

STATE OF MICHIGAN
STATE OFFICE OF ADMINISTRATIVE HEARINGS AND RULES

ADMINISTRATIVE HEARINGS FOR THE
DEPARTMENT OF HUMAN SERVICES

IN THE MATTER OF: Allen Burwick,
Claimant

Reg. No: 2008-23486
Issue No: 2009; 4031
Case No: X2557045A
Load No: 1321010231
Hearing Date:
September 24, 2009
Calhoun 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 on September 24, 2008 in Battle Creek. The claimant personally appeared and testified under oath.

The department was represented by Allen Sage (FIM) and Mary Platisis (ES).

Claimant requested additional time to submit new medical evidence. Claimant's medical evidence was submitted to the State Hearing Review Team on September 24, 2008. Claimant waived the timeliness requirement so his new medical evidence could be reviewed by SHRT. After SHRT's second disability denial, the ALJ issued the Decision and Order below.

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/SDA applicant (March 12, 2008) who was denied by SHRT (July 14, 2008) due to claimant's ability to perform unskilled light work.

(2) Claimant's vocational factors are: age—55; education—11th grade; post high school education—GED; work experience—laborer for landscape and lawn care service, commercial painter, laundry aide, switchman for Grand Trunk Railway.

(3) Claimant has not performed Substantial Gainful Activity (SGA) since August 2007 when he worked as a laborer for a landscape and lawn care service.

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

- (a) Severe arthritis/cervical pain;
- (b) Takes pain meds;
- (c) Status post surgery on leg;
- (d) Has difficulty walking;
- (e) Deformed right hand;
- (f) Unable to work as his past work (painter);
- (g) Status post facial surgery;
- (h) Emphysema;
- (i) Tuberculosis;
- (j) Hepatitis B;
- (k) 27 years in prison;
- (l) Has had lots of jobs;
- (m) Mood swings;
- (n) Anger attacks;

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

OBJECTIVE MEDICAL EVIDENCE (July 14, 2008):

- (a) A September 22, 2007 psychiatric evaluation was reviewed.

The psychiatrist provided the following history:

The patient describes a long and complicated history characterized by impulsive behaviors dating back to childhood, resulting in injuries into 'juvenile.' He continued throughout his growing up years and as a result has been incarcerated numerous times for a total of 27 years in prison, on at least 5 or 6 different occasions. He has engaged in car theft and false checks. He has been charged with escaping from prison, possession of marijuana while in prison, and assault and battery. His returns to jail are generally a result of drinking. He describes that he is 'generally a mellow man,' but since his release from prison in April of 2006, he feels overwhelmed by having to deal with kids and dogs and being unable to pay his bills. He has to, at times, leave the cart with groceries in the supermarket and get out. He is very pleased with the benefits obtained from Valium prescribed by Dr. Thakur. At times, he describes worrying and being quite paranoid. It seems, however, more often obsessional behavior, having to check the doors and make sure that everything is safe.

* * *

The psychiatrist provided the following DSM diagnoses:

Axis I—Dysthymic disorder; panic disorder without agoraphobia.

Axis V/GAF—50.

* * *

- (9) The prohibitive 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 mood swings and anger attacks. The psychiatric report in the record provides the following diagnoses: Axis I—Dysthymic disorder; panic disorder without agoraphobia. Axis V/GAF—50. The claimant did not provide a

DHS-49D or a DHS-49E to show his mental residual functional capacity. There is no psychiatric/psychological information in the record that establishes any work-related limitations based on his mental impairments.

(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 does have a history of back and hand arthritis. There was no medical evidence in the record to establish that claimant's physical impairments preclude him from performing normal work activities.

(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/SDA based on the impairments listed in Paragraph #4, above.

DEPARTMENT'S POSITION

The department thinks that claimant has a residual functional capacity to perform unskilled work.

The department thinks that claimant's impairments do not meet/equal the intent or severity of a Social Security listing. The department thinks that claimant retains the residual functional capacity to perform normal work activities.

The department denied claimant's application for MA-P/SDA based on claimant's ability to perform normal work activities.

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).

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 evaluates disability based on mental impairments using the following policies:

(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 and 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.

"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 criteria. 20 CFR 416.920(a).

The severity/duration requirement is a *de minimus* standard. Therefore, 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. Claimant does not allege disability based on the Listings.

However, SHRT evaluated claimant's eligibility based on all applicable SSI Listings at 20 CFR 404, Subpart P, Appendix.

Claimant does not meet any of the Listings and therefore, does not satisfy the Step 3 disability test.

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 laborer for a volunteer service. This was medium work.

There is no medical evidence to establish that claimant is not able to perform his prior work as a laborer for a lawn care service. Claimant's primary work with the lawn care service was running the weed whacker. This would be considered light/medium work.

There is no medical evidence in the record to support a finding that claimant is unable to perform his previous work as a laborer for a lawn care service.

Since claimant is able to return to his work as a laborer for a lawn care service, he does not meet 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 his mental/physical impairments meet the department's definition of disability for MA-P/SDA purposes.

First, claimant alleges disability based a mental impairment (mood swings) and anger attacks. The psychiatric evidence of record shows that claimant's diagnoses are dysthymic disorder and panic disorder without agoraphobia. The evidence of record does not show that claimant's mental impairments totally preclude him from all work activity. Also, claimant did not submit a DHS-49D or DHS-49E to establish his mental residual functional capacity.

Second, claimant alleges disability based on difficulty walking, emphysema, TG, and Hepatitis B. While these are severe impairments, they do not totally preclude claimant from performing all work activities.

During the hearing, claimant testified that a major impediment to his return to work was back/neck pain secondary to cervical dysfunction. Unfortunately, medical evidence 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 work based on his cervical dysfunction and radiating pain. Claimant currently performs many activities of daily living, and has an active social life with his live-in girlfriend. Considering the entire medical record, and in combination with claimant's testimony, the Administrative Law Judge concludes that claimant is able to perform simple unskilled sedentary/light work (SGA). In this capacity, claimant is able to work as a ticket taker for a theater, as a parking lot attendant, and as a greeter for Wal-Mart.

Based on this analysis, 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 is, hereby, AFFIRMED.
SO ORDERED.

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

Date Signed: October 5, 2009

Date Mailed: October 7, 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/tg

2008-23486/jws

cc: A. Burwick
Calhoun County DHS (Dist. #21)
I. Brown
M. Best
B. Dixon
J. Rogers
J. Richardson
J. W. Sexton
Administrative Hearings (2)