

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: 2008-22795
Issue No: 2009; 4031
Case No: [REDACTED]
Load No: [REDACTED]
Hearing Date:
October 15, 2008
Wayne 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, a telephone hearing was held in Taylor on October 15, 2008. Claimant personally appeared and testified under oath.

The department was represented by Judith Kapko (Medical Contact Worker).

The Administrative Law Judge appeared by telephone from Lansing.

ISSUES

(1) Did claimant establish a severe mental impairment expected to preclude him from substantial gainful work, **continuously**, for one year (MA-P) or 90 days (SDA)?

(2) Did claimant establish a severe physical impairment expected to preclude him from substantial gainful work, **continuously**, for one year (MA-P) or 90 days (SDA)?

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/SDA applicant (December 5, 2007) who was denied by SHRT (July 10, 2008) due to claimant's ability to perform other work. He was also denied because drug and alcohol abuse is a material cause of his disability under 20 CFR 416.935. Claimant requests retro-MA for September, October and November 2007.

(2) Claimant's vocational factors are: age--44; education--11th grade; post-high school education--trained as a licensed plumber (license has expired); work experience--operated his own sewer and drain cleaning company for 6 years, has been a sewer and drain cleaner for more than 15 years.

(3) Claimant has not performed Substantial Gainful Activity (SGA) since 1993 when he was a self-employed sewer and drain cleaner.

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

- (a) Chronic fatigue;
- (b) Immunodysfunction;
- (c) Seizures;
- (d) Severe memory loss;
- (e) Spinal fluid leak;
- (f) Chronic headaches.

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

OBJECTIVE MEDICAL EVIDENCE (July 10, 2008)

SHRT denied MA-P/retro/SDA because claimant is capable of performing work that does not require working around unprotected heights or dangerous machinery. SHRT also denied benefits because claimant's drug and alcohol abuse is a material factor in his disability under 20 CFR 416.935.

(6) Claimant lives with his sister and performs the following Activities of Daily Living (ADLs): dressing, bathing, cooking, dish washing, light cleaning, laundry and grocery shopping. Claimant uses a cane to walk approximately 10 times a month. He does not use a

walker, a wheelchair or a shower stool. He wears hand braces approximately 15 times a month on both hands. In 2007, claimant was hospitalized three days in order to receive treatment for his seizure condition.

- (7) Claimant does not have a valid driver's license and does not drive an automobile.

Claimant is not computer literate.

- (8) The following medical/psychiatric records are persuasive:

- (a) An April 8, 2008 neurological consult was reviewed.

The psychiatrist provided the following history:

Claimant is a 43-year-old male who came here with a main complaint of back pain and seizure episode. Claimant stated the seizures started about 5 months ago, while he was sitting on a chair and smoking. Suddenly he passed out and when he woke up he was tired. He remembered he had some shaking spells, because prior to the seizure claimant starting getting numb feeling of the right arm and then passed out and fell out of the chair. His sister called the ambulance, but claimant woke up and did not want to go to the hospital. So he was waiting at home and then claimant was eating lunch. At that time, again another seizure started and he completely passed out. He was taken by ambulance to the hospital, where he was waiting and after investigation they were going to discharge him, again he had a seizure in the waiting room, so they admitted him and treated him and started him on Dilantin at the hospital. He was in the hospital for 3 days and then released with a prescription for Dilantin. He went to a neurologist who continued the Dilantin.

He has lumbar disc disease, for which his family physician was taking care of him for the lumbar spine, but the neurologist was taking care of the seizures. Claimant had seizures on that particular day, but after starting Dilantin, claimant did not have any seizures. Claimant did not bite his tongue, but he could not remember whether he had incontinence of urine or not. That happened about 5 months ago. Frequency could not be judged because he had one small seizure while in the hospital and that was only a slight shaking spell and after that there were no seizures at all, but once in awhile he gets some mild shaking spells off

and on. He is taking Dilantin 100 mg three times a day and that is controlling his seizures.

Claimant has a history of head trauma several times, but main head trauma occurred when he was involved in a car accident. He was driving a truck, it flipped over and he was inside the car for 2-½ to 3 hours. It was on the highway, so the police came and pulled him out at that time and put him in the hospital. Since then, claimant has been suffering from back pain and seizures, started just 5 months ago. The accident happened about 5 years ago. Claimant was diagnosed as having disc protrusion and was getting treatment. Walking difficulty is there, bending difficulty is there, memory problems after the accident, that is remote memory is impaired. He did not have any other injury.

