

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: 2009-34723

Issue No: 2009; 4031

Case No: [REDACTED]

Load No: [REDACTED]

Hearing Date:

October 15, 2009

Ingham 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 October 15, 2009, in Lansing, Michigan. Claimant personally appeared and testified under oath.

The department was represented by Sally Wilson (ES).

The Administrative Law Judge appeared by telephone from Lansing.

Claimant requested additional time to submit new medical evidence requested by SHRT. Claimant's new medical evidence was submitted to the State Hearing Review Team (SHRT) on March 9, 2010.

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 issued the final decision below.

ISSUES

(1) Did claimant establish a severe mental impairment expected to preclude him from substantial gainful work, **continuously**, for one year (MA-P) or 90 days (SDA)?

(2) Did claimant establish a severe physical impairment expected to preclude him from substantial gainful work, **continuously**, for one year (MA-P) or 90 days (SDA)?

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/SDA applicant (February 16, 2009) who was denied by SHRT (September 18, 2009) due to claimant's ability to perform unskilled like work. SHRT relied on Med-Voc Rule 201.18, as a guide.

(2) Claimant's vocational factors are: age--45; education—high school diploma, post-high school education—four semesters at [REDACTED] (political science, econ and pre-law major), five semesters at the [REDACTED] (political science and psychology major); work experience—manager of [REDACTED], midnight maintenance crew for [REDACTED] head chef (7 years).

(3) Claimant has not performed Substantial Gainful Activity (SGA) since 2008, when he managed [REDACTED].

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

- (a) Back dysfunction;
- (b) Sciatica in the left;
- (c) Foot drop in the left leg.;
- (d) Claimant's physician recommends surgery to correct left leg atrophy.

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

OBJECTIVE MEDICAL EVIDENCE (September 18, 2009)

In 12/2008, claimant walked one step at a time leading with the stronger right leg. He ambulated without an assistive device. His left leg was atrophic compared to the right. His left thigh was 44 ½ cm and the right thigh was 48 ½ cm in circumference. His reflexes were all present. He complained of a 'Charlie Horse' in the left leg (page 4). Light touch was intact in both legs. Range of motion was normal in the left hip, knee and ankles.

ANALYSIS: Claimant had a significant amount of atrophy noted in his left leg. He was weak on the left leg, but did ambulate without assistance. Claimant would be limited to sedentary work.

* * *

(6) Claimant lives with a friend who pays rent to use one of his bedrooms. Claimant performs the following Activities of Daily Living (ADLs): dressing (needs help), bathing, cooking, dish washing (sometimes), light cleaning (sometimes), vacuuming (sometimes), laundry and grocery shopping (sometimes). Claimant uses a cane approximately 10 times a month. He uses a shower stool approximately 15 times a month. He does not use a walker or a wheelchair. He does not wear braces. Claimant did not receive inpatient hospitalization services in 2008 or 2009.

(7) Claimant has a valid driver's license and drives an automobile approximately five times a month. Claimant is not computer literate. Claimant is one course short of receiving a degree in political science from the [REDACTED].

(8) The following medical records are persuasive:

(a) A February 3, 2008 consult was reviewed.

The neurologist provided the following history:

Claimant started having left leg pain about 7 years ago. Over the last 8 months, he has become very worried because he notes there is atrophy of the entire left leg. He saw an orthopedic surgery who wants to do a laminectomy, but claimant has a nagging question about why the entire left leg is 'melting away.' The orthopedic surgery did not answer this

question according to claimant. His lower back pain reflects to the left leg in the L5 dermatome. His pain is rated at 8-10/generally all the time.

Claimant reports 'Charlie Horse pain' in both calves especially at night. He has seen his 'calf muscles flicker' when he is resting. There are other members in the family who have large calves like him, but there is no one who has atrophy of the muscles.

The LS MRI done in January 2008 shows degenerative joint disease and bilateral pars defects at the L5 level. Claimant states that he used to wrestle as a young teenager and that he also was hit on the left side by a truck, when he was 18 years old. Either one of these incidents, but mostly the wrestling could result in a pars defect.

* * *

The neurologist provided the following conclusion:

- (1) The extent of this presentation is not consistent with only a LS radiculopathy. Claimant has irritability of the muscle fibers seen today in both calves, and a significant amount of atrophy noted on the left leg, especially in the thigh muscles (the L3-4 innervations). He should be sent to a neuromuscular specialist for evaluation of muscular and peripheral nerve disease, before orthopedic surgery is done. The only exception to this is cord compression, but he did not present with paresis. * * *
- (2) Claimant is weak in the left leg. He would have problems doing most of the lower limb activities with that leg.

* * *

- (b) A [REDACTED] consult was reviewed.

The orthopedic surgeon provided the following background:

It was my pleasure seeing claimant. As you recall, he is a very pleasant 44-year-old gentleman who has had back pain for years. He has now also, though, had left leg pain and weakness. He notes that he has had a foot drop going on for 6 years now. He had some numbness and tingling, but that was not his major complaint. His major complaint, at this point in time, has been that this leg is getting weaker. He is now starting to feel some of the same symptomatology in his

right leg; and he is concerned that if we was going to lose muscle mass in his left, that he may also have this happen on the right. He, therefore, is very interested in having something done as soon as possible. He reports he has had no problems with bowel or bladder. He has been taking Vicodin and Flexeril. He ranks his back pain equal to his leg pain. It goes both in the front and back of his calf and thigh. His pain diagram shows pain in both the front and back of his thighs and calves. He notes that his left foot has had weakness and has had changes. Otherwise, he has no other past medical history. He has done some therapy. That did not help him markedly. He has not tried any injections. However, he says now the pain is not his major concern, rather his weakness is.

* * *

The orthopedic surgeon provided the following impression:

Claimant is a 44-year-old with back equal to leg pain as well as neural foraminal stenosis, 6 years of foot drop, and spondylolysis.

* * *

(9) Claimant does not allege a severe mental impairment as the basis for his disability. There are no clinical/psychiatric reports in the record. Claimant did not provide a DHS-49D or a DHS-49E to establish his mental residual functional capacity.

(10) The probative medical evidence does not establish an acute physical (exertional) 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 has back pain, sciatica, left foot drop, and atrophy of the left leg. The medical reports do establish that claimant is not able to perform work activities that require constant standing or lifting. Claimant's ability to lift heavy weights is also limited. At this time, however, there is no reliable medical evidence to establish a severe, disabling condition that totally precludes all sedentary work activities.

(11) Claimant recently applied for federal disability benefits (SSI) with the Social Security Administration. Social Security denied his application; claimant filed a timely appeal.

(12) Claimant currently smokes approximately ten cigarettes a day. Claimant's physicians have advised him to totally discontinue his smoking.

CONCLUSIONS OF LAW

CLAIMANT'S POSITION

Claimant thinks he is entitled to MA-P/SDA benefits based on the impairments listed in paragraph #4, above.

Claimant thinks he is entitled to MA-P/SDA because he needs back/leg surgery in order to improve his ability to walk and stand, and to reduce his sciatic pain.

DEPARTMENT'S POSITION

The department thinks that claimant is able to perform unskilled sedentary work.

The department thinks that claimant's impairments do not meet/equal the intent or severity of a Social Security listing.

The department thinks that claimant retains the capacity to perform a wide range of sedentary work.

The department denied MA-P/SDA benefits based on claimant's vocational profile [younger individual (age 45) with 5 semesters of university work and a history of skilled work as a chef]. The department denied benefits based on Med-Voc Rule 201.18, as a guide.

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 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 his mental/physical impairments meet the department's definition of disability for MA-P/SDA purposes. PEM 260/261. "Disability," as defined by MA-P/SDA 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, 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 claimant has impairments which meet the SSI definition of severity/duration.

Unless an impairment is expected to result in death, or has existed for 12 months and/or totally prevents all current work activities. 20 CFR 416.909.

Also, to qualify for MA-P/SDA, 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 based on the applicable SSI Listings. SHRT determined that claimant does not meet any of the applicable Listings; claimant does not meet the Step 3 disability test.

STEP 4

The issue at Step 4 is whether claimant is able to do his previous work. Claimant previously worked as a restaurant manager and as a maintenance man for a local golf course.

Claimant's work as a restaurant manager was sedentary work. Claimant's work as a maintenance manager, in charge of sprinkling, was medium work.

Based on claimant's current physical impairments including atrophy of the left leg, sciatica of the left leg and back dysfunction, claimant is not able to perform medium work.

However, claimant is able to perform sedentary work similar to the position of that of a restaurant manager.

Therefore, claimant does not meet 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 evidence in the record, that his physical impairments meet the department's definition of disability for MA-P/SDA purposes.

First, claimant does not allege disability based on a mental impairment.

Second, claimant alleges disability based on back dysfunction, back pain, sciatica in the left leg and atrophy in the left leg. The medical evidence of record shows that claimant is not able to perform work that requires extensive standing or lifting. This means that claimant would not be able to return to his position as a maintenance man at a local golf course. However, the medical evidence does not totally preclude sedentary work. Therefore, claimant would be able to return to his previous position as a restaurant manager.

During the hearing, claimant testified that a major impediment to his return to work was his back pain and sciatic pain. Unfortunately, evidence of pain, alone, is insufficient to establish disability for MA-P/SDA purposes.

The Administrative Law Judge concludes that claimant's testimony about his 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 his combination of physical impairments. Claimant currently performs many activities of daily living, has an active social life with his tenant, and drives an automobile approximately five times a month.

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). In this capacity, he is able to work as a ticket taker for a theatre, as a parking lot attendant, and as a greeter for [REDACTED]

Based on this analysis, the department correctly denied claimant's MA-P/SDA 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/SDA disability requirements under PEM 260/261.

Accordingly, the department's denial of claimant's MA-P/SDA application is, hereby, AFFIRMED.

SO ORDERED.

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

Date Signed: March 26, 2010

Date Mailed: March 29, 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/tg

cc:

