

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: 2008-22811  
Issue No: 2009;4031  
Case No: [REDACTED]  
Load No: [REDACTED]  
Hearing Date:  
September 3, 2008  
Montcalm 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 Stanton on September 3, 2008. Claimant personally appeared and testified under oath.

The department was represented by Linda Porter (FIM).

The Administrative Law Judge appeared by telephone from Lansing.

ISSUES

- (1) Did claimant establish a severe mental impairment expected to preclude her 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 her 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 (March 24, 2008) who was denied by SHRT (July 9, 2008) due to claimant's failure to establish an impairment which meets the severity and duration requirements. Claimant requests retro MA for December 2007 and January/February 2008.

(2) Claimant's vocational factors are: age—47; education—high school diploma; post high school education—none; work experience—food service/line worker at several different hospitals.

(3) Claimant has not performed Substantial Gainful Activity (SGA) since December 2007 when she worked for the [REDACTED] as a food service/line worker.

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

- (a) Status post back surgery (March 2008);
- (b) Wearing a full body back brace;
- (c) Unable to lift large amounts;
- (d) Unable to stand for long periods;
- (e) Unable to perform work requiring bending;
- (f) Thoracic pain.

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

**OBJECTIVE MEDICAL EVIDENCE (July 9, 2008)**

Nurse note of 12/2007 reported claimant's physical exam to be within normal limits, with the exception of chest and abdominal pain (page 70).

Hospital records of 1/2008 indicate claimant had gallbladder surgery (page 58).

A whole body scan of 2/2008 reported findings of subtle superior end plate compression fracture at T9 (page 74).

An MRI of the thoracic spine of 3/10/2008 reported findings highly suggestive of discitis with osteomyelitis at T8-9, disc herniation at C6-7, and disc bulge at T3-4 (page 75).

Hospital records of 3/10/08 to 3/18/08 indicate claimant had surgery for biopsy at T8 for possible vertebral osteomyelitis (page 30).

Follow up note of 4/16/08 reported she was doing somewhat better although she continued to have thoracic pain. The incision was noted to be healing nicely and neurologically, she was quite stable (page 13).

ANALYSIS: Claimant recovered from gallbladder surgery. She had spinal surgery for biopsy and was found to have osteomyelitis. She was receiving antibiotics and her condition was improving and expected to continue to improve.

Medical opinion was considered in light of CFR 416.927. The evidence in the file does not demonstrate any other impairment that would pose a significant limitation.

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(6) Claimant has a live-in partner, and performs the following Activities of Daily Living (ADLs): dressing, bathing, cooking, dish washing and grocery shopping (needs help). Claimant does not use a cane, a walker, a wheelchair or a shower stool. She does not wear a brace on her neck, arms or legs. She does wear a full body brace. Claimant was hospitalized in March 2008 for surgery to remove a tumor on her spinal cord.

(7) Claimant has a valid driver's license and drives an automobile approximately 15 times a month. Claimant is not computer literate.

(8) The following medical/psychological records are persuasive:

(a) A May 8, 2008 medical examination report DHS-49 was reviewed.

The family practice physician reported the following current diagnoses:

Post op spinal surgery.

The primary care physician reports that claimant is able to lift less than 10 pounds a day. She is able to stand/walk less than 2 hours in an 8 hour day. She is able to do simple grasping, reaching and fine manipulating, but not pushing or pulling. She is able to operate foot/leg controls normally.

**Note:** Claimant's treating physician has given less than sedentary work restrictions, based on claimant's physical impairments (recent back surgery and full body back brace). However, this Medical Source Opinion (MSO) is inconsistent with the great weight of the objective medical evidence.

- (b) An [REDACTED] letter was reviewed.

The physician's assistant/certified states as follows:

Claimant is back in today to follow up from that T8 vertebral biopsy with aspiration and culture. She had this procedure done back on March 11<sup>th</sup> and tells me she is doing somewhat better. She still has a lot of thoracic pain and this seems to be improving very slowly. She is able to use her arms a bit more comfortably without the significant pain that she had before.