PAST HISTORY:

Chronic fatigue syndrome. He was thoroughly investigated at the [REDACTED] for different tests for chronic fatigue syndrome and lymphadenopathy. Claimant was told he has been suffering from Epstein-Barr virus.

WORK HISTORY:

Claimant had a plumbing job, his own business, now he stopped the business and is getting Social Security benefits. Claimant occasionally drinks, but not a regular alcohol drinker. Claimant used to take cocaine a long time ago and stopped that. He does smoke, does not drink nowadays and lives with his sister.

The neurologist provided the following conclusions:

Claimant has been suffering from seizures, the last one about 5 months ago and claimant is on Dilantin. Claimant has slight memory impairment and back pain. Forward flexion is full, but very slow. Handwriting is pretty well legible.

- (b) A [REDACTED] consultative psychiatric evaluation was reviewed.

The psychiatrist provided the following history:

Claimant comes to the office looking quite disheveled. He is wearing casual jeans and a t-shirt. His hair is covered with a ball cap and on the ball cap is his glasses. He reports

he has chronic fatigue and immunodysfunction syndrome and that has caused a lot of difficulties, because he was unable to do very much or at least financially solvent. Actually, he says he had a very profitable business ensuing when he developed this sometime in his 20's. He also had 6 bad discs. He had been in a severe MVA (motor vehicle accident) while travelling up north once. 9 months ago, he spent 45 days in jail for little reason. Related to complaints of an alleged domestic violence with an allegation that his wife would have been dead, but she was unharmed, but he was kept in jail for 45 days and not given his medication, and as a result he believes when he got out, he took his usual doses and he overdosed on the heavy medication and ended up needing to be rescued and spent three days on life support. After that, he developed seizures and now requires Dilantin. He now has a seizure disorder, problems with his memory related to brain damage at that time, back problems, immunodeficiency and fatigue. He takes Xanax 2 mg four times a day and that was the dosage of medication he had been on before he went to jail... He does not report a history of psychiatric treatment.

Claimant has an 11th grade education, but actually he is only 2 credits short of his diploma and was carrying straight A's. He went back to school to finish, but he missed too many classes because he was working fulltime and he was thrown out of the class and he never thought he needed a GED, because he had his field. He ran a sewer and drain business with plumbing. He has an apprentice card for his plumbing, but he was a licensed sewer person. He was doing very well until he was about 27 years of age, when he was diagnosed with chronic immunodysfunction with chronic fatigue. At that point, he was put on Social Security disability. He went back to work at some point and was working 6 years ago when he was involved in a major MVA, which then caused more difficulties again...

He likes to fish but has not been able to for 3 years. He makes his own meals, does his own laundry and household cleaning. He lives in his sister's home. Yesterday he was home all day. He watched television. He ate in the afternoon and evening. He had lunch, cold sandwiches and he even had a grilled turkey sandwich for dinner. His sister and he eat separately, but he will go marketing with his sister for his own stuff when she goes.

The psychiatrist provided the following mental status evaluation:

Claimant has fair contact with his surroundings, poor self-esteem and marked psychomotor retardation. He is somewhat unusual in appearance, not particularly pleasant, but he is not actively unpleasant. He is very dependent. His motivation is poor. He tends to minimize any psychiatric problems he may have and his insight is poor.

His stream of mental activity is blocked, illogical, vague, and poorly organized and he truly believes, although he was taking a higher dose of Xanax than he needed and then when he was not on it he went back to it suddenly and then he ended up in the Emergency Room, that he had clearly overdosed on something. He denies hallucinations and delusions. He denies current suicidal ideations, and has never attempted suicide. His sleep is disturbed and he is up a lot during the night, often not getting enough, but then he naps in the daytime and he feels he gets as much as 8 hours over a 24 hour period. He is obsessed with how hard life has been for him. He demonstrates anxiety, depression, suspiciousness, and his affect is severely blunted.

The psychiatrist provided the following diagnosis:

AXIS I--Major affective disorder, bipolar type;
AXIS V Moderately Severe. GAF--40.

- (c) A January 9, 2008 Medical Examination Report (DHS-49) was reviewed.

The physician provided the following diagnoses: chronic pain, seizures, and (illegible).

The physician reported the following functional limitations: Claimant is able to lift less than 10 pounds frequently. He is able to lift up to 20 pounds occasionally. He is able to stand/walk less than 2 hours in an 8 hour day. He is able to do simple grasping and fine manipulating with both hands. Not able to do reaching or pushing and pulling. Not able to operate foot controls.

The physician reported the following mental limitations: Memory; sustained concentration; social interaction.

- (9) The probative medical evidence does not establish an acute (non-exertional)

mental condition expected to prevent claimant from performing all customary work functions for

the required period of time. Claimant testified that he has severe memory loss which prevents him from performing substantial gainful activity. The recent medical evidence shows that claimant has the following mental limitations: memory, sustained concentration and social interaction. The consulting psychiatrist thinks that claimant has major affective disorder, bipolar type and classified claimant as AXIS V--moderately severe with GAF of 40. The consulting psychiatrist did not state that claimant was totally unable to work. Also, claimant did not provide a DHS-49D or a DHS-49E to determine his mental residual functional capacity.

(10) The probative medical evidence does not establish an acute (exertional) physical impairment expected to prevent claimant from performing all customary work functions for the required period of time. Claimant's physician reports the following functional limitations: claimant is able to lift less than 10 pounds frequently and able to lift 20 pounds occasionally; he is able to stand/walk less than 2 hours in an 8 hour day; and he is able to do simple grasping and fine manipulating, but not able to do reaching or pushing/pulling with his hands/arms; he is unable to use his feet/legs to operate foot controls.

(11) Claimant recently applied for federal disability benefits with the Social Security Administration. Social Security denied his application; claimant filed a timely appeal.

CONCLUSIONS OF LAW

CLAIMANT'S POSITION

Claimant thinks he is entitled to MA-P/retro/SDA based on the impairments listed in paragraph #4, above.

DEPARTMENT'S POSITION

The department thinks that claimant has the residual functional capacity to perform normal work activities.

The department considered Social Security Listings 11.01, 11.03, 1.02, 1.04, 12.03, 12.04, 12.06, and 12.08. Claimant was not eligible under any of these Listings.

The department denied claimant's request for disability benefits because he is capable of performing work that does not require working around unprotected heights or dangerous machinery.

The department also denied disability benefits because claimant's history of drug and alcohol abuse is a material cause of claimant's disabilities under 20 CFR 416.935.

LEGAL BASE

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).

To determine to what degree a severe mental impairment limits claimant's ability to work, the following regulations must be considered.

(a) **Activities of Daily Living.**

...Activities of daily living including adaptive activities such as cleaning, shopping, cooking, taking public transportation, paying bills, maintaining a residence, caring appropriately for one's grooming and hygiene, using telephones and directories, using a post office, etc. 20 CFR, Part 404, Subpart P, App. 1, 12.00(C)(1).

(b) **Social Functioning.**

...Social functioning refers to an individual's capacity to interact independently, appropriately, effectively, and on a sustained basis with other individuals. 20 CFR, Part 404, Subpart P, App. 1, 12.00(C)(2).

Social functioning includes the ability to get along with others, such as family members, friends, neighbors, grocery clerks, landlords, or bus drivers. You may demonstrate impaired social functioning by, for example, a history of altercations, evictions, firings, fear of strangers, avoidance of interpersonal relationships, or social isolation. You may exhibit strength in social functioning by such things as your ability to initiate social contacts with others, communicate clearly with others, or interact and actively participate in group activities. We also need to consider cooperative behaviors, consideration for others, awareness of others' feelings, and social maturity. Social functioning in work situations may involve interactions with the public, responding appropriately to persons in authority (e.g., supervisors), or

cooperative behaviors involving coworkers. 20 CFR, Part 404, Subpart P, App. 1, 12.00(C)(2).

(c) **Concentration, Persistence or Pace.**

...**Concentration, persistence or pace** refers to the ability to sustain focused attention and concentration sufficiently long to permit the timely and appropriate completion of tasks commonly found in work settings. 20 CFR, Part 404, Subpart P, App. 1, 12.00(C)(3).

Limitations in concentration, persistence, or pace are best observed in work settings, but may also be reflected by limitations in other settings. In addition, major limitations in this area can often be assessed through clinical examination or psychological testing. Wherever possible, however, a mental status examination or psychological test data should be supplemented by other available evidence. 20 CFR, Part 404, Subpart P, App. 1, 12.00(C)(3).

Claimant has the burden of proof to show by a preponderance of the medical evidence in the record that his mental/physical impairments meet the department's definition of disability for MA-P/SDA purposes. PEM 260/261. "Disability," as defined by MA-P/SDA 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, he is not eligible for MA-P/SDA.

SGA is defined as the performance of significant duties over a reasonable period of time for pay. Claimants who are working, or otherwise performing Substantial Gainful Activity (SGA), are not disabled regardless of medical condition, age, education or work experience. 20 CFR 416.920(b).

The medical/vocational evidence of record shows that claimant is not currently performing SGA.

Therefore, claimant meets the Step 1 disability test.

STEP 2

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

Unless an impairment is expected to result in death, it must have lasted or be expected to last for a continuous period of at least 12 months. 20 CFR 416.909.

Also, to qualify for MA-P/SDA, claimant must satisfy both the gainful work and the duration requirement. 20 CFR 416.920(a).

Since the severity/duration requirement is *de minimus*, claimant meets the Step 2 disability test.

STEP 3

The issue at Step 3 is whether claimant meets the Listing of Impairments in the SSI regulations. The department considered the following Listings in evaluating claimant's request for disability: 11.01, 11.03; 1.02, 1.04; 12.03, 12.04, 12.06, 12.08. Claimant does not meet any of these Listings.

Therefore, claimant does not meet the Step 3 disability test.

STEP 4

The issue at Step 4 is whether claimant is able to do his previous work. Claimant previously worked as a self-employed sewer and drain cleaner. It was heavy work.

The medical evidence of record shows that claimant is not able to lift more than 10 pounds frequently or 20 pounds occasionally.

Based on the medical evidence of record, claimant is not able to return to his previous work as a sewer and drain cleaner (heavy/medium work). Therefore, he meets the Step 4 disability test.

STEP 5

The issue at Step 5 is whether claimant has the Residual Functional Capacity (RFC) to do other work.

Claimant has the burden of proof to show by the medical/psychological evidence of record that his mental/physical impairments meet the department's definition of disability for MA-P/SDA purposes.

First, claimant alleges disability based on memory loss. Claimant's mental status was diagnosed as major affective disorder (bipolar type), by a psychiatrist. It is important to know however, that the psychiatrist stopped short of stating that claimant was totally unable to work. Furthermore, claimant did not submit a DHS-49D or a DHS-49E to establish his mental residual functional capacity.

Second, claimant alleges disability based on a seizure disorder, lumbar spinal dysfunction and chronic fatigue syndrome.

Claimant was recently evaluated (April 8, 2008) by a consulting neurologist. The neurologist states that claimant has been suffering from seizures, but is currently seizure free based on his use of Dilantin. The neurologist reported a slight memory impairment and back pain. A treating physician reported that claimant has some functional limitations: he is able to lift less than 10 pounds frequently and less than 20 pounds occasionally. He is able to stand/walk less than 2 hours in an 8 hour day. He is able to use his hands/arms for simple grasping and fine manipulating. He is not able to use his hands/arms for reaching or pushing/pulling. He is unable to use his legs to operate foot/leg controls. However, it is important to note that the treating physician did not state that claimant is totally unable to work.

During the hearing, claimant testified that a major impediment to his return to work was his lumbar back dysfunction, back pain and chronic headaches. Unfortunately, evidence of pain, alone, is insufficient to establish disability for MA-P/SDA purposes.

The Administrative Law Judge concludes that claimant's testimony about his pain is profound and 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 do any work based on his back dysfunction, back pain and chronic headaches, in combination with his bipolar disorder. Claimant currently performs numerous activities of daily living and has an active social life with his sister. Considering the entire medical record, in combination with claimant's testimony, the Administrative Law Judge concludes that claimant is able to perform simple unskilled sedentary work (SGA). In this capacity, claimant is able to work as a ticket taker at a theater, as a parking lot attendant, as a weed whacker operator for a lawn care service and as a parking lot trash cleaner for [REDACTED].

Based on this analysis, the department correctly denied claimant's MA-P/SDA application based on Step 5 of the sequential evaluation process, as presented above.

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/SDA disability requirements under PEM 260/261.

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

SO ORDERED

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

Date Signed: January 22, 2010

Date Mailed: January 25, 2010

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 receipt date of the rehearing decision.

JWS/kgw

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