on the degree to which they provide supporting explanations for their opinions. We will evaluate the degree to which these opinions consider all of the pertinent evidence in your claim, including opinions of treating and other examining sources.
>
> (4) *Consistency.* Generally, the more consistent an opinion is with the record as a whole, the more weight we will give to that opinion.
>
> (5) *Specialization.* We generally give more weight to the opinion of a specialist about medical issues related to his or her area of specialty than to the opinion of a source who is not a specialist.
>
> (6) *Other factors.* When we consider how much weight to give to a medical opinion, we will also consider any factors you or others bring to our attention, or of which we are aware, which tend to support or contradict the opinion. For example, the amount of understanding of our disability programs and their evidentiary requirements that an acceptable medical source has, regardless of the source of that understanding, and the extent to which an acceptable medical source is familiar with the other information in your case record

The evidence presented shows that [redacted] was the Claimant's treating orthopedic physician. According to the federal regulations, [redacted] medical opinion is entitled to controlling weight unless his opinion is not well supported by medically acceptable clinical and laboratory diagnostic techniques. (*SSR 96-2p: Policy Interpretation Ruling, #3).* Even if a treating source's medical opinion is well-supported, controlling weight may not be given to the opinion unless it also is "not inconsistent" with the other substantial evidence in the case record. (*SSR 96-2p: Policy Interpretation Ruling, #4).*

[redacted] opinion regarding the Claimant's physical limitations is not well supported by acceptable clinical and laboratory diagnostic techniques.

The Claimant's exertional limitations reported by [redacted] are not consistent with other objective medical evidence. For example, [redacted] completed the Medical Examination Reports in March and July 2007, but provided no reports or medical opinions regarding the Claimant's condition after from that time. The consistent and supported medical evidence presented shows that the Claimant's left leg fracture was improving and was expected to improve and would not significantly limit the Claimant's

ability to engage in basic work activities for 12 continuous months or more. The ALJ correctly found that the Claimant was not disabled at Step 2. A finding of a severe impairment at Step 2 is a *de minimus* standard and the ALJ correctly considered the Claimant's eligibility at step 3.

The Claimant may be found disabled at Step 3 if the Claimant's physical impairments meet or equal the requirements for the Social Security listings. The Claimants impairment of left leg fracture could arguably meet the requirements of listing 1.6 *Fracture of the femur, tibia, pelvis, or one or more of the tarsal bones.* The requirements of this listing require a fracture with:

> A. Solid union not evident on appropriate medically acceptable imaging and not clinically solid;
>
> and
>
> B. Inability to ambulate effectively, as defined in 1.00B2b, and return to effective ambulation did not occur or is not expected to occur within 12 months of onset.

The Medical evidence shows that the Claimant had a diagnosis of a fracture of the left femur. The evidence also shows that on September 20, 2006, the fracture was surgically repaired. The post operative x-rays show that the Claimant's left femur was healing. There is no evidence in the post surgical reports which indicates that the a solid union was not evidence, nor clinically solid.

The medical evidence does show that, post surgically, the Claimant's ambulation was assisted with the use of crutches. In February 2007, the Claimant was ordered to being limited weight bearing. In July 2007, [redacted] indicted in his evaluation that the Claimant was weight bearing on the Claimant's left leg with foot drop/rodding placed in femur/not completely healed. No evidence was provided which shows that the Claimant was unable to ambulate effectively without his crutches after July 2007. The record is devoid of evidence the Claimant ability to ambulate after July 2007. Therefore, there is not sufficient evidence to find that the Claimant was not able to ambulate effectively for 12 months, nor evidence that the Claimant was not expected to return to effective ambulation within 12 months of September 20, 2006.

At Step 4, the Claimant's residual functional capacity and past relevant work are considered. The Claimant's past relevant reported work was unskilled work as a cashier or pickle sorter. This type of work is considered to be light/sedentary, unskilled work. 20 CFR § 416. 968 states "..unskilled work is work which needs little or no judgment to do simple duties that can be learned on the job in a short period of time."

The ALJ correctly found that the Claimant's past relevant work required prolonged periods of standing and walking and that the Claimant did not have the residual functional capacity to perform his former work. Therefore the ALJ correctly found that the Claimant did not have the residual functional capacity to perform his former work and correctly found the Claimant was not ineligible at Step 4.

At Step 5, the Department has the burden of establishing that despite the Claimant's limitations, she has the residual functional capacity to perform work in the national economy. Residual Functional Capacity is defined as what the Claimant can do despite his limitations. Residential Functional Capacity also includes an assessment of the Claimant's physical and mental abilities.

The physical demands of jobs in the national economy are classified as sedentary, light, medium, heavy, or very heavy. The more physically demanding classification includes all less demanding classifications. For example, a classification of very heavy includes all other less physically demanding classifications. Sedentary work is defined as work which involves the lifting of no more than 10 lbs at a time and the occasional lifting or carrying of files, ledgers, small tools, and similar items. Sedentary work presumptively includes sitting but also includes some necessary walking and standing.

Light work involves the lifting of no more than 20 lbs at any time and the frequent lifting or carrying of objects weighting less than 10 lbs. Light work may involve significant walking or standing. Absent a loss of dexterity or other limiting factors, typically those who can do light work can do sedentary work.

Medium work involves lifting objects of 50 lbs or less with frequent lifting or carrying of objects, which weigh 25 lbs or less. A person who can do medium work can typically do light and sedentary work.

Heavy work involves the lifting of 100 lbs or less with frequent lifting of objects weighting 50 lbs or less. Persons who can do heavy work typically can do medium, light, and sedentary work.

Very heavy work involves the lifting of objects over 100 lbs and the frequent carrying or lifting of objects weighting 50 lbs or more. A person who can do very heavy work typically can do heavy, medium, light, and sedentary work.

The person claiming a physical disability has the burden to establish it through the use of competent medical evidence from qualified medical sources such as her medical history, clinical/laboratory findings, diagnosis/prescribed treatment, prognosis for a recovery and/or medical assessment of ability to do work-related activities. 20 CFR 416.913. A conclusuory statement, by a physician that an individual is disabled without supporting medical evidence, is not sufficient to establish disability. 20 CFR 416.929.

The medical evidence presented shows that the Claimant is a 35-year-old individual with less than a high school education and past work history of light, unskilled work. Prior to September 2006, the Claimant was a relatively healthy individual. With no exertional or non-extertional impairments. Subsequent to the surgical repair of the Claimant's left femur the Claimant ambulated with the use of crutches with increasing level of weight bearing. In July 2007, the Claimant's treating orthopedic physician opined that the Claimant was limited in lifting, standing, and walking. The Claimant had no limitations in the ability to use his hands, arms, or feet during work related activities.

[redacted] opined that the Claimant's limitations in walking and standing would continue for 12 months or more. Neither [redacted], the Claimant, nor the Claimant's representative provided any medical information which detailed the Claimants ability to walk and stand after July 2007. The medical information provided shows that the Claimant's fracture left femur was healing and the Claimant was bearing weight on his left leg. There is no evidence, save [redacted] unsupported opinion that the Claimant's physical limitations continued or were expected to continue after July 2007.

The evidence presented shows that the Claimant has the residual functional capacity to perform sedentary work. According to vocational rule 201.24, given the Claimant's vocational profile, the Claimant is not disabled. 20 CFR Pt. 404, Subpt. P, App.2. Therefore, the ALJ correctly found the Claimant was not disabled at Step 5

The MRT and SHRT determined that the Claimant was not disabled and was ineligible for Retroactive MA-P. PAM 115 provides the standard Retro MA-P eligibility requirements. A Claimant is eligible for Retro MA-P if the Claimant:

- meets all financial and nonfinancial eligibility factors in that month, and
- has an unpaid medical expense incurred during the month, or

  Note: Do **not** consider bills that the person thinks may be paid by insurance as paid bills. It is easier to determine eligibility sooner rather than later.
- has been entitled to Medicare Part A.

PAM 115, pp. 8-9.

Because the Claimant was not disabled for each of the three (3) months prior to the date of his application for MA-P, he is ineligible for Retro MA-P. Therefore, the MRT, SHRT and the ALJ correctly denied Retro MA-P.

[redacted]
Reconsideration Decision
SOAHR Docket No. 2008-22600 REHD
DHS Req. No: 2008-22592

DECISION AND ORDER

This Administrative Law Judge, based on the above findings of fact and conclusion of law, decides that the Administrative Law Judge did not err when she found that the Claimant was not disabled.

IT IS THEREFORE ORDERED that:

The Administrative Law Judge's decision mailed April 28, 2008, is AFFIRMED

/s/
Martin D. Snider
Administrative Law Judge
for Michigan Department of Human Services

cc: [redacted]

Date Signed: 7/22/09
Date Mailed: 7/22/09

***** NOTICE *****
The Appellant may appeal this Rehearing Decision to Circuit Court within 30 days of the mailing of this Rehearing Decision.