

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: 2008-29265
Issue No: 2009
Case No: [REDACTED]
Load No: [REDACTED]
Hearing Date:
March 4, 2009
Mason 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 Ludington on March 4, 2009. Claimant personally appeared and testified under oath.

The department was represented by Dave Carlson (ES).

The Administrative Law Judge appeared by telephone from Lansing.

ISSUES

(1) Did the department provide probative psychiatric evidence to show marked improvement in claimant's mental impairment, to the degree that claimant is now able to perform Substantial Gainful Activity (SGA) on a **continuous** basis?

(2) Did the department provide probative medical evidence to show marked improvement in claimant's physical impairments, to the degree that claimant is now able to perform Substantial Gainful Activity (SGA) on a **continuous** basis?

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 former MA-P recipient who had an eligibility review in May 2008. Pursuant to the eligibility review, MRT decided that claimant was no longer disabled for MA-P purposes. Claimant's MA-P was closed on August 18, 2008 because claimant did not file a timely hearing request within the window permitted by the department's regulations.

(2) On August 6, 2008, pursuant to claimant's May eligibility review, MRT reviewed and denied claimant MA-P benefits because "his conditions improved with treatment and are not expected to prevent all work for 12 months from the date of application or time of injury or surgery."

(3) On August 7, 2008, the local office notified claimant that MRT had denied his request for ongoing MA-P benefits.

(4) On June 19, one day late to continue his MA-P without interruption, claimant filed a hearing request. Claimant's MA-P case was closed on the day that claimant requested his hearing.

(5) On September 8, 2008, SHRT denied claimant's review application for ongoing MA-P for the following reason:

Conditions improved with treatment and not expected to prevent all work for 12 months from the date of application or time of injury or surgery.

(6) Claimant's vocational factors are: age--33; education--10th grade, post-high school education--GED and four semesters at [REDACTED], majoring in

English; work experience--logger and tree loader for lumber company, self-employed scrap iron collector and recycler, sawmill sawyer.

(7) Claimant has not performed Substantial Gainful Activity (SGA) since 2004, when he worked as a lumberjack and log loader.

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

- (a) Back dysfunction;
- (b) Chronic back pain;
- (c) Bipolar disorder;
- (d) Psychotropic medications;
- (e) Status-post two recent back surgeries.

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

OBJECTIVE MEDICAL EVIDENCE (September 8, 2008)

SHRT reviewed claimant's MA-P eligibility using SSI Listings 1.02, 1.04, 12.04, 12.06, 12.08. Claimant does not meet the requirements of the applicable listings.

SHRT decided claimant's impairments did not meet the severity and duration requirements because claimant's medical conditions have improved with treatment and are not expected to prevent all work activities for 12 months from the date of application or the time of injury or surgery.

(10) Claimant lives with his parents and performs the following Activities of Daily Living (ADLs): dressing, bathing, cooking, dish washing, light cleaning, laundry and grocery shopping. Claimant uses a cane approximately 10 times a month. He does not use a walker, a wheelchair or a shower stool. He does not wear braces on his neck, arms or legs. Claimant was hospitalized at [REDACTED] for back surgery in June 2008.

(11) Claimant does not have a valid driver's license and does not drive an automobile. Claimant is computer literate.

(12) The following medical records are persuasive:

- (a) A [REDACTED] [REDACTED] medication review was reviewed. The nurse practitioner provided the following background: Claimant was seen individually. He indicates he is scheduled for back surgery next week in [REDACTED]. He is looking forward to it as basically it's a re-do of surgery from a year or so ago. We talked about his problem with pain medications in the past and in anticipation of that, his mother will be managing all the pain medications. He continues to be clean and sober. He has stopped smoking for the last six days in anticipation of the surgery. He is taking the medications as prescribed and he denies any side effects. There is no indication of any difficulties with the Lithium. He is sleeping well. He adamantly denies any suicidal thoughts. Overall, he states, 'I'm doing pretty good.'

On exam today, he is bright and articulate. He is more conversant than I have seen in the past. His response time to questions is quicker and there is a notable decrease in what was a rather profound latency in the past. His affect is fuller. His thoughts are logical, linear, and goal-directed. There are no psychotic symptoms. There are no manic or hypomanic symptoms. There is no grandiosity or euphoria. There are no racing thoughts or flight of ideas. Hygiene and grooming are good. Speech is within normal limitations. I do not see any involuntary movements.

* * *

The nurse practitioner provided the following diagnoses: schizoaffective disorder, bipolar type and alcohol and narcotic abuse, all stable.

The nurse practitioner provided the following diagnostic impressions:

AXIS I--Bipolar I Disorder, most recent episode depressed, severe without psychotic features.

AXIS V/GAF--62.

- (b) A [REDACTED] [REDACTED] neuroscience narrative report was reviewed.

The physician's assistant provided the following:

I saw claimant in the neurosurgical clinic today on July 9, 2008 for a follow-up status visit post his lumbar fusion and exploration with removal of previous hardware and placement of hardware from L3 to S1 with arthrodesis and internal bone growth stimulator placement which occurred on May 29, 2008.

He states at this time he is doing well. He complains of intermittent lower back pain. He denies leg pain. He states that overall he is much improved after his surgery. He states he is not smoking at this time as well. He has gradually increased his activity. He has been wearing his brace.

* * *

- (c) The department has not provided claimant with a current psychological evaluation by a psychiatrist and has not provided claimant with a current neurological examination by his treating neurologist.

(13) There is no current probative psychiatric evidence to establish that claimant's mental impairment has improved to the point that he is now able to perform Substantial Gainful Activity. The department did not provide a DHS-49D or a DHS-49E to establish claimant's mental residual functional capacity. Without a current report on claimant's mental residual functional capacity, there is no medical evidence to establish improvement.

(14) There is no current probative medical evidence from a neurologist or orthopedic surgery to establish claimant's physical residual functional capacity. There are no recent DHS-49s in the file. The department has not provided claimant with a recent examination to determine his functional capacity, as ordered by Administrative Law Judge Janice Spodarek on April 21, 2008.

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

(16) On April 21, 2008, Administrative Law Judge Janice Spodarek ordered the department to update claimant's medical file including an April 4, 2008 medical appointment. There is no evidence that this medical appointment was provided in the record as it stands today.

CONCLUSIONS OF LAW

CLAIMANT'S POSITION

Claimant thinks he is entitled to a continuation of his MA-P benefits based on the impairments listed in paragraph #4, and based on the fact that he has not recently been evaluated by a psychiatrist or a neurologist.

In particular, claimant thinks he has severe mental impairments, in combination with severe back dysfunction, which preclude Substantial Gainful Activity.

DEPARTMENT'S POSITION

The department evaluated claimant's disability using SSI Listings 1.02, 1.04, 12.04, 12.01, 12.08. The department decided claimant does not meet any of the applicable listings. However, the department did not use the appropriate standards (review standards) to determine whether claimant has medically and psychiatrically improved to the point that he is now able to work. The department cannot establish that due process has been provided to claimant for the termination of his benefits, without following the applicable SSI improvement rules.

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).

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).

The department has the burden of proof to show by a preponderance of the medical evidence in the record that claimant's mental and physical impairments have improved to the extent that claimant is now able to perform Substantial Gainful Activity. PEM 260. "Disability," as defined by MA-P 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.

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 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 the department has established improvement in claimant's mental and physical impairments to the degree that he is now able to perform Substantial Gainful Activity.

The department has the burden of proof to show that claimant's mental impairments (bipolar disorder) and physical impairments (degenerative disc disease) have substantially improved to the point that claimant can now perform basic work activities.

MENTAL IMPAIRMENTS: The department has not established marked improvement in claimant's bipolar disorder. The department has not provided a recent mental status

examination, a DHS-49D, or a DHS-49E to establish claimant's medical residual functional capacity.

Absent a competent, material and relevant mental status examination, the department has not met its burden of proof.

PHYSICAL IMPAIRMENTS: The department has not shown, using competent, material and substantial evidence that claimant's degenerative disc disease has now improved to the point that claimant is now able to perform Substantial Gainful Activity. The department has failed to obtain a recent neurological examination to establish claimant's functional limitations due to his back dysfunction. Again, the department has not shown that claimant's physical impairments have improved to the point where claimant is now able to perform SGA.

DECISION AND ORDER

The Administrative Law Judge, based upon the above findings of fact and conclusions of law, decides that the department has not met its burden of proof to establish marked improvement in claimant's mental and physical impairments to the degree that he is now able to work under the standards provided in PEM 260 and the applicable SSI regulations.

Accordingly, the department's denial of claimant's MA-P Review is, hereby, REVERSED.

SO ORDERED.

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

Date Signed: July 8, 2009

Date Mailed: July 9, 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 mailing of the Decision and Order or, if a timely request for rehearing was made, within 30 days of the mailing date of the rehearing decision.

JWS/cv

cc:

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