The incisional area is healing quite nicely. There is no evidence of any type of inflammation, erythema or induration. I don't see any evidence of infection. Neurologically, she is quit stable.

I think we need to continue her off work until her next visit. I am going to see her back in 2 months or perhaps sooner with x-rays and specifically an MRI of the thoracic spine region to follow up for that vertebral osteomyelitis. She will continue her IV antibiotic by PICC line per the ID specialist.

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- (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 does not allege a mental impairment as the basis of her disability. Claimant did not provide a DHS-49D or a DHS-49E to show her 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. While it is true that claimant's treating physician reports that she is totally unable to work, this Medical Source Opinion (MSO) is inconsistent with the great weight of the objective medical evidence in the record and is contradicted by claimant's testimony at the hearing.

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

#### CONCLUSIONS OF LAW

##### **CLAIMANT'S POSITION**

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

##### **DEPARTMENT'S POSITION**

The department thinks that claimant has the Residual Functional Capacity (RFC) to perform normal work activities. The department thinks that claimant's osteomyelitis is expected to improve and that claimant will not be precluded from all work activities for 12 consecutive months.

The department thinks that the Medical Source Opinion issued by claimant's internist which indicates that claimant is able to do less than sedentary work, is not controlling because it is inconsistent with the great weight of the medical evidence in the record.

## LEGAL BASE

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).

The State Disability Assistance (SDA) program which provides financial assistance for disabled persons is established by 2004 PA 344. The Department of Human Services (DHS or department) administers the SDA program pursuant to MCL 400.10, *et seq.*, and MAC R 400.3151-400.3180. Department policies are found in the Program Administrative Manual (PAM), the Program Eligibility Manual (PEM) and the Program Reference Manual (PRM).

**Claimant has the burden of proof** to show by a preponderance of the medical evidence in the record that her 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, she 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 criteria. 20 CFR 416.920(a).

If claimant does not have an impairment or combination of impairments which profoundly limit her physical/mental ability to do basic work activities, she does not meet the Step 2 criteria.

Claimant's primary impairment at this time, is the osteomyelitis of the thoracic spine. While this a severe condition, and claimant is currently wearing a full body cast as the result of recent surgery, claimant's osteomyelitis is not expected to be disabling for a continuous period of 12 months.

### **STEP 3**

The issue at Step 3 is whether claimant meets the Listing of Impairments in the SSI regulations. Claimant does not allege disability based on the Listing.

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

### **STEP 4**

The issue at Step 4 is whether claimant is able to do her previous work. Claimant previously worked as a hospital food service/line worker. Claimant's previous employment was

unskilled light work. Because the claimant is currently in a full body cast, as part of her recuperation from spinal surgery in March 2008, she is not able to return to her previous work as a food service/line worker.

Since claimant is not able to return to her previous work, she 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 in the record that her mental/physical impairments meet the department's definition of disability for MA-P/SDA purposes.

First, claimant does not allege disability based on a mental impairment.

Second, claimant alleges disability primarily on her back dysfunction secondary to her recent thoracic surgery. The only evidence in support of claimant's claim of total disability is the information supplied by her treating physician. However, this Medical Source Opinion cannot be given controlling weight because it is contrary to the great weight of the medical evidence in the record and also contrary to claimant's testimony.

During the hearing, claimant testified that a major impediment to return to work was her back dysfunction and thoracic pain due to recent thoracic surgery. 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 her pain is 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 work based on her recent thoracic back surgery and her current need to wear a full body brace. Currently claimant performs several Activities of Daily Living (ADLs) and has an active social life with her live-in partner. Claimant drives an automobile approximately 15 times a month. Considering the entire medical record, in combination with claimant's testimony, the Administrative Law Judge concludes that claimant is able to perform unskilled sedentary work (SGA). In this capacity, she is able to work as a ticket taker at a theater, as a parking lot attendant and as a greeter for [REDACTED].

The department correctly denied claimant's MA-P/SDA application based on Step 5 of the sequential analysis, 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 7, 2010

Date Mailed: January 7, 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/vmc

cc:

