

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: 2008-9159
Issue No: 2009; 4031
Case No: [REDACTED]
Load No: [REDACTED]
Hearing Date:
May 15, 2008
Sanilac 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 Sandusky on May 15, 2008. Claimant personally appeared and testified under oath.

The department was represented by Linda Courter (Program Manager).

Claimant requested additional time to submit new medical evidence. Claimant's new medical evidence was sent to the State Hearing Review Team (SHRT) on May 19, 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 her 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 her 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/Retro/SDA applicant (September 19, 2007) who was denied by SHRT (March 5, 2008) based on claimant's ability to perform light work. SHRT relied on Med-Voc Rule 203.29, as a guide. Claimant requests retro-MA for June, July and August 2007.

(2) Claimant's vocational factors are: age--46; education—high school diploma, post-high school education—claimant has attended community college and obtained a LPN license; claimant's license expired in 2006; work experience—advocate [REDACTED], nurse aide instructor for [REDACTED], licensed practical nurse for [REDACTED], visiting nurse for [REDACTED]

(3) Claimant has not performed Substantial Gainful Activity (SGA) since 2006 when she worked as an advocate for [REDACTED]

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

- (a) Traumatic brain injury (May 24, 2006);
- (b) Poor memory;
- (c) Unexpected falls;
- (d) Loses consciousness without warning;
- (e) Spinal dysfunction/pinched nerve/bulging disc;
- (f) Right shoulder dysfunction;
- (g) Numbness in both arms;
- (h) Pinched nerve in neck;
- (i) Headaches;
- (j) Sleep dysfunction;
- (l) Back and neck pain;
- (m) Chronic obstructive pulmonary disease;
- (n) Emphysema.

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

OBJECTIVE MEDICAL EVIDENCE(MARCH 5, 2008)

Multiple MRI's are reported in file. MRI of right shoulder of 6/2007 demonstrated tendinosis of the supraspinatus and intraspinatus with minimal AC joint hypertrophy (page 76).

MRI of cervical spine demonstrated a disc protrusion at C3-4 and one at C4-5 causing mild canal stenosis (page 70).

MRI of the thoracic spine demonstrated multi-level disc bulging and herniated disc at T10-11 causing impingement of the thecal space (page 74).

MRI of the lumbar spine demonstrated a suggestion of a thin disc herniation at L5-S1 (page 72).

MRI of the brain of 3/2007 was normal (page 71).

PHYSICAL

Independent medical examination by a Board Certified Neurologist of 5/24/2007 reported several inconsistencies in claimant's presentation and history. Claimant had a varied memory remembering some things in quite detail and a very poor memory for other things. The physician opined her physical exam was "markedly non-psychological" and her give-away weakness was not weakness at all, but lack of effort. Claimant was noted to be wheelchair bound, although she was reportedly able to perform transfers independently. When standing and asked to try to perform range of motion of her lumbar spine, she collapsed to a seated position on the floor. She did demonstrate excellent range of motion in the seated position (page 57).

MENTAL

Neural psychological examination of 5/20/2007 reported claimant indicated she had not lost consciousness at the time of her accident, but she indicated she had developed a number of post-concussional symptoms. She reported being highly emotional. She denied intrusive recollections or nightmares. She reported pain in shoulders, low back, right arm, buttocks, and both legs. IQ testing was reported as normal. Personality testing reported significant anxiety and depression related to her physical condition. She had

significant multiple cognitive deficits somewhat greater than would be expected (page 18).

Hospital records of 7/2007 reported claimant was depressed with suicidal ideation after losing her benefits or "lost wages." She had thoughts of wheeling herself in front of traffic. She responded well to the treatment milieu and was discharged in a much improved state. She did purport having multiple losses, recently broke-up with her boyfriend 11 months earlier, and lost her house at the same time. On consultation, she was awake for the interview and was noted to be cooperative with fluent speech, depressed mood and slightly restricted affect. She reported her suicidal ideation was gone. Cognition was grossly intact (page 26, 30).

ANALYSIS:

This is an interesting case. Claimant alleges a traumatic brain injury (TBI) and other injuries sustained in a motor vehicle accident. The findings at the neural/psychological exam of 5/20/2007 reported they were in excess of what would be expected for someone who reported not losing consciousness. Cognition was noted to be grossly intact on consultation on 7/2007 hospitalization. An MRI of the brain was normal. An independent medical exam by a neurologist reported that the physical exam was "markedly non-physical." Her memory was quite varied. In addition, the independent exam reported claimant originally did not allege any type of brain injury or loss of consciousness at the time of the accident and the police report from the accident stated there was no visible damage to her vehicle. In addition, the physician also noted a report that indicated in 2/2007 it was recommended that claimant stop using the wheelchair.

The above findings do raise a question as to claimant's consistency and credibility; thus, making the assessment of limitations difficult. However, since she reported having some depression prior to the accident and appearing emotional at both exams cited above, and given her depression and suicide ideation in July 2007, after she lost her benefits, she appears to have a severe mental impairment that would limit or affect her ability to perform skilled work. Also, she does have some findings in her thoracic spine and right shoulder that could pose some limitations. Physically, the evidence in the file suggests she would be capable of a wide range of medium work with limitations in overhead reaching on the right to occasional.

The evidence in the file does not demonstrate any other impairments that would pose a significant limitation.

* * *

(6) Claimant performs the following Activities of Daily Living (ADLs): dressings, bathing (sometimes), dish washing (sometimes), grocery shopping (needs help). Claimant does not use a cane or a walker to ambulate. She uses a wheelchair daily, as well as a shower stool. She uses a neck brace, a back brace, a wrist brace and carries her right arm in a sling.

(7) Claimant has a valid driver's license but does not drive an automobile. Claimant is computer literate.

(8) The following medical records are persuasive:

- (a) See the SHRT summary of medical evidence at paragraph #5, above.
- (b) A May 5, 2008 medication review was considered.

The psychiatrist provided the following subjective information: claimant presents on time today, alone, for her medication appointment. She reports, over the last couple of weeks, she has not been doing very well. She reports she has been having significant crying spells. She reports they "come out of nowhere and last 10-15 minutes." She reports that she is uncertain as to why her mood has worsened, but she feels it may be due to the fact that her closest friend from nursing school is in the hospital for MRSA. Also, her fiancé is supposed to be getting out of prison for a drunken driving offense and hasn't contacted her, she feels that the relationship may be over, and she is quite upset about the loss. She reports that [REDACTED] has been coming to check on her quite regularly, almost every other day, and that's been quite helpful. She also reports she is still planning on going out west to see her daughter and her new grandchild, but would like to get her sleep issues addressed. We reviewed that we are going to titrate her off Lexapro, continue with Cymbalta, and add some Trazodone at bedtime. We asked to call us in a few days to let us know how she is responding to the new medicine, and she agrees to do so. She reports that she has been having a hard time getting her pain medicines, and she has been having to watch how many she uses

because she is not supposed to need a refill for a few days. She reports that she is uncertain as to why she was shorted from the pharmacy, but she planning on counting the pills before she leaves to make sure she has all that she needs for the month.

The psychiatrist provided the following assessment:

Axis I—Major Depressive Disorder, recurrent, moderate without psychotic features; mood disorder due to general medical condition (chronic pain); pain disorder associated with both psychological factors and a general medical condition (cervical lumbar herniated disc).

* * *

Axis V/GAF—60

(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. The psychiatric/psychological records do show the following diagnoses: Major Depressive Disorder, mood disorder, pain disorder. The GAF score is 60. Claimant did not provide a DHS-49D or DHS-49E to establish her residual mental 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 the required period of time. Medical records show the following diagnoses: chronic pain, cervical and lumbar herniated disc's, rotator cuff injury. The consulting physician did not state claimant was unable to work.

(11) Claimant has applied for federal disability benefits from the Social Security Administration. Social Security recently denied her application; claimant filed a timely appeal.

CONCLUSIONS OF LAW

CLAIMANT'S POSITION

Claimant thinks she is entitled to MA-P/SDA benefits based on the impairments listed in paragraph #4, above.

DEPARTMENT'S POSITION

The department thinks that claimant has the Residual Functional Capacity (RFC) to perform unskilled medium work.

The department thinks that claimant's impairments do not meet/equal the intent or severity of a Social Security Listing. The medical evidence of record indicates that claimant retains the capacity to perform a wide range of unskilled sedentary and light work.

The department denied MA-P/SDA based on claimant's vocational profile [younger individual (age 46) with a high school education, junior college studies and training as a licensed practical nurse]. The department's MA-P denial was based on Med-Voc Rule 203.29. The department denied SDA because the nature and severity of claimant's impairments do not preclude all work activity for at least 90 days.

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).

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/SDA purposes. PEM 260/261. "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, she 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 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 eligibility 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 her mental/physical ability to do basic work activities, she does not meet the Step eligibility criteria.

SHRT found that claimant's mental impairment meets the severity/duration requirements.

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.

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 an advocate for [REDACTED]

Claimant's current medical condition, depression, mood disorder and pain disorder would prevent claimant from performing her previous skilled work as an advocate for [REDACTED].

Therefore, claimant meets 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/SDA purposes.

First, claimant alleges disability based on her spinal dysfunction and the resulting chronic pain. Claimant also alleges a closed head injury.

A careful review of the exertional evidence shows that claimant does have some limitations with her right shoulder that would preclude her from doing overhead work. However, claimant is physically able to perform sedentary work. This would include working as a ticket taker for a theatre, as a parking lot attendant, or as a greeter for Walmart.

Second, claimant alleges disability based on her depression, mood disorder, and pain disorder.

As mentioned above, claimant's psychiatric conditions would prevent her from performing skilled work. However, these conditions do not prevent her from performing light/sedentary unskilled work, as mentioned above. It should be noted that claimant did not submit a DHS-49D and a DHS-49E to establish her residual functional capacity.

Finally, the Administrative Law Judge observes that claimant's testimony and medical records do present a certain level of inconsistency that makes it difficult to establish exactly claimant is and is not able to do. The board certified neurologist reported that claimant's physical exam was "markedly non-psychological, i.e. inconsistent."

During the hearing, claimant testified that a major impediment in her return to work was chronic pain secondary to cervical and lumbar herniated discs. Evidence of pain, alone, is insufficient to establish disability for MA-P/SDA purposes.

The Administrative Law Judge concludes that claimant's testimony about her 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 her combined impairments. Claimant was injured in a 2006 motor vehicle accident. She now has pain associated with her spinal dysfunction.

Claimant currently performs many Activities of Daily Living, has an active social life and is computer literate. Her testimony at the hearing revealed a person who was quite lucid when it came to the details of her daily activities. This means that claimant is able to perform unskilled sedentary/light work. Claimant is able to work as a ticket taker at a theater, as a parking lot attendant and as a greeter for Wal-Mart.

The department correctly denied claimant's MA-P/SDA application, based on Step 5 of the sequential analysis, as presented above. Also, claimant is not eligible for benefits under Med-Voc Rule 201.27.

Finally, claimant alleges chronic obstructive pulmonary disease, which was not documented in any of the reports currently in the record. In that regard, the Administrative Law Judge notes that claimant continues to smoke against medical advice.

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. Claimant is not disabled for MA-P/SDA purposes based on Step 5 of the sequential analysis, as described above.

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

SO ORDERED.

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

Date Signed: August 13, 2009

Date Mailed: August 13, 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/sd

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