

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: 2009-15971
Issue No: 2009
Case No: [REDACTED]
Load No: [REDACTED]
Hearing Date:
May 14, 2009
Emmet 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 May 14, 2009 in Petoskey. Claimant personally appeared and testified under oath.

The department was represented by Jennifer Hunt (ES).

The Administrative Law Judge appeared by telephone from Lansing.

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 14, 2009, Claimant waived the timeliness requirement so that her new medical evidence could be reviewed by SHRT. After SHRT's second disability denial, 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)?

(2) Did claimant establish a severe physical impairment expected to preclude her 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 applicant (September 115, 2008) who was denied by SHRT (March 23, 2007) based on claimant's ability to perform normal work activities. Claimant's application was denied because she failed to establish an impairment which meets the departments severity and duration requirements under 20 CFR 416.909.

(2) Claimant's vocational factors are: age—46; education—high school diploma, post-high school education--none; work experience—cashier for a convenience store, deli manager at [REDACTED], deli clerk at [REDACTED] and deli clerk at [REDACTED]
[REDACTED]

(3) Claimant has not performed Substantial Gainful Activity (SGA) since 2007 when she worked as a cashier at a convenience store.

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

- (a) Status post back surgery (2008);
- (b) Re-injured her back with a recent fall;
- (c) Mentally going downhill;
- (d) Chronic disc herniation;
- (e) Chronic low back pain;
- (f) Left toe numbness.

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

OBJECTIVE MEDICAL EVIDENCE (MARCH 23, 2009)

SHRT decided that claimant's was able to perform normal work activities. SHRT evaluated claimant's disability using SSI Listings at 20CFR 406, Subpart P, Appendix. SHRT decided that claimant

does not meet any of the applicable Listings. SHRT denied disability based on 20 CFR 416.909 due to lack of the required severity and duration.

(6) Claimant lives with her husband and her son and performs the following Activities of Daily Living (ADLs): dressing, bathing, cooking, dish washing (sometimes), light cleaning, laundry and grocery shopping (needs help). Claimant does not use a cane, a walker, or a wheelchair. She does use a shower stool on a daily basis. Claimant does wear braces. Claimant received inpatient hospital care in October 2008. The purpose of the hospitalization was to receive surgical treatment for a herniated disc.

(7) Claimant has a valid driver's license and drives an automobile approximately 8 times a month. Claimant is computer literate. Claimant has a grandchild who lives nearby who she sees on a regular basis.

(8) The following medical records are persuasive:

(a) A [REDACTED] narrative medical report from the office of [REDACTED] was reviewed.

The physician provides the following information:

Claimant is a 46-year-old woman who has had low back pain since August 2008. The woman she was helping to transfer fell on her causing L4-5 and L5-S1 disc herniation with compression of the left S1 nerve root and central stenosis. She had an epidural injection in October 2008 from [REDACTED] with little relief. [REDACTED] then performed a L4-5 and L5-S1 discectomy on October 29, 2008. The pain has been aggravated by falls on the ice twice since the surgery. She is not currently taking any pain medication.

* * *

She also had DVT in her LLE 6 years ago and Barrett's esophagus, hypertension and lumbar radiculopathy.

* * *

Claimant has smoked cigarettes for 30 years, but does not abuse alcohol or other drugs. She is married. Her husband,

who is disable and her adult child with Down's syndrome rely on her for every day needs.

* * *

Claimant is unable to work at this time and may never be well enough to maintain a full-time job. Due to economic restraints, it is difficult to get proper health care and medications for claimant. She has a long and difficult road ahead of her regaining her health.

* * *

- (b) On October 9, 2008 neurosurgical consultation was reviewed. The neurologist provided the following background:

Claimant is seen in the office today at the request of [REDACTED] regarding back pain. Claimant is a 45-year-old right hand dominant female who complains of low back pain with left leg pain radiating to the toes. In addition, patient suffers from muscle spasm and numbness and tingling in the left toes. These symptoms started August 2008 when patient was helping a 94-year-old female get up in a seated position. The woman who claimant was moving ended up falling on top of claimant and this started her low back pain. Claimant notes recent left groin pain which started approximately 2 weeks ago. The pain is constant. In addition, claimant has a sensation to urinate all the time and she reports she must manually push on her bladder to void. She has been treated in the Emergency Room this past Tuesday.

* * *

The neurologist provided the following impression:

- (1) Lumbar radiculopathy;
- (2) Hypertension;
- (3) Hypothyroidism;
- (4) DVT (deep vein thrombosis) of the lower left extremity which occurred 6 years ago;
- (5) Hormone replacement;
- (6) Graves disease;
- (7) Barrett's esophagitis.

* * *

(9) Claimant does not allege a severe mental impairment. She did testify that her physician states she is mentally going down hill. However, there are no probative psychiatric reports in the record. Also, claimant did not provide a DHS-49D or a DHS-49E to establish her mental residual functional capacity.

(10) The probative medical evidence does not establish an acute (exertional) physical impairment, or combination of impairments, expected to prevent claimant from performing all customary work functions for the required period of time. The medical reports do establish that claimant is physically challenged because she has chronic back pain, eye dysfunction (Grave's disease) and dysfunction of the esophagus (Barrett's esophagitis). There is no information in the record to indicate that these conditions have reduced claimant's ability to perform normal work activities. However, it is evident from the record that she is unable to lift substantial amounts due to her disc herniation. At this time, there is no other medical evidence to establish a severe, disabling, physical condition that totally precludes all work activities.

(11) Claimant has not applied for federal disability benefits with the Social Security Administration.

CONCLUSIONS OF LAW

CLAIMANT'S POSITION

Claimant thinks she is entitled to MA-P benefits based on the impairments listed in paragraph #4, above. Claimant thinks she is entitled to MA-P because she needs to get her life back in order in order to care for her disabled husband and her Down syndrome son.

DEPARTMENT'S POSITION

The department thinks that claimant is able to perform normal work activities. The department evaluated claimant's impairments using the SSI Listings found at 20 CFR 404, Subpart P, Appendix. The department decided that claimant does not meet any of the applicable Listings.

The department notes that claimant had back surgery in 10/2008 for a large disc herniation. Her condition is expected to improve after her recovery and is not expected to limit all types of work for 12 months, consecutively.

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 her 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, 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 (SGA) are not disabled regardless of medical condition, age, education or work experience. 20 CFR 416.920(b).

The vocational evidence of record shows 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. Claimant must establish an impairment which is expected to result in death, or has existed for 12 months, and totally prevents all basic work activities. 20 CFR 416.909.

Also, to qualify for MA-P, claimant must satisfy both the gainful work and the duration criteria. 20 CFR 416.920(a).

Since the severity/duration requirement is a *de minimus* requirement, 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 using the SSI Listings at 20 CFR 404, Subpart P, Appendix. SHRT determined that claimant does not meet any of the applicable 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 her previous work. Claimant previously worked as a cashier at a convenience store. Claimant has many years of experience working as a deli clerk in the local grocery stores. Claimant's work as a deli clerk was light work. However, claimant's recent back surgery and the subsequent re-injury she sustained while falling on the ice, makes it difficult for her to stand for long periods of time and to do continuous lifting.

Based on claimant's current physical impairments (back dysfunction and chronic pain) she is not able to return to her previous job as a deli clerk.

Therefore, claimant 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/psychological evidence in the record, that her combined impairments meet the department's definition of disability for MA-P purposes.

First, claimant alleges that her mental capacity is declining, but she did not provide any clinical evidence to establish a psychiatric diagnosis. Also, claimant did not provide a DHS-49D or a DHS-49E to establish her mental residual functional capacity.

Second, claimant alleges disability based on disc herniation at L4-5 and L5-S1 with compression of the left S1 nerve root and central stenosis. She has also been diagnosed with Barrett's Esophagitis, hypertension and lumbar radiculopathy.

It is clear from the medical evidence that claimant will not be able to perform work that requires constant standing and lifting. However, the medical evidence at this time does not totally preclude all basic work activities.

Finally, claimant testified that a major impediment to her return to work was her chronic back and leg pain caused by her spinal dysfunction. Unfortunately, evidence of pain, alone, is insufficient to establish disability for MA-P purposes.

The Administrative Law Judge concludes that claimant's testimony about her 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 her herniated disc, Barrett's esophagitis, hypertension and radiculopathy. Claimant currently performs numerous activities of daily living, has an active social life with her husband, her son and her grandchildren. She drives an automobile approximately 8 times a month and 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). Claimant is able to do work that has a sit/stand option. In this capacity, she is able to work as a ticket taker for a theatre, as a parking lot attendant, and as a greeter for [REDACTED]. Because of handicapper laws recently enacted in the United States, there are many jobs available for persons with handicaps similar to claimants.

Consistent with this analysis, the department correctly denied claimant's MA-P 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 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: March 10, 2010

Date Mailed: March 11, 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 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

cc:

