

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: 2009-21314
Issue No: 2009, 4031
Case No: [REDACTED]
Load No: [REDACTED]
Hearing Date:
July 1, 2009
Oakland County DHS

ADMINISTRATIVE LAW JUDGE: Jeanne M. VanderHeide

HEARING DECISION

This matter was conducted by hearing on July 1, 2009 pursuant to MCL 400.9 and MCL 400.37 upon the Claimant's request for hearing received by the Department on April 1, 2009. At the hearing, the Claimant was present and testified along with her daughter, [REDACTED]. Linda Riffenburg, FIM 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 State Disability Assistance ("SDA") programs.

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 8/5/08. Claimant requested MA retroactive to May of 2008.
2. Claimant's impairments have been medically diagnosed as lumbar radiculopathy, discogenic pain, lumbar strain and high blood pressure.

3. Claimant's physical symptoms are breathing problems, hot flashes, frequency in urination, back pain from neck to low back, pain down left side to feet and back spasms.
4. Claimant's mental symptoms are memory difficulties, crying spells (every week), panic attacks, (usually with the occurrence of a back spasm 2-3x/week), weight gain (40 lbs. w/in a year), confusion, insomnia, fatigue, depression, suicidal thoughts and self esteem problems.
5. Claimant testified that she was treated at the [REDACTED] in [REDACTED] of 2009 and was issued a prescription for a psychiatric evaluation and to the pain center.
6. Claimant's impairments will last or have lasted for a continuous period of not less than 12 months.
7. Claimant is 5'9 1/2" tall and weighs 174 pounds.
8. Claimant is right handed.
9. Claimant is 50 years of age.
10. Claimant has a 12th grade education plus a year and a half at community college studying political science.
11. Claimant is able to read, write, and perform basic math skills.
12. Claimant last worked [REDACTED] of 2007 as a security guard. Claimant's job required her to stand all day, drive, and take care of medical alerts and lift up to 30 lbs. Claimant left that position after slipping and falling on ice and injuring her back.
13. Claimant has prior employment experience as a packer, box lifter, fork lift driver (required lifting up to 30 lbs. and bending, stooping and standing). Claimant also has experience as a teacher's aide for an elementary school (required bending, stooping, and cleaning).
14. Claimant testified to the following limitations:
 - Sitting – ½ hour with medication
 - Stand – 15 minutes
 - Walking – 1 block
 - Lifting – not even a gallon of milk.
15. Claimant performs household chores such as folding clothes, preparing some meals, and sorting clothes. Claimant receives help from her daughter and uses paper plates so as to avoid dishes.

16. The Department found that Claimant was not disabled and denied Claimant's application on December 12, 2008.

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

██████████ Orthopedic Surgeon Report (Exhibit 2, pp. 12-15)

MRI of her lumbar spine is reviewed today by film and report. This MRI is dated ██████████. The MRI is significant for an annular tear at L5-S1 with discogenic changes. There is desiccation of the disc.

PLAN: I think she is a candidate for an L5-S1 anterior interbody fusion.

██████████ Orthopedic Surgeon Report (Exhibit 2, pp. 10-11)

The patient is really not much better. It has been now six months since her injury and I see no improvement. I am going to recommend that we go ahead and proceed with the anterior lumbar procedure

██████████ Back Surgery (Exhibit 1, pp. 15-21, Exhibit 2, pp. 8-9))

Anterior lumbar fusion with instrumentation at L5-S1

Anterior lumbar instrumentation L5-S1 using Kanek pyramid for anterior lumbar plate.

██████████ Orthopedic Surgeon Report (Exhibit 2, p. 5)

The patient returns today. She had a fall. She tells me she was using her walking and slipped when it gave out on her and she fell down.

PHYSICAL EXAM: The left hip is not irritable, but there is a lot of left hip bursa pain. I did inject the left hip bursa.

██████████ Orthopedic Surgeon report (Exhibit 2, pp. 3-4)

The patient has been hurting quite a bit. I want her to go ahead and start some physical therapy. She has got a problem right now because the insurance has run out. I do have concern by how much pain she is having. I did review the MRI of her lumbar spine by film and report. The previous L5-S1 fusion looks good. There is a little bit of granulation tissue and some abutment to the thecal sac, but no disc herniation, no canal stenosis. The patient has had a bad back before. She reinjured it. She is in a bad state right now. I think she will be at least a year if not longer on this disability in terms of her entire recovery. I think her prognosis at this point is guarded.

██████████ Orthopedic Medical Exam Report (Exhibit 1, pp. 12-13)

DX: Lumbar radiculopathy, discogenic pain, lumbar strain

CLINICAL IMPRESSIONS: Deteriorating

PHYSICAL LIMITATIONS: No lifting, stand/walk less than 2 hrs/day, sit less than 6 hrs/day.

CURRENT MEDICATIONS: MS Contin every 12 hrs as needed, Percocet every 6 hours as needed.

██████████ Medical Needs Form (Exhibit 1, p. 27)

DX: Lumbar radiculopathy, discogenic pain, lumbar pain/strain

Pt needs medical assistance with personal care activities

Can patient work at usual occupation or any other job? No

██████████ Orthopedic IME (Exhibit 1, pp. 3-4)

Range of motion in the lower back revealed extension 15 degrees with complaint of pain at the end of motion, flexion 45 degrees also with pain. Right and left lateral flexion 20 and rotation 15 degrees with complaint of pain.

CONCLUSION: There is some limitation of motion of her lower back with pain and a surgical scar is located anteriorly in the lower abdominal wall. There is no neurological deficit in the lower limb but SLR is limited due to back pain.

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, under the first step, the Claimant last worked in [REDACTED] of 2007. 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, the Claimant has presented medical evidence from medical providers showing diagnoses of lumbar radiculopathy, discogenic pain and lumbar strain. Claimant also had an annular tear at L5-S1 resulting in an L5-S1 anterior interbody fusion. Claimant is under physical restrictions placed by her physician. Therefore, the medical evidence has established that Claimant has physical and mental impairments that have more than a minimal effect on basic work activities; and Claimant’s impairments have lasted continuously for more than twelve months. It is necessary to continue to evaluate the Claimant’s impairments under step three.

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 will not support findings 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). According to the medical evidence, alone, the Claimant cannot be found to be disabled.

Appendix I, Listing of Impairments discusses the analysis and criteria necessary to a finding of a listed impairment. The Listings 1.04 *Disorders of the Spine* was reviewed. In this case, this Administrative Law Judge finds the Claimant is not presently disabled at the third step for purposes of the Medical Assistance (MA) program because the medical evidence reviewed does not show that the physical impairments meet the intent or severity of the listings. 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.

In the present case, Claimant had an anterior lumbar fusion with instrumentation at L5-S1. Three months post surgery, Claimant's fusion looked good, but the orthopedic doctor expressed concern about Claimant's ongoing pain and indicated that "I think she will be at least a

year if not longer on this disability in terms of her entire recovery.” While 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)), it is an indication that Claimant’s complaints are medically valid through the date of the hearing given Claimant’s recent surgery. Claimant’s physical limitations have limited her to the level of sedentary work or less.

Claimant’s prior employment, based on her testimony of her job duties would have been considered unskilled and medium in exertional level as it required lifting up to 30 lbs. and walking/standing a significant portion of the day. Claimant’s work as a teacher’s aide is considered unskilled and light exertional level. Based on this information the undersigned finds the Claimant unable to return to past relevant work in any of the above mentioned prior occupations. 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 at the limit of sedentary exertional range as light work requires prolonged periods of time spent walking or standing. 20 CFR 416.967.

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 fifty-three years is considered an *individual approaching advanced age*; a category of individuals in age group (50-54) who may be significantly limited in vocational adaptability if restricted to sedentary work. 20 CFR 404, Subpart P, Appendix 2, Rule 201.00(g). Considering Claimant's medical limitations, this Administrative Law Judge finds that claimant's impairments render her capable of doing only sedentary work. Given Claimant's age, education, and prior work experience of unskilled work, Claimant is disabled by law for the purposes of the programs. 20 CFR 404, Subpart P, Appendix 2, Table 1, Rule 201.12.

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

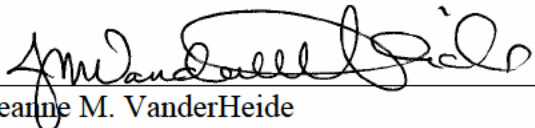
disabled for purposes of the SDA program. Other specific financial and non-financial eligibility criteria are found in PEM 261.

In this case, there is sufficient evidence to support a finding that Claimant's impairment has disabled her 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 8/5/08, inclusive of retroactive benefits to May, 2008.

Therefore, the department is ordered to initiate a review of the application of August 5, 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 December, 2010.


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

Date Signed: 02/01/10

Date Mailed: 02/02/10

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.

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JV/dj

cc:

