

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: 2008-27829
Issue No: 2009
Case No: [REDACTED]
Load No: [REDACTED]
Hearing Date:
September 30, 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, an in-person hearing was held in Flint on September 30, 2008. Claimant personally appeared and testified under oath. Claimant was represented by [REDACTED].

The department was represented by Mary Burn (ES).

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/retro applicant (May 30, 2008) who was denied by SHRT (August 19, 2008), due to claimant's failure to establish an impairment which meets the severity and duration requirements. Claimant requests retro-MA for February 2008.

(2) Claimant's vocational factors are: age—50; education—8th grade; post-high school education—GED; work experience—union roofer and sewer line laborer.

(3) Claimant has not performed Substantial Gainful Activity (SGA) since 2003 when he was a union roofer.

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

- (a) Unable to walk long distances;
- (b) Extended sitting produces pain;
- (c) Right leg pain;
- (d) Right arm pain;
- (e) Unable to bend over;
- (f) May need additional spinal surgery;
- (g) Status-post cervical surgery (February 2008).

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

OBJECTIVE MEDICAL EVIDENCE (AUGUST 19, 2008):

SHRT denied claimant's MA-P application due to lack of severity and duration.

SHRT thinks that the medical evidence of record shows that claimant's spinal condition is improving or is expected to improve within 12 months from the date of onset or the date of surgery.

(6) Claimant lives with his brother and performs the following Activities of Daily Living (ADLs): dressing, bathing, cooking, laundry and grocery shopping (uses an [REDACTED] while shopping). Claimant was hospitalized in February 2008 for cervical surgery to repair injuries sustained when he fell out of a tree. Claimant uses a cane approximately 17 days a month. He wears a neck brace while sleeping. He does not use a walker, wheelchair or a shower stool.

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

Claimant is computer literate.

- (8) The following medical records are persuasive:

- (a) A May 16, 2008 Medical Examination Report (DHS-49) was reviewed. The orthopedic surgeon provided the following diagnosis: C6 fracture with parestesias.

The orthopedic physician states that claimant is unable to work until post-operatively healed. He is able to return to work June 15, 2008. (His surgery was in February 2008. In short, the orthopedic surgeon stated that claimant would require approximately 4 months recuperating from his surgery).

(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 his claimant of disability. Claimant did not provide a DHS-49D or a DHS-49E to show his mental residual functional capacity.

(10) The probative medical evidence does not establish an acute (exertional) physical condition expected to prevent claimant from performing all customary work functions for 12 months. Claimant's orthopedic physician stated that claimant would be able to return to work on June 15, 2008. Also, claimant walked one mile to the hearing on September 30, 2008. Claimant thinks he is entitled to MA-P because he may have to have additional surgery. There is no scheduled surgery at this time.

(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 based on his status-post cervical surgery in February 2008. Claimant thinks that his inability to walk long distances and his right leg and right arm pain are sufficient to establish a MA-P related disability. Claimant has made a remarkable recovery from his February 2008 cervical surgery. On the date of the hearing, claimant walked over a mile to the hearing, because his ride did not show-up as scheduled.

DEPARTMENT'S POSITION

The department thinks that claimant has not established a severe impairment which meets the meets the 12 month duration requirement for MA-P.

Based on the medical evidence of record, the department thinks that claimant's cervical fracture is improving, or is expected to improve within 12 months from the date of onset.

The department's position is bolstered by claimant's doctor who stated on a May 16, 2008 DHS-49 that claimant would be able to return to work approximately June 15, 2008.

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 his 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, he 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, 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 his physical/mental ability to do basic work activities, he does not meet the Step 2 disability criteria.

Applying the *de minimus* requirement, claimant satisfies the severity and duration 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.

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 union roofer. Claimant's work as a union roofer was medium work. Because claimant has sequeli from his February 2008 cervical surgery, he is not able to climb ladders and work on roofs which are significant distances from the ground.

Since claimant is unable to return to his previous work as a union roofer, 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 evidence in the record that his mental/physical impairments meet the department's definition of disability for MA-P purposes.

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

Second, claimant alleges disability based on his right leg and right arm dysfunction which are sequeli from his February 2008 cervical surgery. The most significant medical evidence of record is the Medical Examination Report (DHS-49) provided by claimant's orthopedic surgeon on May 16, 2008. At that time, the orthopedic surgeon reported that claimant would be able to return to work approximately June 15, 2008. In addition, claimant is making a successful recovery from his February 28, 2008 surgery because he is able to walk up to one mile. Based on the medical evidence provided by claimant's orthopedic surgeon, he does not meet the 12 month duration requirements.

The evidence of spinal surgery creates a presumption of MA-P disability; the medical reports in the record, taken collectively, rebut the presumption. Claimant has not met his burden of proof.

During the hearing, claimant testified that a major impediment to his return to work was his right leg pain, right arm pain and the pain he experiences while sitting for long periods. Unfortunately, evidence of pain, alone, is insufficient to establish disability for MA-P purposes.

The Administrative Law Judge concludes that claimant's testimony about his 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 his right leg and right arm pain, secondary to his February 2008 cervical surgery. Claimant performs many Activities of Daily Living and has an active social life with his brother. Claimant is computer literate. 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, he is able to work as a ticker taker at a theatre, as a parking lot attendant, as a greeter for [REDACTED], or as a roofing consultant for [REDACTED].

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

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: 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 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:

