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: 2009-16330
Issue No: 4031, 2001
Case No: [redacted]
Load No:
Hearing Date:
May 7, 2009
Wayne County DHS

ADMINISTRATIVE LAW JUDGE: Jeanne M. VanderHeide

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 filed on February 5, 2009. After due notice, a hearing was held on May 7, 2009. The Claimant was present and testified along with his mother, [redacted]. Claimant was represented by [redacted] from [redacted]. Rhonda Robinson, 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") and the State Disability Assistance ("SDA") 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 & SDA on June 13, 2008. Claimant requested MA retroactive to March, 2008.

2. Claimant's impairments have been medically diagnosed as osteoarthritis with varus deformity (7-9°) of the knees (bowlegged and pigeon toed). Claimant began having problems with arthritis at 34 or 35.

3. Claimant's physical symptoms are pain in both knees (L knee whenever he stands or try to bend it back–aching all the time, stabbing when stand. R knee–pain when he stands too long after 8-10 min) numbness in feet, crook in neck, pain in right shoulder, pain in right hand/wrist when weather changes.

4. Claimant's mental symptoms are difficulty remembering things, lack of concentration, anxiety, crying spells, confusion, increase in appetite, sleep disturbances and fatigue

5. Claimant's impairments will last or have lasted for a continuous period of not less than 12 months.

6. Claimant has undergone five surgeries on his knees and expects to undergo two more within another year.

7. Claimant is 6'4 ½" tall and weighs 225 pounds.

8. Claimant is right handed.

9. Claimant is 42 years of age.

10. Claimant has a 12th grade education in computer programming from [redacted]. Claimant stopped his schooling two classes short of an Associates degree.

11. Claimant last worked in 2001 as a machinist, feeding parts up to 50 lbs in weight into a machine. The job required bending and stooping.

12. Claimant has prior employment experience in machine work, working as a set up guy (CNC operator–computer numerical controller), spray painting car parts weighing 50-60 lbs., cutting grass, and working as a clerk in the law library in prison.

13. Claimant testified to the following limitations:
    - Sitting: 2 hours
    - Standing: 15-20 min.
    - Walking: ½ block with crutches (not allowed to walk any distance without crutches.
    - Bending/stooping: none
    - Lifting: 20 lbs
    - Grip/grasp: no problems unless arthritis kicks in.

14. Claimant lives with his parents. Claimant testified that he would be unable to live on his own right now as he is unable to maintain his household. Claimant does not perform any household chores.

15. Claimant uses crutches to ambulate.

16. The Department found that Claimant was not disabled and denied Claimant's application on 11/18/08.

17. Medical records examined are as follows, in part:

[redacted], M.D., Orthopedic Surgeon, 3/23/09, SS Attending Physician's Statement (Exhibit C, p. 4)
Patient would need one 10 min. rest period every hour in addition to a 30 minute lunch period if returning to repetitive work activities in which a sit-stand option was provided.

[redacted], M.D., 3/23/09, Medical Eval of Physical Impairments (Exhibit C, p. 5)

- Lifting/carrying are affected by impairments: "Patient is still on crutches and has long leg cast on.

- Standing/walking are affected by the impairments. "Patient is in long leg case. He can weight-bear as tolerated. His leg is very weak."

- No climbing, balancing, stooping, crouching, kneeling or crawling.

[redacted], M.D., 3/17/09, Physical RFC Questionnaire, (Exhibit B, pp. 1-2)

SYMPTOMS: Swelling, tenderness over the corticotomy, tenderness primary medral

[redacted], M.D., 3/9/09, Exam Notes, (Exhibit B, pp. 8-9)

KNEE SYMPOMS: Cl had his frame removed on 2/16/09. There is some swelling around the surgical sight. He does have right shoulder pain and he thinks that the shoulder was made worse by using the crutches for the leg.

PHYSICAL EXAM: Range of motion is full. If I try valgus stress on the knee this is very painful to him at the osteotomy site. His gait is mildly antalgic on the right.

X_RAYS: An x-ray of the right knee is obtained today with both obliques. The osteotomy is healing well. There is still a defect anteromedially. There is a good amount of callus posterior laterally.

PLAN: "He has been working very hard on getting off his crutches. He feels this will help strengthen the regenerate. He also is having

shoulder pain so he wants to be off the crutches. We have a very clear discussion that this was absolutely not my request of him. Before frame removal I emphasized that he has to start over and listen to pain to tell us how much the regenerate can tolerate and weightbearing. I did offer to leave the frame on longer to let the regenerate heal more. He absolute wanted the frame off. I emphasized that he has to very slowly progressively in increasing the weightbearing. I again emphasized this today. I have shown the ex-rays, that the regenerate is still weak. He can fracture this easily and that would put him back to the day one of healing."

[redacted], M.D., 3/9/09, Exam Notes, (Exhibit B, pp. 14-20)

[redacted] Operative Report, 2/16/09, (Exhibit B, p. 12)

OPERATION: Removal of retained fixator, left leg.

[redacted], PT Discharge Note 12/10/08, (Exhibit A, p. 6)
Modalities used: moist heat/cold pack, strengthening/stretching, posture/body mechanics, home exercise program, balance/ gait/proprioception training.

PT 10/27/08–12/10/08

[redacted], Operative Report, 9/17/08 (Exhibit A, p. 27).
Procedure: High tibial and fibular osteotomy, application multiplanar Taylor special frame left knee.

[redacted], 9/10/08 Stress Test (Exhibit A, p. 32)

IMPRESSION:
1. No pharmacologic-induced myocardial ischemia
2. Normal wall motion of the left ventricle with a global ejection fraction of 60%
3. Mild fixed defect of the inferior wall. This appears to be attenuation artifact by the diaphragm

[redacted], 9/12/08 Adenosine Stress Test (Exhibit A, p. 32)
Non-ischemic EKG response to Adenosine

[redacted], 8/5/08 (Exhibit 1, pp. 14-22)
Hx of bilateral knee injury. Left arthroscopy for meniscus tear in 3/08 with reconstruction surgery at [redacted]. Rt. Knee meniscus tear status post arthroscopic surgery. Complains of

swelling and had knee drained two weeks ago. Ambulates with a crutch.

NEUROLOGICAL: Coordination–Standing balance is poor.

FUNCTIONAL: The patient ambulates with a crutch with an unpredictable gait pattern. Unable to heal walk, toe walk and tandem walk. The patient can sit. Unable to bend, stoop, carry, push and pull. Unable to squat and arise.

IMPRESSION: Bilateral knee injuries status post left knee reconstructive surgery.

Post surgical findings involving the left knee with marked degenerative changes.

RANGE OF MOTION: Knee 90°, normal 0-150°

WALKING AID: Needed to reduce pain and for balance – Cl would fall without aid

[redacted], Surgery 6/12/08 (Exhibit B, pp. 21)

PROCEDURE: Right knee arthroscopy, partial medial meniscectomy and chondroplasty medial femur.

[redacted], M.D., 6/4/08 Progress notes (Exhibit B, pp. 22-23)
Patient complains of bilateral knee pain. He is 3 months s/p of surgery on his left knee. Right knee is still very painful.

EXAM RIGHT KNEE: Mild soft tissue swelling, Greater than 20 degrees valgus alignment, diffuse crepitation medially. Moderate anterior medial joint line tenderness. 1+ effusion present in the knee joint. Palpable medial osteophytes.

SPECIAL TESTS: +1 Medial McMurray's.

XRAY FINDINGS: Mild degenerative joint disease with mild joint space loss in the left lateral compartment. Moderate degenerative joint disease with moderate joint space loss in the left medial compartment.

[redacted], 5/21/08 MRI Right Knee (Exhibit B, p. 24)

IMPRESSION: Advanced degenerative disease medial compartment with a medial meniscal tear.

[redacted], M.D., 6/4/08 Progress notes (Exhibit B, pp. 25-26)
Patient complains of aching in the left knee, stiffness in the left knee, swelling in the left knee. 5 weeks s/p of his surgery, 3/11/08

LEFT KNEE INSPECTION: Medial para-patellar scar formation noted. Palpable medial osteophytes, Active flexion 130 degrees.

SHRT Decision, 4/1/09
Cl is capable of performing Sedentary type work.

[redacted], 3/11/08 Operative Report, in part (Exhibit B, pp. 28-29)

PROCEDURE: Left knee proximal tibia, high tibial opening wedge osteotomy and allograft bone grafting. 4 screws placed in knee

POSTOP DX: Left knee varus deformity (7-9°) with osteoarthritis medial joint.

- previous arthroscopy for medial meniscus tear and ACL intact
- previous corticosteroid injection followed by Synvisc injections

[redacted], M.D., Progress notes (Exhibit B)
3/19/08–Exhibit B, p. 27

Kenalog and Synvisc injections given on following dates:
2/6/08 – Exhibit B, p. 31
1/30/08 – Exhibit B, p. 32
11/19/07 – Exhibit B, p. 33-34
11/2/07 – Exhibit B, p. 36
11/5/07 – Exhibit B, p. 37
9/26/07 – Exhibit B, p. 38

[redacted], 8/23/07 Operative Report, in part (Exhibit B, p. 39)

PROCEDURE: Left knee arthroscopic partial medial meniscectomy and chrondroplasty medial femur.

18. Other evidence reviewed from [redacted]:

Osteotomy ("bone cutting") is a procedure in which a surgeon removes a wedge of bone near a damaged joint. This shifts weight from an area where there is damaged cartilage to an area where there is more or healthier cartilage. In osteoarthritis, cartilage

> breakdown in the knee often is much greater in the inner part of the knee joint, often resulting in a bowlegged appearance.
>
> In knee osteotomy for osteoarthritis of the inner knee, your surgeon removes bone from the outer side of the lower leg bone near the knee. This tilts your body weight toward the outer, healthier part of the knee cartilage and away from the inner, damaged cartilage. Weight is spread more evenly across the joint cartilage. After removing the bone wedge, your surgeon will bring together the remaining bones and secure them, most often with either pins or staples. An osteotomy for osteoarthritis of the outer knee is just the opposite-your surgeon will remove bone from the inner side of the lower leg to shift the weight toward the inner knee.
>
> Osteotomy may be effective for hip and knee joints. Doctors often do an osteotomy to correct certain knee deformities such as bowleg (varus) and knock-knee (valgus) deformities of the knees. Osteotomy may allow an active person to postpone a total joint replacement for a few years and is usually reserved for younger people.
>
> It may take up to a year for the knee to fully adjust to its corrected position.

CONCLUSIONS OF LAW

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 2001. Claimant was then incarcerated from 2001-2006 and performed work that would normally be done for pay as a library clerk. 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 F2d 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 suffers from a left knee varus deformity (7-9°) with osteoarthritis in the medial joint along with osteoarthritis in the right knee and right knee degenerative joint disease with moderate joint space loss. These diagnoses are all 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 supports 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 1.03 *Reconstructive surgery or surgical arthrodesis of a major weight-bearing joint* was reviewed.

After reviewing the criteria of listing of 1.03 *Reconstructive surgery or surgical arthrodesis of a major weight-bearing joint* the undersigned finds the Claimant's medical records substantiate that the Claimant's mental impairments meets or is medically equivalent to the listing requirements. Appendix 1 of Subpart P of 20 CFR 404 describes the listings as follows:

> 1.03 *Reconstructive surgery or surgical arthrodesis of a major weight-bearing joint*, with inability to ambulate effectively, as defined in 1.00(B)(2)(b), and return to effective ambulation did not occur, or is not expected to occur, with 12 months of onset.

In order to qualify as a listed impairment under 1.03, Claimant's impairment must cause limitation in his ability to ambulate effectively meaning that the impairment must interfere very seriously with the individual's ability to independently initiate, sustain, or complete activities. Generally ineffective ambulation requires walking assistance that limits both hands. 20 CFR Part 40, Subpart P, Appendix 1, Rule 1.0(B)(1).

> To ambulate effectively, individuals must be capable of sustaining a reasonable walking pace over a sufficient distance to be able to carry out activities of daily living. They must have the ability to travel without companion assistance to and from a place of employment or school. Therefore, examples of ineffective ambulation include, but are not limited to, the inability to walk

> without the use of a walker, two crutches or two canes, the inability to walk a block at a reasonable pace on rough or uneven surfaces, the inability to use standard public transportation, the inability to carry out routine ambulatory activities, such as shopping and banking, and the inability to climb a few steps at a reasonable pace with the use of a single hand rail. The ability to walk independently about one's home without the use of assistive devices does not, in and of itself, constitute effective ambulation.

Id. at Rule 1.0(B)(2).

In the subject case, Claimant has osteoarthritis which has affected both knees. As arthritis progresses, the cartilage of the joint wear thin. The meniscus, or joint cushions, are also damaged and wear away. Usually, the damage is more on one side of the joint than the other and then the knee will take on a deformed appearance. When the inside, or medial side, of the joint is worn thin, a varus deformity (bow-legged) will result. Claimant has undergone a series of surgeries on his knees to try and repair his knees, beginning with an arthroscopic meniscus tear repair on each knee and then an opening wedge osteotomy and allograft bone grafting placing 4 screws in the left knee. In September of 2008, Claimant underwent a left knee tibial osteotomy where a fixator was surgically placed to gradually correct the bow-leggedness. The fixator is composed of two parallel k-wires drilled into the bone and adjusted with a tension band wire. The fixator was surgically removed in February of 2009. Claimant and his physician anticipate an osteotomy to the right leg in the future.

At eight (8) months post osteotomy surgery, Claimant is currently using crutches to ambulate. Claimant testified that the crutches caused him serious pain in his shoulder and he is anxious to quit using the crutches. On 3/9/09, however, [redacted] emphasized that the Claimant needs to weightbear only as tolerated by pain. Claimant testified that he can only walk a ½ block even with the crutches. The medical evidence shows that it may take up to a year for the knee to fully adjust to its corrected positions, so it is uncertain how long Claimant will be required to be on crutches. Furthermore, even before the most recent osteotomy surgery,

Claimant was using crutches to ambulate due to his osteoarthritis knee impairments. In an independent medial examination on [redacted], [redacted] found that Claimant "ambulates with a crutch with an unpredictable gait pattern," and that Claimant "would fall without the aid."

Claimant and his mother both testified that Claimant would be unable to live on his own. He is currently unable to stand long enough due to pain to make his meals or do his laundry. Claimant is unable to walk long enough to do any shopping. Claimant was able to sit through a 45 minute hearing, but did take breaks to stand and appeared uncomfortable. Based on the testimony and medical evidence, the undersigned finds Claimant's complaints of pain and limitations credible. Furthermore, the undersigned finds that Claimant's impairment interferes very seriously with the individual's ability to independently initiate, sustain, or complete activities.

Therefore, the undersigned finds the Claimant's medical records substantiate that the Claimant's mental impairments meets or are medically equivalent to the listing requirements. In this case, this Administrative Law Judge finds the Claimant is presently disabled at the third step for purposes of the Medical Assistance (MA) program. As claimant is disabled, there is no need to evaluate Claimant with regards to the fourth or fifth steps.

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 is disabling 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 on the findings of fact and conclusions of law, decides that the Claimant is "disabled" for purposes of the Medical Assistance program and the State Disability Program.

It is ORDERED; the Department's determination in this matter is REVERSED.

Accordingly, The Department is ORDERED to initiate a review of the 6/13/08 application to determine if all other non-medical eligibility criteria are met. The Department shall inform Claimant of its determination in writing. Assuming Claimant is otherwise eligible for program benefits, the Department shall review Claimant's continued eligibility for program benefits in May 2010.

/s/
Jeanne M. VanderHeide
Administrative Law Judge
for Ishmael Ahmed, Director
Department of Human Services

Date Signed: 05/19/09

Date Mailed: 05/19/09

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: [redacted]