

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: 2009-22947
Issue No: 2009; 4031
Case No: [REDACTED]
Load No: [REDACTED]
Hearing Date:
September 9, 2009
Ionia 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 on September 9, 2009, in Ionia. Claimant personally appeared and testified under oath. Claimant was represented by [REDACTED].

The department was represented by Steve Speiser (FIM).

Claimant requested additional time to submit new medical evidence. Claimant's medical evidence was sent to the State Hearing Review Team (SHRT) on September 14, 2009. Claimant waived the timeliness requirement so his new medical evidence could be reviewed by SHRT. After SHRT's second disability denial, the Administrative Law Judge made the final decision below.

ISSUES

(1) Did the department provide probative psychiatric evidence to show marked improvement in claimant's mental condition to the degree that claimant is now able to perform substantial gainful activity (SGA) on a **continuous** basis?

(2) Did the department provide probative medical evidence to show marked improvement in claimant's physical condition to the degree that claimant is now able to perform substantial gainful activity (SGA) on a **continuous** basis?

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 a current MA-P/SDA recipient who had an eligibility review in April 2008.

(2) Claimant's MA-P/SDA benefits are currently open pending a review of SHRT's decision to close this claimant's cases.

(3) On June 5, 2008, the local office notified claimant that MRT denied his application for ongoing MA-P/SDA benefits.

(4) On June 10, 2008, claimant filed a timely hearing request. The local office pended the closure of claimant's benefits pending the result of this hearing.

(5) Claimant's vocational factors are: age--60; education--high school diploma; post high school education--(), (); work experience-- insurance agent, pest control inspector and master carpenter.

(6) Claimant has not performed substantial gainful activity (SGA) since November 2003 when he was a life and health insurance agent.

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

- (a) Cancer;
- (b) Status post six strokes;
- (c) Emphysema;
- (d) COPD;
- (e) GERD;
- (f) Peripheral artery disease (PAD);
- (g) Cardio disease;
- (h) Status post two aneurysms;
- (i) Sciatica;
- (j) Fibromyalgia;
- (k) Incontinence;
- (l) Chronic diarrhea;
- (m) Loss of equilibrium;
- (n) Left eye dysfunction;
- (o) Hip dysfunction; and
- (p) Osteoarthritis.

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

OBJECTIVE MEDICAL EVIDENCE (July 10, 2008)

Hospital records of 7/06 reported the claimant was treated for left hemiparesis. The examining physician indicated the hemiparesis was resolving and he questioned whether it was as the result of: transient ischemic attack (TIA); reversible ischemic neurological deficit (RIND - a type of cerebral infarction whose clinical course lasts between 24 and 72 hours)(page 87).

A pulmonary function study of 9/06 reported claimant performed poorly on the test and that his effort was variable. With that, his FEV1 was 1.52 before bronchodilator and 1.0 post bronchodilator (page 116).

Rehabilitation records of 9/06 indicated the claimant reported he could walk independently for distances of less than 50 feet, yet he could not even stand up at this examination (page 39).

Outpatient therapy note of 11/06 indicated the claimant's symptoms of soreness appeared exaggerated (page 46).

Records of 3/07 indicate the claimant complained of left-sided weakness and pain in multiple extremities. On physical examination, he demonstrated inconsistent hemiparesis. Deep tendon reflexes were within normal limits. His lungs were clear. An MRI of the brain was within normal limits. An MRA of the intracranial circulation was within normal limits. He was noted to have an aorta aneurysm for which monitoring was suggested (pages 28 to 35).

* * *

Note of 12/07 reported the claimant had a minimal limp. X-rays of both hips demonstrated very minimal findings (page 5).

Medical examination report of 4/02/08 reported the claimant to ambulate with a cane due to chronic hip pain. He was also reported to have restrictive lung disease and COPD. He was noted to walk with a cane, have mild weakness on the left side and an ataxic gait (page 79).

ANAYLSIS:

The medical records provided a history of many inconsistencies that have raised a question of malingering or poor effort.

The claimant has some significant complaints and allegations, although objective testing has not supported his complaints.

Given the inconsistencies and lack of objective support for his symptoms and complaints, it is difficult to assess a functional limitation.

Medical opinion was considered in light of CFR 416.927.

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

* * *

(9) Claimant lives with his niece and performs the following Activities of Daily Living (ADLs): dressing (sometimes), bathing (needs help), light cleaning (sometimes), grocery shopping (needs help) and uses an Amigo. Claimant uses a cane on a daily basis and does not use a walker; he uses a wheelchair approximately four times a month. He does not use a shower

stool. He does not wear braces. Claimant was hospitalized in 2008 to obtain a pulmonary sleep apnea test. He was hospitalized in 2009 for a coronary bypass procedure.

(10) Claimant has a valid driver's license and drives an automobile once a month.

Claimant is computer literate.

(11) The following medical records are persuasive:

(a) An [REDACTED]
[REDACTED] was reviewed.

The consulting physician provided the following background.

We had the pleasure of seeing claimant in our office on 8/19/2009 in follow up for COPD and pulmonary nodules. As you know, he is a very pleasant 60-year-old male with a history of COPD and active tobacco abuse. Claimant has been having issues with his inhalers due to recent changing in his formulary to Molina. He has been unable to take his Advair due to pus issues. Claimant does state that he has been doing relatively well after his vascular procedure. He had a repeat CT scan done which did show a thoracic abdominal aneurysm for which he states they have been following. He is also noted to have a one cm in the right upper lobe adjacent to the minor fissure as well as a mediastinal adenopathy.

* * *

The consulting internist provided the following impression:

1. COPD/emphysema;
2. Active tobacco use;
3. Pulmonary nodes with lymphadenopathy;
4. Thoracic and abdominal aneurysm;
5. Issues with compliancy with medications,
Secondary to insurance issues.

* * *

NOTE: The consulting internist did not state that claimant was able to return to work. Also, the consulting internist did not state that claimant's impairments were improving.

(12) Claimant does not allege a mental impairment as the basis for his disability.

Claimant did not provide a DHS-49D or DHS-49E. There are no recent probative psychiatric reports in the record to establish that claimant is not mentally able to perform substantial gainful activity (SGA).

(13) The probative medical evidence does establish an acute (exertional) physical impairment expected to prevent claimant from performing all customary work functions. The recent consultative report (August 19, 2009) states that claimant recently had a vascular procedure and his COPD is remaining constant. **[A recent CT scan also shows a thoracic and abdominal aneurysm.]** The physician also reports a one cm nodule in the upper right lobe adjacent to the minor fissure as well as mediastinal adenopathy (lymph node inflammation). The August 19, 2009 consulting physician does not state that claimant's conditions are improving. In addition to claimant's longstanding COPD impairment, he now has been diagnosed with a thoracic and abdominal aneurysm. A ruptured aneurysm would be life-threatening. The current medical records establish that claimant's physical condition has not improved to the point where he is able to perform jobs which require attention to detail and sustained concentration on the job duties at hand.

(14) Claimant recently applied for federal disability benefits (SSI) with the Social Security Administration. Social Security denied his 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. In particular, claimant thinks he has a severe physical impairment.

Claimant thinks he has a combination of severe physical impairments that totally prevent him from doing any work. Claimant was recently hospitalized to have a vascular bypass.

DEPARTMENT'S POSITION

The department thinks that claimant has some significant complaints and allegations, although objective testing has not supported his complaints.

The department thinks that the medical records provide a history of many inconsistencies, which raise a question of malingering or poor effort.

Given these inconsistencies and the lack of objective support for his symptoms and complaints, the department thinks it is difficult to assess claimant's functional capacities.

* * *

NOTE: The department did not review claimant's MA-P/SDA eligibility using the applicable SSI improvement rules. Also, the department did not obtain current medical reports, from the relevant specialists, to determine the status of claimant's aneurysms, COPD, and cardiac impairments.

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 does 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).

The department has the burden of proof to show by a preponderance of the medical evidence in the record that claimant's mental/physical impairments have improved to the extent that claimant is now able to perform substantial gainful activity. PEM 260/261. "Disability," as defined by MA-P/SDA standards is a legal term which is individually determined by 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 earning substantial income, he 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, 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 that claimant is not currently performing SGA. Therefore, claimant meets the Step 1 disability test.

STEP #2

The issue at Step 2 is whether the department has established improvement in claimant's physical impairments to the degree he is now able to perform SGA. **The department has the burden of proof** to show the claimant's physical impairments have substantially improved to the point that he is now able to perform basic work activities.

MENTAL IMPAIRMENTS

Claimant does not allege ongoing disability based on a mental impairment. Also, claimant did not provide a DHS-49D or DHS-49E to establish his mental residual functional capacity.

PHYSICAL IMPAIRMENTS

The medical evidence of record establishes that claimant has ongoing physical impairments which have not substantially improved and still prevent substantial gainful employment.

The most important of claimant's physical impairments are: chronic obstructive pulmonary disease (COPD), claudication, strokes, arthritis, sciatica, lung tumors, aneurysms and arterial calcifications. The combination of claimant's impairments, especially his inability to obtain medications for his asthma (Advair) preclude claimant from performing normal work activities including prolonged standing, walking, and lifting.

In short, the department has not shown that claimant's physical impairments have improved to the point claimant is now able to perform substantial gainful activity.

DECISION AND ORDER

The Administrative Law Judge, based upon the above findings of fact and conclusions of law, decides that the department has not established marked improvement in claimant's physical impairments to the extent that he is now able to perform substantial gainful improvement. PEM 260/261.

Accordingly, the department's denial of claimant's request for ongoing MA-P/SDA is, hereby REVERSED.

SO ORDERED.

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

Date Signed: April 4, 2010

Date Mailed: April 6, 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 receipt 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.

JWS/tg

cc:

