

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: 2008-27839
Issue No: 2009
Case No: [REDACTED]
Load No: [REDACTED]
Hearing Date:
March 4, 2009
Iron 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 March 4, 2009, in Caspian. Claimant personally appeared and testified under oath.

The department was represented by Brian Koenig (FIM) and Lisa Carlson (AP Worker).

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 (affective disorder, Listing 12.04), 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 impairment to the degree that she 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 (July 1, 2006 to September 2006) due to an MRT decision. The claimant's MA-P eligibility was reviewed in June 2008. Claimant's MA-P benefits were terminated on July 18, 2008 because she failed to file a timely hearing request.

(2) In July 2008, MRT denied MA-P eligibility due to claimant's ability to perform Substantial Gainful Activity (SGA).

(3) On July 7, 2008, the local office notified claimant an MRT had denied eligibility for ongoing MA-P.

(4) On July 28, 2008, claimant filed a late hearing request. Claimant's MA-P case was closed on July 18, 2008; claimant did not request her hearing until July 28, 2008.

(5) On August 19, 2008, SHRT denied claimant's Review Application for the following reasons:

There has been significant improvement since the 9/2005 MRT approval. Currently, claimant is capable of unskilled work.

(6) Claimant's vocational factors are: age 28; education 11th grade; post high school education is receiving training at an [REDACTED] ([REDACTED]) sheltered workshop; work experience: Kitchen aide, dishwasher, and prep cook at a local restaurant.

(7) Claimant has not performed substantial gainful activity since February 2008 when she worked as a kitchen aide and dishwasher at a restaurant.

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

(a) Liver dysfunction;

(b) Hepatitis C;

- (c) Bipolar disorder;
 - (e) Depression;
 - (f) Carpal tunnel syndrome;
- (9) SHRT evaluated claimant's medical evidence as follows:

OBJECTIVE MEDICAL EVIDENCE (August 19, 2008):

SHRT reviewed claimant's eligibility for ongoing MA-P using SSI Listings 12.04 (affective disorder) and 12.06 anxiety-related disorders.

SHRT decided the claimant's impairments did not prevent her from performing unskilled heavy work.

SHRT denied a continuation of claimant's MA-P benefits because claimant is capable of unskilled work.

SHRT did not review claimant's eligibility for ongoing MA-P using the required SSI improvement regulations.

- (10) Claimant lives alone and performs the following Activities of Daily Living (ADLs): dressing, bathing, cooking, dishwashing, light cleaning, mopping, vacuuming, laundry and grocery shopping. Claimant does not use a cane, walker, wheelchair or shower stool. She wears braces on both wrists while sleeping. Claimant received inpatient treatment at a psychiatric facility and was counseled in July 2008.

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

The following medical records are persuasive:

- (a) An April 3, 2008 family care doctor's progress note was reviewed. The physician provided the following background: Claimant is a pleasant 27-year-old female who we are seeing for multiple medical problems.

PROBLEM #1: Asthma

Claimant has been on Flovent 110 mcg. She has not been taking this recently because of a recent thrush that she had experienced two weeks ago. Was then seen in the Urgent Care. Claimant has been maintaining on Mystatin and has improvement over the past week or so.

PROBLEM #2: Chronic Hepatitis C

Regarding claimant's chronic Hepatitis C, claimant has been maintained on Rivravirin as well as Interferon. She is followed up by Infectious Disease for this on a monthly basis, getting labs, including blood counts and HBC, RNA connotative DNA tighter monthly.

* * *

Regarding patient's asthma, patient is moving to a new house soon, however, presently, she is still getting exposed to her roommate's cats. She has stopped using Flovent because of her thrush and has the Albuterol inhaler which she uses on a needed basis.

* * *

Otherwise, claimant does have some general malaise and some problems with her sleep. She has been getting some Restroil from Infectious Disease doctors; however, they stated most recently they were going to stop giving this within the next month or so.

* * *

The physician provided the following assessment:

- (1) ADHD;
- (2) Insomnia;
- (3) Asthma;
- (4) Chronic Hepatitis;
- (5) Anemia;

(c) An [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] psychological assessment was reviewed.

The social worker provided the following background:

Claimant is a 25-year-old female who is currently living at the [REDACTED] facility. She is single and has no children. She is working on re-developing a relationship with mother. Her mother is very supportive of [REDACTED] and she is also working hard at the relationship. [REDACTED] prefers going to the Catholic Church as her parental relatives are Hispanic and Catholic. However, she is exploring other religious beliefs. She would like to complete her GED, but her behavior keeps her from realizing this goal.

* * *

Before the first five or six years, claimant lived in a nuclear family. She has a younger sister, [REDACTED] who lives downstate and receives disability payment of some type. Prior to the age of five, claimant was sexually abused by babysitter. From the time claimant started school, claimant exhibited behavior problems. Her parents finally divorced when she was about eight. Her father was an alcoholic and had some mental illness. Claimant's mother reports that several of claimant's siblings have depression or bipolar illness. There is also alcoholism on her side of the family. Claimant has been out of her family since about age 13 either in psychiatric hospital, on the street, or temporary placements. Her out-of-control behavior originally necessitated these placements.

* * *

Claimant has an extensive history of substance dependence. At this time, her drug of choice is alcohol. She has a very high tolerance for alcohol and when she drinks, she tends to be assaultive. Her time in jail has been a result of her drinking. Claimant will smoke marijuana and until three years ago was using street drugs. She is positive for Hepatitis C because of IV drug use.

The social worker provided the following DSM for diagnostic impression:

Axis I/posttraumatic stress disorder; polysubstance dependence.

* * *

Axis V/GAF—48

(12) The probative psychological evidence establishes an acute (non-exertional mental condition expected to prevent claimant from performing all customary work functions for the required period of time. There is very little recent clinical information on claimant's psychological condition. However, she was approved for MA-P benefits by MRT on July 9, 2007, based on SSI Listing 12.04 (affective disorder).

(13) The department has not shown, using competent material and relevant psychological evidence that claimant's stress disorder has improved to the point that claimant is now able to perform substantial gainful activity. The department has not obtained a recent mental status exam, and has not provided a DHS-49D or DHS-49E to establish claimant's current mental residual functional capacity.

(14) The probative medical evidence does not establish that claimant's exertional impairments had improved to the point that claimant is now able to perform substantial gainful activity. The department has not shown using competent relevant and material evidence that claimant's Hepatitis C and related impairments have improved to the point that claimant is now able to work.

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

(16) Claimant is currently employed part-time (20 hours per week) at a [REDACTED] [REDACTED] sheltered workshop. She earns approximately \$614 gross, per month.

CONCLUSIONS OF LAW

CLAIMANT'S POSITION

Claimant thinks she is entitled to a continuation of her MA-P benefits based on the impairments listed in Paragraph #4, above.

In particular, claimant thinks that she has severe mental impairments (posttraumatic stress disorder which precludes Substantial Gainful Activity (SGA). Furthermore, claimant thinks she has severe physical impairments that totally preclude substantial gainful activity.

DEPARTMENT'S POSITION

The department evaluated claimant's disability claim using SSI Listing 12.04 (affective disorders) and 12.06 (anxiety-related disorders). The department did not properly review claimant's entitlement to a continuation of her MA-P using 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).

To determine to what degree claimant's alleged mental impairments limit her ability to do basic work activities, the following regulations must be considered:

(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 or 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).

The department has the burden of proof to show by a preponderance of the medical evidence that claimant's mental and physical impairments have improved to the extent the 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 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. Claimants who are working or otherwise performing substantial gainful activity 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 currently employed at a [REDACTED] sheltered workshop. Because claimant's monthly income at the sheltered workshop does not exceed \$900, it is not substantial gainful income under SSI rules.

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 she is now able to perform substantial gainful activity.

The department has the burden of proof to perform an assessment of claimant's ongoing eligibility for MA-P using the SSI improvement standards. The improvement standards require the department to obtain a recent mental and physical assessment of claimant's

impairments in order to evaluate her current residual functional capacity. In short, the department has the burden of proof and the burden to provide credible medical evidence to establish, objectively, what the claimant's current residual functional capacity is.

MENTAL IMPAIRMENTS.

The department has not provided current psychiatric evidence, including a mental status evaluation and a DHS-49D and DHS-49E evaluation. Furthermore, the medical record on claimant's current mental residual functional capacity is woefully, inadequate. The most recent assessment of claimant's mental status is a [REDACTED] psychological assessment dated August 31, 2005.

Because the department did not supply a current mental status evaluation for claimant, it has not met its burden of proof to show that claimant's mental impairments have improved to the point where claimant is now able to perform substantial gainful activity.

PHYSICAL IMPAIRMENTS.

In addition to claimant's mental impairments, claimant has physical impairments which include carpal tunnel, Hepatitis C and asthma. The department did not obtain a current medical evaluation in order to evaluate claimant's current residual functional capacity.

Because the department has not obtained recent medical records, the department has not established a clinical basis for its position that claimant has improved to the point where she can now perform substantial gainful activity.

DECISION AND ORDER

The Administrative Law Judge, based upon the above findings of fact and conclusions of law, decides that the department has not established marked improvement in both claimant's

mental and physical impairments to the extent that she is now able to perform substantial gainful activity under PEM 260.

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

SO ORDERED.

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

Date Signed: June 25, 2009

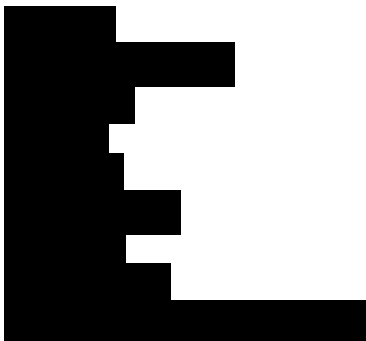
Date Mailed: June 25, 2009

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

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