

STATE OF MICHIGAN
STATE OFFICE OF ADMINISTRATIVE HEARINGS AND RULES

ADMINISTRATIVE HEARINGS FOR THE
DEPARTMENT OF HUMAN SERVICES

IN THE MATTER OF:

██████████,

Claimant

Reg No: 2006-24540

Issue No: 2009, 4031

Case No: ██████████

Load No: ██████████

Hearing Date:

July 22, 2009

Wayne County DHS

ADMINISTRATIVE LAW JUDGE: Jeanne M. VanderHeide

HEARING DECISION

This matter was conducted by Administrative Law Judge Jeanne M. VanderHeide on July 22, 2009 pursuant to MCL 400.9 and MCL 400.37 upon the Claimant's request for hearing received by the Department on April 29, 2009. At the hearing, the Claimant was present and testified. Mareitha Allman, ES, 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 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 applied for SDA and MA as of February 5, 2009.
2. Claimant is 5'10" tall and weighs 130 pounds.
3. Claimant is right handed.
4. Claimant is 44 years of age.

5. Claimant's impairments have been medically diagnosed as severe thoracolumbar scoliosis, restrictive lung disease, chronic low back pain related to scoliotic T-L ROM restriction, right iliocostal inflammation with significant pain in the right 12th rib.
6. Claimant's physical symptoms are pain across entire back and up to neck; tight muscles in low back, shoulders, hips and thighs; pressure on right kidney; and a protruding rib on right side.
7. Claimant takes the following prescription medications:
 - a) Aleve – 4x/day
8. Claimant's impairments will last or have lasted for a continuous period of not less than 12 months.
9. Claimant has a 12th grade education.
10. Claimant is able to read/write/perform basic math skills.
11. Claimant last worked in [REDACTED], 2008 at [REDACTED] in the warehouse doing general labor/production. Claimant's job duties required bending and stooping, walking and standing all day and lifting up to 65 lbs. Claimant left this job for short term disability due to his physical impairments. Claimant does not have any other type of job experience.
12. Claimant testified that he has no physical limitations as follows:

Sitting:	12 minutes without discomfort
Standing:	10-15 minutes, but cannot stand in one spot b/c of pressure from back on muscles and kidney. Claimant must be in constant movement.
Walking:	Less than a city block. Claimant uses a cane sometimes to get from car to medical building.
Bend/Stoop:	Limited motion
Lifting:	3 lbs.
13. Claimant testified that he is able to make the bed and clear dishes from the table. Claimant does not go shopping due to walking required.
14. The Department received Claimant's request for a hearing on April 29, 2009.
15. Medical records were examined as follows, in part:

Outpatient Physical Medicine & Rehab Spine Program

Pt has scoliosis since he was 15, getting progressively worse.

[REDACTED] Neurosurgeon Report (Exhibit 2, p. 2)

Pt has severe thoracic scoliosis with coronal imbalance. On CT scan in supine position it appears to decrease overall curvature. He

does have a large osteophyte formation at the L1-2 segment which cause a relatively fixed lumbar curve. Thoracic curve on the other hand appears to be mobile to some extent. I have confirmed with him at this point the indication for surgery to treat his thoracolumbar pain. It will be a posterior deformity correction with Smith-Petersen type osteotomies at multiple levels.

██████████ Physiatrist Medical Exam Report (Exhibit 1, pp. 10-11)

HX: Familial hx and congenital scoliosis with worsening pain now w/ restrictive lung disease: referral to neurosurgery for correction.
CLINICAL IMPRESSION: Deteriorating
PHYSICAL LIMITATIONS: Lifting 20 lbs occasionally, Stand/walk 2 hours in 8 hour work day.

██████████ Neurosurgeon Report (Exhibit 2, pp. 4,5)

On examination, he again has remarkable wasting of the temporal muscles bilaterally. The scoliosis is evident. The tip of the rib is tender.

ASSESSMENT: Familial scoliosis with increasing symptoms in deltoid. He may be reaching the point where surgery is the right thing to do for him. We talked about cortisone injection around the rib.

IMPRESSION:

1. Chronic low back pain related to scoliotic T-L ROM restriction, muscle and joint tightness.
2. Right iliocostal inflammation – significant pain from the distal aspect of the right 12th rib approximating the right iliac crest.
3. Hip muscle imbalances with significant internal rotation tightness on the left, moderate-to-severe hamstring tightness on the right, and generalized hip tightness bilaterally. The right hip is especially tight in the external rotation.
4. Kissing spinous processes pain in the lumbar spine
5. Thoracolumbar scoliosis. Moderate-to-severe in degree of unknown etiology.

██████████ MRI Thoracic and lumbar spine (Exhibit 2, p. 8)

IMPRESSION:

1. Marked dextro-convex curvature of the thoracic spine is noted above with a slight compensatory levoconvex curvature of the lumbar spine.
2. No intrinsic spinal cord abnormalities visualized.
3. Severe thoracolumbar scoliosis with the thoracic spine concave to the left and lumbar spine concave to the right.

██████████ Interdepartmental Spine Program Report (Exhibit 2, pp. 16-18)

HX: Scoliosis since he was 15 and back pain since that time. The pain has gradually increased in frequency and intensity over the

years, especially since 2000-2001 for no particular known reason. He is now off work because of the pain. He was employed as a labor in a warehouse and had been having difficulty staying on the job because of the pain involved with lifting and using his back.

PHYSICAL EXAM: Lumbosacral active range of motion is severely limited in flexion. Very limited motion in rotation throughout the lumbosacral and thoracolumbar spine. Most of his limitation in the lumbosacral spine in extension with significant pain provocation. Left hip internal rotation is severely limited. Hamstrings are moderately tight bilaterally, right more than left. Hip external rotation is limited on the right more than the left. He has difficulty performing a partial sit up. Palpation, he is tender to palpation in the interspinous region of the lumbar spine as well as over the spinous processes. He is also quite tender in the distal aspect of the right 12th rib and over the right iliac crest.

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 testified that he last worked in 2008. 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)

To be eligible for MA-P, claimant must have a medically determinable impairment, meaning impairment(s) that can be demonstrated by a physical or mental examination, and/or by X-rays. Findings consist of symptoms, signs and laboratory findings. Signs are anatomical, physiological or psychological abnormalities which can be observed apart from statements (or testimony) of claimant which are considered symptoms. (20 CFR 416.928). Either claimant's or another's statements alone are not enough to establish a physical or mental impairment (20 CFR 416.929(a)) and must be supported by medically identifiable signs as explained above. The reason is because symptoms are a person's own private experience and may or may not be caused by a real physical or mental illness.

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 indicating that he suffers from severe thoracolumbar scoliosis, restrictive lung disease, chronic low back pain related to scoliotic ROM restriction, and right iliocostal inflammation with pain in the distal aspect of the right 12th rib. Furthermore, Claimant has been placed on physical restrictions by his treating physician. The Administrative Law Judge finds that the medical evidence has established that Claimant has a medically documented mental impairment that has more than a minimal effect on basic work activities which has lasted or is expected to last more than twelve (12) months. Claimant's mental impairments will be evaluated at the next 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 Appendix 1 of Subpart P of 20 CFR, Part 404. Based on the hearing record, the undersigned finds that the Claimant's medical record will not support findings that the Claimant's 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 Listing 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.

Claimant has presented medical evidence supporting a medical diagnosis of progressively worsening scoliosis and resulting restrictive lung disease. Claimant's prior employment is limited to general laborer/factory work involving standing/walking and lifting up to 65 lbs. The work would be considered unskilled and medium exertional level. Claimant has provided medical evidence of physical limitations of lifting 20 lbs occasionally and standing 2 hours per day. The undersigned finds the Claimant capable of sedentary work only based only on physical limitations. Claimant would, therefore, be unable to return to his previous type of employment. 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. Sedentary work is described as follows:

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.

20 CFR 416.967(a). Claimant's treating physician recommended physical limitations of lifting 20 lbs occasionally throughout the day and standing/walking two (2) hours per eight hour day. Therefore, Claimant would be limited to sedentary work. 20 CFR 416.967.

Claimant at forty-four is considered a *younger individual*; a category of individuals in age group under 45 years when age is a lesser advantage factor for making adjustment to other work. 20 CFR 404, Appendix 2 to Subpart P, Rule 201.20. Claimant's education is high school graduate and his previous work experience is unskilled. While generally, such an individual would be able to make a transition into sedentary work, there are exceptions:

[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 . . . 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 restriction 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.

20 CFR 404, Appendix 2 to Subpart P, Rule 201.00(h)(3). In the present case, Claimant has a high school education but no transferable work skills. Claimant has physical limitations in terms of bending/stooping, lifting, standing and walking. Claimant testified that he uses a cane if

he has to walk any significant distance. Claimant also has restrictive lung disease as a result of his scoliosis. The Department, meanwhile, has failed to provide vocational evidence which establishes that Claimant has the residual function capacity for substantial gainful activity and that, given the individualized analysis required of 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. It is the finding of the undersigned, based upon the medical data and hearing record that Claimant is "disabled" at the fifth step.

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.

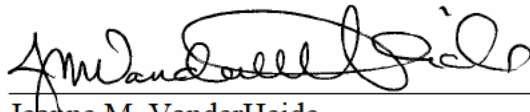
In this case, there is sufficient evidence to support a finding that Claimant's impairment is disabling him under SSI disability standards. This Administrative Law Judge finds the Claimant is "disabled" for purposes of the MA program.

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 2/5/09 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 January, 2011.



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

Date Signed: 02/02/10

Date Mailed: 02/03/10

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.

JV/dj

2009-24540/JV

cc:

