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: 2009-4071
Issue No: 2009; 4031
Case No: [redacted]
Load No:
Hearing Date:
February 4, 2009
Oakland County DHS

ADMINISTRATIVE LAW JUDGE: Colleen M. Mamelka

HEARING DECISION

This matter is before the undersigned Administrative Law Judge pursuant to MCL 400.9 and MCL 400.37 upon the Claimant's request for a hearing. After due notice, a hearing was held in Madison Heights, Michigan on February 4, 2009. The Claimant appeared and testified. The Claimant was represented by [redacted]. [redacted] appeared on behalf of the Department.

ISSUE

Whether the Department properly determined that the Claimant was not disabled for purposes of Medical Assistance ("MA-P") and Retroactive MA-P benefit 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. The Claimant submitted a public assistance application seeking MA-P with retroactive benefits for March 2008 on April 25, 2008.

2. On May 14, 2008, the Medical Review Team ("MRT") deferred a disability determination in order for a pulmonary function study to be obtained as well as additonal medical documentation. (Exhibit 1, pp. 11–14)

3. On June 26, 2008, the Claimant was evaluated as requested by the Department at [redacted]. (Exhibit 1, pp. 5–10)

4. On July 25, 2008, the MRT determined the Claimant was not disabled finding the Claimant's impairment(s) did not prevent employment of 90 days or more for SDA purposes, and found the Claimant capable of performing other work for MA-P purposes. (Exhibit 1, pp. 3, 4)

5. On August 4, 2008, the Department sent the Claimant an eligibility notice informing her she was found not disabled. (Exhibit 1, pp. 1, 2)

6. On September 26, 2008, the Department received the Claimant's Request for Hearing protesting the determination that she was not disabled.

7. On December 28, 2008, the State Hearing Review Team ("SHRT") found the Claimant not disabled. (Exhibit 2, pp. 1, 2)

8. The Claimant's alleged physical disabling impairments are due to tendon tears in both shoulders, chronic hip and knee pain, severe allergic asthma, sleep apnea, and hypertension.

9. The Claimant's alleged mental disabling impairments are due to depression and anxiety.

10. At the time of hearing, the Claimant was 49 years old with a [redacted] birth date; was 5' 8" and weighed 247 pounds.

11. The Claimant graduated from high school and has a work history as a nail technician.

12. The Claimant's impairments have lasted, or are expected to last, continuously for a period of at least 12 months.

CONCLUSIONS OF LAW

The Medical Assistance ("MA") program is established by Subchapter XIX of Chapter 7 of The Public Health & Welfare Act, 42 USC 1397, and is administered by the Department of Human Services ("DHS"), formally known as the Family Independence Agency, 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").

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) The person claiming a physical or mental disability has the burden to establish it through the use of competent medical evidence from qualified medical sources such as his or her medical history, clinical/laboratory findings, diagnosis/prescribed treatment, prognosis for recovery and/or medical assessment of ability to do work-relate activities or ability to reason and make appropriate mental adjustments, if a mental disability is alleged. 20 CRF 413.913 An individual's subjective pain complaints are not, in and of themselves, sufficient to establish disability. 20 CFR 416.908; 20 CFR 416.929(a) Similarly, conclusory statements by a physician or mental health professional that an individual is disabled or blind, absent supporting medical evidence, is insufficient to establish disability. 20 CFR 416.929(a)

When determining disability, the federal regulations require several factors to be considered including: (1) the location/duration/frequency/intensity of an applicant's pain; (2) the type/dosage/effectiveness/side effects of any medication the applicants takes to relieve pain; (3) any treatment other than pain medication that the applicant has received to relieve pain; and (4) the effect of the applicant's pain on his or her ability to do basic work activities. 20 CFR 416.929(c)(3) The applicant's pain must be assessed to determine the extent of his or her functional limitation(s) in light of the objective medical evidence presented. 20 CFR 416.929(c)(2)

In order to determine whether or not an individual is disabled, federal regulations require a five-step sequential evaluation process be utilized. 20 CFR 416.920(a)(1) The five-step analysis requires the trier of fact to consider an individual's current work activity; the severity of the impairment(s) both in duration and whether it meets or equals a listed impairment in Appendix 1; residual functional capacity to determine whether an individual can perform past relevant work; and residual functional capacity along with vocational factors (i.e. age, education, and work experience) to determine if an individual can adjust to other work. 20 CFR 416.920(a)(4); 20 CFR 416.945

If an individual is found disabled, or not disabled, at any step, a determination or decision is made with no need evaluate subsequent steps. 20 CFR 416.920(a)(4) If a determination cannot be made that an individual is disabled, or not disabled, at a particular step, the next step is required. 20 CFR 416.920(a)(4) If an impairment does not meet or equal a listed impairment, an individual's residual functional capacity is assessed before moving from step three to step four. 20 CFR 416.920(a)(4); 20 CFR 416.945 Residual functional capacity is the most an individual can do despite the limitations based on all relevant evidence. 20 CFR 945(a)(1) An individual's

residual functional capacity assessment is evaluated at both steps four and five. 20 CFR 416.920(a)(4) In determining disability, an individual's functional capacity to perform basic work activities is evaluated and if found that the individual has the ability to perform basic work activities without significant limitation, disability will not be found. 20 CFR 416.994(b)(1)(iv)

In general, the individual has the responsibility to prove disability. 20 CFR 416.912(a) An impairment or combination of impairments is not severe if it does not significantly limit an individual's physical or mental ability to do basic work activities. 20 CFR 416.921(a) As outlined above, the first step looks at the individual's current work activity. An individual is not disabled regardless of the medical condition, age, education, and work experience, if the individual is working and the work is a substantial, gainful activity. 20 CFR 416.920(a)(4)(i) The individual has the responsibility to provide evidence of prior work experience; efforts to work; and any other factor showing how the impairment affects the ability to work. 20 CFR 416.912(c)(3)(5)(6)

As previously stated, the first step looks at the individual's current work activity. An individual is not disabled regardless of the medical condition, age, education, and work experience, if the individual is working and the work is a substantial, gainful activity. 20 CFR 416.920(a)(4)(i) In the record presented, the Claimant is not involved in substantial gainful activity and last worked in approximately 2006. The Claimant is not disqualified from receipt of disability benefits under Step 1.

The severity of the Claimant's alleged impairment(s) is considered under Step 2. The Claimant bears the burden to present sufficient objective medical evidence to substantiate the alleged disabling impairments. In order to be considered disabled for MA purposes, the impairment must be severe. 20 CFR 916.920(a)(4)(ii); 20 CFR 916.920(b) An impairment, or

combination of impairments, is severe if it significantly limits an individual's physical or mental ability to do basic work activities regardless of age, education and work experience. 20 CFR 916.920(a)(4)(ii); 20 CFR 916.920(c) Basic work activities means the abilities and aptitudes necessary to do most jobs. 20 CFR 916.921(b) 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.

Id. The second step allows for dismissal of a disability claim obviously lacking in medical merit. *Higgs v Bowen*, 880 F2d 860, 862 (CA 6, 1988). The severity requirement may still be employed as an administrative convenience to screen out claims that are totally groundless solely from a medical standpoint. *Id.* at 863 *citing Farris v Sec of Health and Human Services*, 773 F2d 85, 90 n.1 (CA 6, 1985) An impairment qualifies as severe only if, regardless of a claimant's age, education, or work experience, the impairment would not affect the claimant's ability to work. *Salmi v Sec of Health and Human Services*, 774 F2d 685, 692 (CA 6, 1985)

In the present case, the Claimant alleges physical disability due in part to severe shoulder pain, hip and knee pain, severe allergic asthma, and hypertension. Additionally, the Claimant asserts mental impairments due to depression and anxiety.

On [redacted], the Claimant was treated at [redacted] after complaints of fever and chest pain. An x-ray demonstrated left lower lobe infiltrate. The Claimant was treated with IV antibiotics and breathing treatments. The Claimant's discharge diagnoses on [redacted], was acute left lower lobe pneumonia, leukocytosis, asthma, and morbid obesity.

On [redacted], the Claimant's treating physician for her asthma and allergies, submitted a Medical Examination Report based upon a [redacted] examination of the Claimant. The Claimant's past treatment for severe asthma exasperation, malignant hypertension, allergies, depression, anxiety, GERD, and hyperlipidemia were noted. The Claimant's condition was documented as deteriorating finding the Claimant unable to stand and/or walk less than 2 hours in a 8-hour work day but able to sit about 6 hours in an 8-hour work day. Occasional use of a cane was noted as well as the Claimant's ability to sustain repetitive actions with both hands and arms.

On [redacted], the Claimant was admitted to [redacted] due to an exacerbation of her asthma. The Claimant was placed on IV steroids and given breathing treatments. The Claimant was discharged the following day.

On [redacted], the Claimant attended an internist evaluation at [redacted]. The Claimant's hip flexion was restricted to 85 degrees with extension to 20 degrees and flexion of the knee to 120 degrees. No pain was noted. No pain, swelling, limitation of movements of crepitus in other joint was found. Grip was 5/5 in both hands tested manually. The Claimant was able to ambulate well but could not squat more than 80% due to left knee joint pain. The Pulmonary Function Studies revealed restrictive and obstructive airway disease. The Claimant's bronchial asthma and hypertension were found well controlled with the Claimant's current

regime. The results of the Pulmonary Function Study revealed a Forced Vital Capacity ("FVC") for 3 tests as 1.91, 1.94, and 1.95 before bronchodilator. The Forced Expiratory Volume at 1 second ("FEV_1") for each test was 1.23, 1.30, and 1.34. The results 10 minutes after the bronchodilator for the FVC were 2.36, 2.24, and 2.07 with the FEV_1 at 1.82, 1.72, and 1.60. Coughing, gagging, and wheezing were noted.

On [redacted], the Claimant was admitted to [redacted] due to increased wheezing and shortness of breath. The Claimant was placed on IV antibiotics with steroids and given bronchodilator treatments. The Claimant was released on [redacted] with a diagnosis of asthma with hypoxia with acute bronchitis, hypertension, and obesity.

On [redacted] the Claimant's treating physician (asthma and allergies) submitted a Medical Examination Report on behalf of the Claimant. Bilateral wheezing was noted with a FVC of 1.70 and a FEV of 1.11 based upon results of a spirometry testing. The Claimant was found temporarily disabled and unable to lift/carry any weight.

On [redacted], the Claimant's primary care physician submitted a Medical Examination Report on behalf of the Claimant. The Claimant was found to have severe asthma and allergy, hypertension, headaches, and shoulder pain. The physical examination revealed bilateral wheezing and a limited range of motion in the Claimant's shoulders. The Claimant was found temporarily disabled for one year but able to occasionally lift up to 20 pounds. The Claimant was unable to stand/walk for more than 2 hours in an 8-hour work day.

On [redacted], an MRI was performed at [redacted] on the Claimant's shoulders. The Claimant's right shoulder revealed a supraspinatus tendon tear with a smaller distal infraspinatus tendon tear. Moderate degenerative changes at the acromioclavicular joint including inferior spur leading to impingement was noted. Mild bicep

tenosynovitis was also documented. In addition, a 1.5 to 2.0 cm "ill-defined high T2 signal intensity cyst or fluid within the posterosuperior aspect of the distal supraspinatus muscle" was found which could represent a "muscle tear or ganglion cyst." The MRI of the left revealed a small distal supraspinatus tendon tear along with a small proximal/mid infraspinatus tendon tear. Bicep tenosynovitis and subdeltoid bursitis was also documented as well as moderate degenerative change at acromioclavicular joint to include inferior spur leading to a mild impingement.

As previously noted, the Claimant bears the burden to present sufficient objective medical evidence to substantiate the alleged disabling impairment(s). As summarized above, the Claimant has presented objective medical evidence establishing that she does have some physical limitations on her ability to perform basic work activities. Accordingly, the Claimant has an impairment, or combination thereof, that has more than a *de minimus* effect on the Claimant's basic work activities. Further, the impairments have lasted, or are expected to last, continuously for a twelve month period; therefore, the Claimant is not disqualified from receipt of MA-P benefits under Step 2.

In the third step of the sequential analysis of a disability claim, the trier of fact must determine if the Claimant's impairment, or combination of impairments, is listed in Appendix 1 of Subpart P of 20 CFR, Part 404. The Claimant has alleged disabling physical impairments due, in part, to chronic shoulder, hip, and knee pain. Appendix I, Listing of Impairments, discusses the analysis and criteria necessary to support a finding of a listed impairment. Listing 1.00 defines musculoskeletal system impairments. Disorders of the musculoskeletal system may result from hereditary, congenital, or acquired pathologic processes. 1.00A Impairments may result from infectious, inflammatory, or degenerative processes, traumatic or developmental

events, or neoplastic, vascular, or toxic/metabolic diseases. 1.00A Regardless of the cause(s) of a musculoskeletal impairment, functional loss for purposes of these listings is defined as the inability to ambulate effectively on a sustained basis for any reason, including pain associated with the underlying musculoskeletal impairment, or the inability to perform fine and gross movements effectively on a sustained basis for any reason, including pain associated with the underlying musculoskeletal impairment. Inability to ambulate effectively means an extreme limitation of the ability to walk; i.e., an impairment(s) that interferes very seriously with the individual's ability to independently initiate, sustain, or complete activities. 1.00B2b(1) Ineffective ambulation is defined generally as having insufficient lower extremity function to permit independent ambulation without the use of a hand-held assistive device(s) that limits the functioning of both upper extremities. (Listing 1.05C is an exception to this general definition because the individual has the use of only one upper extremity due to amputation of a hand.) *Id.* 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. 1.00B2b(2) They must have the ability to travel without companion assistance to and from a place of employment or school. . . . *Id.* When an individual's impairment involves a lower extremity uses a hand-held assistive device, such as a cane, crutch or walker, the medical basis for use of the device should be documented. 1.00J4 The requirement to use a hand-held assistive device may also impact an individual's functional capacity by virtue of the fact that one or both upper extremities are not available for such activities as lifting, carrying, pushing, and pulling. *Id.*

Categories of Musculoskeletal include:

1.02	Major dysfunction of a joint(s) due to any cause: Characterized by gross anatomical deformity (e.g. subluxation, contracture, bony or fibrous ankylosis, instability) and chronic joint pain and stiffness with signs of

> limitation of motion or other abnormal motion of the affected joint(s), and findings on appropriate medically acceptable imaging of joint space narrowing, bony destruction, or ankylosis of the affected joint(s). With:
>
> A. Involvement of one major peripheral weight-bearing joint (i.e., hip, knee, or ankle), resulting in inability to ambulate effectively as defined in 1.00B2b; or
>
> B. Involvement of one major peripheral joint in each upper extremity (i.e., shoulder, elbow, wrist, hand), resulting in inability to perform fine and gross movements effectively a defined in 1.00B2c

The inability to perform fine and gross movements effectively means that the impairment(s) interferes very seriously with the individual's ability to independently initiate, sustain, or complete activities. 1.00B2c To use upper extremities effectively, an individual must be capable of sustaining functions such as reaching, pushing, pulling, grasping, and fingering to be able to carry out activities of daily living. *Id.*

In the record presented the Claimant's MRI dated [redacted] reveals that the Claimant has tendon tears in both shoulders. The Claimant's treating physician further noted a limited range of motion. There was however, insufficient objective medical evidence that supports a finding that the Claimant's impairment(s) meets or equals the severity requirement of Listing 1.02. Accordingly, the Claimant cannot be found disabled under this listing.

The Claimant also asserts physical disabling impairments due to severe allergic asthma and sleep apnea. Listing 3.00 defines respiratory system impairments. Respiratory disorders, along with any associated impairment(s), must be established by medical evidence sufficient enough in detail to evaluate the severity of the impairment. 3.00A Evidence must be provided in sufficient detail to permit an independent reviewer to evaluate the severity of the impairment.

Id. A major criteria for determining the level of respiratory impairments that are episodic in nature, is the frequency and intensity of episodes that occur despite prescribed treatment. 3.00C Attacks of asthma, episodes of bronchitis or pneumonia or hemoptysis (more than blood-streaked sputum), or respiratory failure as referred to in paragraph B of 3.03, 3.04, and 3.07, are defined as prolonged symptomatic episodes lasting one or more days and requiring intensive treatment, such as intravenous bronchodilator or antibiotic administration or prolonged inhalational bronchodilator therapy in a hospital, emergency room or equivalent setting. 3.00C Hospital admissions are defined as inpatient hospitalizations for longer than 24 hours. *Id.* Medical evidence must include information documenting adherence to a prescribed regimen of treatment as well as a description of physical signs. *Id.* For asthma, medical evidence should include spirometric results obtained between attacks that document the presence of baseline airflow obstruction. *Id.*

Chronic asthmatic bronchitis (Listing 3.03A) is evaluated under Listing 3.02. Chronic obstructive pulmonary disease, due to any cause, meets Listing 3.02 if medical evidence establishes that the Claimant's forced expiratory volume (in one second) is equal to or less than 1.45 (based on the Claimant's 5' 8'' height). Attacks of asthma and/or episodes of bronchitis as referred to in 3.03 and 3.07, in spite of prescribed treatment, that occur at least once every 2 months or at least six times a year are considered. Each in-patient hospitalization for longer than 24 hours counts as two attacks/episodes and an evaluation of at least 12 consecutive months must be used to determine the frequency of attacks/episodes. 3.03B; 3.07B For asthma, the medical evidence *should* include spirometric results obtained between attacks that document the presence of baseline airflow obstruction. 3.00C

In the record presented, for the period from [redacted], the Claimant was hospitalized for more than 24 hours due to her asthma [redacted], thus reflecting at least 6 attacks within one year, despite prescribed treatment. Supporting medical records from each hospitalization, as well as records from the Claimant's treating physicians, document the Claimant's prescribed regimen at home as well as a description of the Claimant's physical signs such as pain, shortness of breath, fever, etc. The regulations also provide that medical evidence should include spirometric results obtained between attacks. The Claimant's treating physician documents spirometric results however it is unclear when the results were obtained. Regardless the federal regulations do not require these results as evidenced by the use of the word "should" include, as opposed to "shall" or "must" include. Ultimately, based upon the submitted medical documentation, it is found that the Claimant's physical disabling impairment meets the severity requirements of Listing 3.03. Accordingly, the Claimant is found disabled at Step 3 therefore subsequent steps in the sequential evaluation process are not necessary.

DECISION AND ORDER

The Administrative Law Judge, based upon the findings of fact and conclusions of law, finds the Claimant disabled for purposes of the Medical Assistance program.

It is ORDERED:

1. The Department's determination is REVERSED.

2. The Department shall initiate review of the April 25, 2008 application which includes Retro MA-P for March 2008 to determine if all other non-medical criteria are met and inform the Claimant and her representative of the determination.

3. The Department shall supplement the Claimant any lost benefits she was entitled to receive if otherwise eligible and qualified in accordance with department policy.

4. The Department shall review the Claimant's continued eligibility in accordance department policy in March 2010.

/s/
Colleen M. Mamelka
Administrative Law Judge
For Ishmael Ahmed, Director
Department of Human Services

Date Signed: February 10, 2009

Date Mailed: February 12, 2009

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 the Circuit 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 recip date of the rehearing decision.

CMM

cc: [redacted]