

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: 2008-13726
Issue No: 2009
Case No: [REDACTED]
Load No:
Hearing Date:
July 23, 2008
Genesee 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 Flint on July 23, 2008. Claimant personally appeared and testified under oath.

The department was represented by Lavonia Alston (ES).

The Administrative Law Judge appeared by telephone from Lansing.

Claimant requested additional time to submit new medical evidence. Claimant's new medical evidence was sent to the State Hearing Review Team (SHRT) on July 23, 2008.

Claimant waived the timeliness requirement so that her new medical evidence could be reviewed by SHRT. After SHRT's second non-disability determination, the Administrative Law Judge issued the Decision below.

ISSUES

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

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

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 applicant (November 2, 2007) who was denied by SHRT (April 10, 2008 and July 25, 2008), due to claimant's failure to establish an impairment which meets the department's severity and duration requirements.

(2) Claimant's vocational factors are: age—21; education—high school diploma; post-high school education—took certified nurse assistant classes, but did not complete the program; work experience—school janitor.

(3) Claimant has not performed Substantial Gainful Activity (SGA) since 2003 when she worked as a school janitor.

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

- (a) Uses crutches;
- (b) Status-post right ankle replacement (May 7, 2008).

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

OBJECTIVE MEDICAL EVIDENCE (APRIL 10, 2008):

PHYSICAL: Claimant has a congenital condition of the ankles. In 11/2007, she underwent orthopedic surgery of her right ankle (tibia talar) and developed a mild post-operative infection (pages 11-12). In 11/2007, she was doing well, weight bearing, and indicated that her pain had mostly resolved (page 14). In 2006, she was treated for interstitial cystitis of the bladder (page 23). In 1/2007, she underwent an excision of a right ganglion cyst on her wrist (pages 115-116).

ANALYSIS:

From a physical standpoint, her condition is expected to improve, post-operatively. From a mental standpoint, there was no evidence of a disabling mental impairment.

(6) Claimant lives with her grandparents, and performs the following Activities of Daily Living (ADLs): dressing, bathing, cooking and light cleaning (sometimes). Claimant is currently on crutches due to her recent right ankle surgery. Claimant wears a brace on her right foot. Claimant does not use a walker or a wheelchair. She does use a shower stool on a daily basis. She does not wear any braces on her neck.

(7) Claimant does not have a valid driver's license. Claimant is computer literate.

(8) The following medical reports were persuasive:

(a) A June 1, 2008 Medical Needs form (DHS-54A) was reviewed. The physician states that claimant needs help with weight bearing activity. The physician further states that claimant is unable to work at her usual occupation for 3 to 4 months. She is unable to work at any job for 3 to 4 months.

(b) A June 1, 2008 Medical Examination Report (DHS-49) was reviewed. The physician provides the following diagnoses: Status-post osteoarticular graft/transplant, post release Achilles tendon lengthening of right ankle. The physician reports that claimant is non-weight bearing on her right leg. X-ray show incomplete healing at junction of the right ankle graft.

The physician reports that claimant is disabled. She is non-weight bearing for purposes of walking and standing. She is unable to lift any weight because she needs to have her right ankle graft healed. The estimated duration of claimant's recuperation is 3 to 4 months.

(c) An [REDACTED] report was reviewed. The physician provided the following report:

Claimant was a patient of mine for several years when I practiced in [REDACTED]. She has severe pathology of both

her ankles. She had avarcular necrosis with osteochondral lesions and flaps of both of her talar bones.

She was treated surgically over the course of time from 2002 to 2006. Her surgeries involved arthroscopic debridement. These failed and she was treated with fresh osteoarticular talar allografts. She has chronic and permanent arthritis. Due to this, she will likely require multiple procedures.

NOTE: Claimant's treating physician has given less than sedentary work restrictions, based on claimant's right ankle surgeries. However, this medical source opinion (MSO) is inconsistent with the great weight of the objective medical evidence in the record. It should be noted that claimant's physician indicates that she will be unable to work for 3 to 4 months.

(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 did not allege a mental impairment as the basis for her MA-P application. There are no psychiatric/psychological reports in the record. Also, claimant did not provide a DHS-49D or a DHS-49E to show her current mental residual functional capacity.

(10) The probative medical evidence of record 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 (during her 3-4 month recuperation) this medical source opinion (MSO) is inconsistent with the great weight of the objective medical evidence in the record.

(11) Claimant has 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 based on the impairments listed in paragraph #4, above.

DEPARTMENT'S POSITION

The department thinks that claimant has normal Residual Functional Capacity (RFC). The department acknowledges that claimant had orthopedic surgery in 11/2007. The department did not comment on claimant's recent ankle replacement (May 2008).

The department thinks claimant's impairments do not meet/equal the intent or severity of a Social Security Listing.

The department thinks that claimant's condition is improving, or is expected to improve within 12 months of the date of surgery.

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).

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 purposes. 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, she is not eligible for MA-P.

SGA is defined as the performance of significant duties over a reasonable period of time for pay. Claimant's who are working and 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, 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 disability criteria.

Claimant meets the severity and duration criteria.

Claimant meets the Step 2 eligibility test.

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 Listings.

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

STEP 4

The issue at Step 4 is whether claimant is able to do her previous work. Claimant previously worked as a school janitor. Claimant's school janitor work was light work.

Except for the medical source opinion provided by claimant's orthopedic surgeon, there is no medical evidence that claimant is unable to return to her work as a janitor.

Because claimant's medical source opinion (MSO) is not supported by the great weight of the medical evidence in the record, they will not be given controlling weight. 20 CFR 416.927(c) and 20 CFR 416.927(d).

Since claimant will be able to return to her previous work after a 3-4 month recuperation, she does not currently meet the Step 4 eligibility 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 purposes.

Claimant alleges disability based on her recent right ankle replacement. Claimant's orthopedic surgeon has opined that claimant is totally disabled for at least 3-4 months or until her ankle replacement heals.

Claimant's orthopedic surgeon states that claimant is totally unable to work. However, this medical source opinion (MSO) cannot be given controlling weight under the applicable regulations, as mentioned above.

In short, the Administrative Law Judge is not persuaded that claimant is and will be totally unable to work for 12 months due to her right ankle replacement. Claimant currently

performs several Activities of Daily Living. Taking the entire medical record, in combination with claimant's testimony, the Administrative Law Judge concludes that claimant is able to perform at least unskilled sedentary work (SGA). This means that claimant is able to work as a ticket-taker for a theatre, as a parking lot attendant, and as a greeter for [REDACTED].

The department correctly denied claimant's MA-P 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 the claimant does not meet the MA-P disability requirements under PEM 260.

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

SO ORDERED.

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

Date Signed: December 11, 2009

Date Mailed: December 11, 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 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.

JWS/sd

cc:

