

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: 2009-14947
Issue No: 2009
Case No: [REDACTED]
Load No: [REDACTED]
Hearing Date:
May 14, 2009
Wayne County

ADMINISTRATIVE LAW JUDGE: Jeanne M. VanderHeide

HEARING DECISION

This matter was conducted by Administrative Law Judge Jeanne M. VanderHeide on May 14, 2009 pursuant to MCL 400.9 and MCL 400.37 upon the Claimant's request for hearing received by the Department on February 2, 2009. At the hearing, the Claimant was present and testified. [REDACTED] of [REDACTED] was present and represented Claimant. Betty McBride, MCW, appeared on behalf of the Department.

ISSUE

Whether the Department properly determined that the Claimant was not disabled for purposes of Medical Assistance ("MA") program.

FINDINGS OF FACT

The Administrative Law Judge, based on the competent, material and substantial evidence on the whole record, finds as material fact:

1. Claimant filed for MA on September 29, 2008. Claimant requested MA and SDA retroactive to August 2008.

2. Claimant's impairments have been medically diagnosed as asthma, slow recovery from small intestine dissection and abdominal surgery, and scar tissue from tracheostomy.
3. Claimant's physical symptoms are swelling in legs, lower abdominal pain, and pain in legs from knee down.
4. Claimant was shot in 1986 and had a previous bowel obstruction. Claimant's small intestines began to rot inside of him until he presented to the emergency room in August 2008. Claimant underwent several surgeries and lost 10" of small intestine.
5. Claimant's mental symptoms are short term memory problems, sleep disturbances and concentration problems.
6. Claimant takes the following prescriptions:
 - a) Lasix – water pill
 - b) Vicodin 750 mg – for pain in abdomen and leg.
 - c) Two inhalers (Advair and Albuteral)
7. Claimant's impairments will last or have lasted for a continuous period of not less than 12 months.
8. Claimant is 5'8" tall and weighs 187 pounds.
9. Claimant is right handed.
10. Claimant is 41 years of age.
11. Claimant has an 11th grade education and he also received his GED.
12. Claimant last worked as a [REDACTED] in [REDACTED]. Claimant's job duties included mopping the floors, swept, clean walls. This job included lifting 50-60 lbs. and bending & stooping. Claimant's only other work experience was janitorial.
13. Claimant testified to the following limitations:
 - Sitting: no limitations, but must be careful not to twist or turn
 - Stand: 2 hours, needs to sit at least 15 minutes
 - Walk: 6-10 blocks, recently causes pain in legs
 - bend/stoop: cannot bend, can only stoop so far
 - lifting: nothing heavier than vacuum cleaner
 - grip/grasp: no problems
14. Claimant lives with his parents.

15. Claimant performs minimal household chores – washing a few dishes here and there. Claimant does not perform any cleaning. Claimant can do some laundry. Claimant can go to grocery store, but cannot carry all the bags.
16. The Department found that Claimant was not disabled and denied Claimant's application on December 15, 2008.
17. Documents examined include Exhibit C, pp. 1-3 which are photographs of Claimant's abdomen showing significant scarring, an unhealed wound, and loss of belly button.
18. Medical records examined are as follows:

[REDACTED], 5/10/09 (Exhibit B, p. 1-13)

Patient came into the ER complaining of having increased shortness of breath over the last few days. He was unable to sleep without feeling dyspneic. He would wake up feeling extremely shortness of breath and at times he was not able to lie on his back. He was forced to lie on his side. He had wheezing, coughing. He had also noticed a change in his voice quality. He had become more hoarse. He maintained he also had a choking feeling very occasionally and he had to drink water to prevent him from failing to breath.

IMPRESSION: Rule out tracheal stenosis. We need to continue with steroids. ENT Surgery will be consulted to see if patient needs to be transferred to the ICU pending results of the CT scan.

CT Scan of Neck, 5/8/09 (Exhibit B, p. 14)

There is a focal segment of marked narrowing involving the airway at the level of the hyoid bone extending into the epiglottis. This may be related to scar tissue consistent with a patient's known history of tracheostomy.

[REDACTED], 4/20/09 (Exhibit A, pp. 1-2)

History of pulmonary problems (asthma) and history of GSW with s/p surgical repair

CURRENT DIAGNOSIS: Pain issue secondary to surgical repair for GSW, Asthma

PHYSICAL LIMITATIONS:

Lifting – 20 lbs. occasionally
Stand/walk – less than 2 hours in 8 hour day
Sitting – less than 6 hours in 8 hour day
Limited strength in legs.

MENTAL LIMITATIONS: Comprehension, memory, social interaction

[REDACTED] Progress note, 3/23/09 (Exhibit A, p. 5)

Surgery postponed for hernia repair due to insurance issues. Patient states that he has been going to the ER.

[REDACTED], Medical Exam Report, 2/12/09 (Exhibit A, pp. 3-4)

Patient had exploratory laparotomy with small bowel resection for necrotic bowel in 8/08. His abdomen was unable to be closed initially. He is slowly healing.

GENERAL: In mild distress

PHYSICAL LIMITATIONS:

Lifting – less than 10 lbs. frequently, occas. 50 lbs.

Stand/walk – at least 2 hours/day

Sitting – 6 hours in a 8 hour work day

Patient is still recuperating from multiple major abdominal surgeries.

[REDACTED], 3/23/09 Office notes (Exhibit 1, pp. 5-9)

[REDACTED], 1/8/09, Medical Exam Report (Exhibit 3)

HX OF IMPAIRMENT: Patient has exploratory laparotomy with small bowel resection for neurotic bowel in 8/08. His abdomen was unable to be closed initially. He is now slowly healing.

CURRENT DIAGNOSIS: Large incisional hernia

MUSCULOSKELTAL: decreased strength globally

PHYSICAL LIMITATIONS:

- Lifting: less than 10 lbs. 2/3 of 8 hour day

Up to 25 lbs. 1/3 of 8 hour day

- Standing: At least 2 hours in 8 hour day

[REDACTED], 8/20/08-10/1/08 (Exhibit 2, pp. 1-4)

Small bowel obstruction secondary to adhesions. Exploratory laparotomy performed and small bowel resection. Very complicated postoperative course, majority of which was spent in the ICU. Tracheostomy and Ventilated.

[REDACTED], 8/25/08 (Exhibit 2, pp. 16-17)
OPERATION: Second look laparotomy

[REDACTED], 8/30/08 (Exhibit 2, pp. 18-19)
OPERATIONS: Abdominal exploration, partial wound closure, wound vac replacement.

[REDACTED], 9/4/08 (Exhibit 2, pp. 22-23)
OPERATIONS: Laparotomy, Repair of small bowel perforation, wound vac change

It was decided that the abdomen could not be closed, especially in view of the recent perforation.

[REDACTED], 9/7/08 (Exhibit 2, pp. 25-26)
OPERATIONS: Abdominal exploration with removal of wound vac, repair of small bowel perforation with primary sutures, Mobilization of skin flaps for partial abdominal wound closure, tracheostomy

[REDACTED], 9/7/08 (Exhibit 2, pp. 28-33)
OPERATIONS: relook laparotomy, tube enterostomy to establish controlled enterocutaneous fistula, partial closure of abdominal wound.

“Does complain of some mild abdominal pain and some pain for the current wrist restraints that he has on.”

[REDACTED], 9/18/08 (Exhibit 1, p. 33)
Sinus Tachycardia. Low voltage in the limb leads. Nonspecific ST segment changes

[REDACTED], 9/23/08 (Exhibit 2, pp. 5-8)
Fluctuating mental state with periods of lucidity followed by confusion and irritability. Patient has refused standard care.

MENTAL STATUS EXAMINATION: Patient is disoriented to date, day, month, place. There is a hint of paranoia as the patient abruptly terminated the conversation indicating that the bottles have been moved across the room. The patient was also nonverbal at times, appeared to be pensive and reflecting on his own thoughts but also appeared to be not able to organize his thoughts. Some of his answers were nonsensical. He could not give any relevant history regarding his need for hospitalization.

FORMULATION: The history of agitation, combativeness, refusal to participate with medical treatment and fluctuating mental status is consistent with atypical psychosis/delirium. This profile does not allow the patient to make good competent medical decisions and therefore his is not competent to make his own medical decisions. Although the patient is clearly experiencing significant delirium which does pose a management challenge, his mentioning of having been seen by psychiatrists, reported time in prison as well as reference to [REDACTED] is intriguing and does raise the question about an underlying psychiatric disorder, possibly mood based or schizophrenic spectrum in nature.

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 400.1 *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).

Federal regulations require that the department use the same operative definition for “disabled” as used for Supplemental Security Income (SSI) under Title XVI of the Social Security Act. 42 CFR 435.540(a).

“Disability” is:

. . . 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 CFR416.905

In determining whether an individual is disabled, 20 CFR 416.920 requires the trier of fact to follow a sequential evaluation process by which current work activity; the severity of impairment(s); residual functional capacity, and vocational factors (i.e., age, education, and work experience) are assessed in that order. A determination that an individual is disabled can be made

at any step in the sequential evaluation. Then evaluation under a subsequent step is not necessary.

1. Current Substantial Gainful Activity

First, the trier of fact must determine if the individual is working and if the work is substantial gainful activity. 20 CFR 416.920(b). Substantial gainful activity (SGA) is defined as work activity that is both substantial and gainful. “Substantial work activity” is work activity that involves doing significant physical or mental activities. 20 CFR 416.972(a). “Gainful work activity” is work that is usually done for pay or profit, whether or not a profit is realized. 20 CFR 416.972(b). Generally if an individual has earnings from employment or self-employment above a specific level set out in the regulations, it is presumed that she has the demonstrated ability to engage in SGA. 20 CFR 416.974 and 416.975. If an individual engages in SGA, she is not disabled regardless of how severe her physical and mental impairments are and regardless of her age, education and work experience. If the individual is not engaging in SGA, the analysis proceeds to the second step.

In this case, Claimant last worked for pay in 1990. Claimant was then incarcerated until 2007 and performed work that would normally be done for pay as a custodian. Claimant is not currently engaged in substantial gainful activity. Therefore, the Claimant is not disqualified from receipt of disability benefits under Step 1.

2. Medically Determinable Impairment – 12 Months

Second, in order to be considered disabled for purposes of MA, a person must have a “severe impairment” 20 CFR 416.920(c). A severe impairment is an impairment which significantly limits an individual’s physical or mental ability to perform basic work activities.

Basic work activities mean the abilities and aptitudes necessary to do most jobs. Examples 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)

The purpose of the second step in the sequential evaluation process is to screen out claims lacking in medical merit. The court in *Salmi v Sec’y of Health and Human Servs*, 774 F.2d 685 (6th Cir 1985) held that an impairment qualifies as “non-severe” only if it “would not affect the claimant’s ability to work,” “regardless of the claimant’s age, education, or prior work experience.” *Id.* At 691-92. Only slight abnormalities that minimally affect a claimant’s ability to work can be considered non-severe. *Higgs v Bowen*, 880 F.2d 860, 862 (6th Cir. 1988); *Farris v Sec’y of Health & Human Servs*, 773 F.2d 85, 90 (6th Cir. 1985).

In this case, Claimant underwent multiple abdominal surgeries and lost 10” of his small intestine. Claimant’s abdominal wound is not healed after eight months. Once it does heal, Claimant will be required to undergo additional surgery to repair the surgical hernia. In addition, Claimant suffers from scar tissue as a result of his tracheostomy and memory and comprehension problems. The undersigned finds that Claimant’s impairments are expected to last more than

twelve months. Therefore, this impairment is sufficiently severe to meet the intent of the regulations. The analysis will continue with the third step.

3. Listed Impairment

In the third step of the sequential analysis of a disability claim, the trier of fact must determine if the Claimant's impairment is listed in 20 CFR Part 40, Subpart P, Appendix 1 (20 CFR 416.920(d), 416.925 and 416.926). Based on the hearing record, the undersigned finds that the Claimant's medical record does not support a finding that the Claimant's physical and mental impairment are "listed impairment(s)" or equal to a listed impairment. 20 CFR 416.920(a) (4) (iii). Appendix I, Listing of Impairments discusses the analysis and criteria necessary to a finding of a listed impairment. The Listing 5.07 *Short bowel syndrome (SBS)* was reviewed. Listing 5.07 requires a short bowel "due to surgical resection of more than one half of the small intestine, with dependence on daily parenteral nutrition via a central venous catheter.

In the subject case, Claimant lost 10" of his small intestine, but not half. Furthermore, Claimant is not in any need of parenteral nutrition. Therefore, Claimant does not meet a listed impairment and sequential evaluation under step four or five is necessary. 20 CFR 416.905.

4. Ability to Perform Past Relevant Work

In the fourth step of the sequential evaluation of a disability claim, the trier of fact must determine if the claimant's impairment(s) prevent him/her from doing past relevant work. 20 CFR 416.920(e). Residual functional capacity (RFC) will be assessed based on impairment(s), and any related symptoms, such as pain, which may cause physical and mental limitations that affect what you can do in a work setting. RFC is the most you can still do despite your limitations. All the relevant medical and other evidence in your case record applies in the assessment.

Claimant has presented medical evidence supporting an unhealed surgical abdominal wound. Claimant was in the hospital for 42 days and in an induced coma for much of that time. As a result, Claimant suffers from scar tissue as a result of the tracheostomy as well as some comprehension and memory issues from the coma inducing medications. Claimant is currently on lifting restrictions by his surgeon of less than 10 lbs. frequently, standing at least 2 hours/day and sitting less than 6 hours in a 8 hour work day.

Claimant's prior employment was limited to janitorial type work which is considered unskilled and required a medium exertional level. Based on Claimant's medical impairments, the undersigned finds the Claimant unable to return to past relevant work in his prior occupation as a custodian. Evaluation under step five will be made according to the law.

5. Ability to Perform Other Work

In the fifth step of the sequential evaluation of a disability claim, the trier of fact must determine: if the claimant's impairment(s) prevent him/her from doing other work. 20 CFR 416.920(f). This determination is based on the claimant's:

- (1) "Residual function capacity," defined simply as "what you can still do despite your limitations," 20 CFR 416.945.
- (2) Age, education and work experience, and
- (3) The kinds of work which exist in significant numbers in the national economy which the claimant could perform despite his/her impairments.

20 CFR 416.960. *Felton v. DSS*, 161 Mich. App. 690, 696-697, 411 N.W.2d 829 (1987).

It is the finding of the undersigned, based upon the medical evidence, objective physical findings, and hearing record that Claimant's RFC for work activities on a regular and continuing basis is functionally at the level of sedentary work.

Appendix 2 to Subpart P of Part 404—Medical-Vocational Guidelines 20 CFR

416.967(a) describes sedentary work:

Sedentary work. Sedentary work involves lifting no more than 10 pounds at a time and occasionally lifting or carrying articles like docket files, ledgers, and small tools. Although a sedentary job is defined as one which involves sitting, a certain amount of walking and standing is often necessary in carrying out job duties. Jobs are sedentary if walking and standing are required occasionally and other sedentary criteria are met.

Claimant at forty-one is considered a *younger individual*. For individuals who are under age 45, age is a more advantageous factor for making an adjustment to other work. It is usually not a significant factor in limiting such individual's ability to make an adjustment to other work, including an adjustment to unskilled sedentary work. 20 CFR 404, Subpart P, Appendix 2, Rule 201.00(2)

Nevertheless, a decision of "disabled" may be appropriate for some individuals under age 45 who do not have the ability to perform a full range of sedentary work. However, the inability to perform a full range of sedentary work does not necessarily equate with a finding of "disabled." Whether an individual will be able to make an adjustment to other work requires an adjudicative assessment of factors such as the type and extent of the individual's limitations or restrictions and the extent of the erosion of the occupational base. It requires an individualized determination that considers the impact of the limitations or restrictions on the number of sedentary, unskilled occupations or the total number of jobs to which the individual may be able to adjust, considering his or her age, education and work experience, including any transferable skills or education providing for direct entry into skilled work.

After careful review of the Claimant's extensive medical record and the Administrative Law Judge's personal interaction with the Claimant at the hearing, the undersigned finds that Claimant's impairments render him unable to engage in a full range of even sedentary work activities on a regular and continuing basis. Furthermore, the Department has failed to provide vocational evidence which establishes that Claimant has the residual function capacity for

substantial gainful activity and that, given Claimant's age, education and work experience, there are significant numbers of jobs in the national economy which the Claimant could perform despite Claimant's limitations. Accordingly, the Administrative Law Judge concludes that Claimant is disabled for the purposes of the MA program.

The State Disability Assistance (SDA) program which provides financial assistance for disabled persons is established by 1939 PA 280, as amended. The Department of Human Services (formerly known as the Family Independence Agency) administers the SDA program pursuant to MCL 400.1 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). A person is considered disabled for purposes of SDA if the person has a physical or mental impairment which meets federal SSI disability standards for at least ninety days. Receipt of SSI or RSDI benefits based on disability or blindness or the receipt of MA benefits based on disability or blindness (MA-P) automatically qualifies an individual as disabled for purposes of the SDA program. Other specific financial and non-financial eligibility criteria are found in PEM 261.

In this case, there is sufficient evidence to support a finding that Claimant's impairment has disabled him under SSI disability standards. This Administrative Law Judge finds the Claimant is "disabled" for purposes of the MA program.

DECISION AND ORDER

The Administrative Law Judge, based upon the above findings of fact and conclusions of law, decides that the claimant is medically disabled under the MA program as of August 2008.

Therefore the department is ORDERED to initiate a review of the application of September 29, 2008, if not done previously, to determine claimant's non-medical eligibility. The

department shall inform the claimant of the determination in writing. The case shall be reviewed May 2010.

/s/

Jeanne M. VanderHeide
Administrative Law Judge
for Ismael Ahmed, Director
Department of Human Services

Date Signed: 05/28/09

Date Mailed: 05/28/09

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 receipt date of the rehearing decision.

JV/dj

cc:

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