

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: 2009-13247
Issue No: 2009
Case No: [REDACTED]
Load No: [REDACTED]
Hearing Date:
May 13, 2009
Midland 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 May 13, 2009 in Midland. Claimant personally appeared and testified under oath.

The department was represented by Carol Oman (ES).

The Administrative Law Judge appeared by telephone from Lansing.

Claimant requested additional time to submit new medical evidence. Claimant's new medical evidence was mailed to the State Hearing Review Team (SHRT) on June 8, 2009. Claimant waived the timeliness requirement so that his new medical evidence could be reviewed by SHRT. After SHRT's second disability denial, the Administrative Law Judge issued the 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)?

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

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/Retro applicant (September 9, 2008) who was denied by SHRT (March 5, 2009) based on claimant's failure to establish an impairment which meets the department's severity and duration requirements under 20 CFR 416.909. Claimant requests retro-MA for June, July and August 2008.

(2) Claimant's vocational factors are: age—38; education—high school diploma, post-high school education—one semester at [REDACTED] (Computer Science major), one semester at [REDACTED] (Computer Science major), one semester at [REDACTED] (Computer Science major); work experience—tree trimmer for [REDACTED], crew worker for [REDACTED] (cook and cashier), swing manager for [REDACTED] (supervised 25 people).

(3) Claimant has not performed Substantial Gainful Activity (SGA) since May 2008 when he was working as a self-employed trimmer and fell out of a tree.

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

- (a) Unable to use his arms;
- (b) Nerve damage to right arm;
- (c) Unable to use his right hand;
- (d) Pain medications cause drowsiness;
- (e) Double vision;
- (f) Reconstructive surgery planned for right arm, reconstructive surgery on left arm recommended.

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

OBJECTIVE MEDICAL EVIDENCE (MARCH 5, 2009)

SHRT decided that claimant is able to perform normal work activities. SHRT evaluated claimant's disability using all the SSI Listings in 20 CFR 404, Subpart P, Appendix. SHRT decided that claimant does not meet any of the applicable Listings. SHRT denied disability based on 20 CFR 416.909 due to lack of the required severity and duration.

(6) Claimant lives with his mother and performs the following Activities of Daily Living (ADLs): dressing, bathing, cooking (sometimes), dish washing, light cleaning (sometimes), grocery shopping (needs help) and uses an [REDACTED] cart. Claimant does not use a cane or a walker. He occasionally uses an electric cart (Amigo) for grocery shopping. Claimant wears braces on his right arm and left leg. Claimant received inpatient hospital services in June, July and August 2008 (38 day stay). He received treatment for injuries he sustained when he fell 40 feet from a tree.

(7) Claimant has a valid driver's license and drives an automobile approximately 3 times a month. Claimant is highly computer literate and has studied computer science at several universities. Claimant has 2 young children who live nearby whom he sees on a regular basis.

(8) The following medical records are persuasive:

(a) A September 19, 2008 Medical Examination Report (DHS-49) was reviewed. The physician provided the following diagnosis:

Status post ORIF right distal humerus fracture (left patella fracture, left radial head fracture.

The physician reported the following limitations: Limited. The physician did not specify claimant's ability to lift and carry. The physician did not specify claimant's ability to stand, walk and sit. The physician did not specify claimant's ability to use his hands/arms. The physician did indicate claimant may not lift anything with the right upper extremity.

- (b) An [REDACTED] Discharge Summary was reviewed.

A [REDACTED] physician provided the following principle diagnoses: (a) Impaired activities of daily living; (b) gait dysfunction; (c) status post fall; (d) mild TBI; (e) left radial head fracture; (e) left closed patella fracture; (f) heterotopic ossifications of the elbows bilaterally (g) multiple facial fractures. The physician provided the following secondary diagnoses: (a) small bilateral pneumothoraces; (b) open wound to right posterior elbow; (c) subjective right eye blind spot; (d) left rib fractures.

The physician provided the following background:

Claimant is a 37 year-old man with no significant past medical history that presented initially one month ago after falling approximately 40 feet from a tree. Claimant states that he does landscaping which is why he was up in this tree; however he is not covered by any disability insurance. Claimant states that the last event he recalls is the tree shaking. He says he was concerned and thought the tree might be uprooting, but the next thing he remembers he was in the hospital. Claimant states that in fact, he had been in the hospital for 5 days before any recall of where he was or what was going on.

* * *

Aside from his orthopedic injuries, claimant has not had any significant complications during his hospital stay. Claimant's most recent surgery has been local rearrangement of tissue for wound coverage of his right elbow. Since that surgery, claimant's restrictions limit his right elbow inflection to 35 degrees. Of note, claimant was going to have his left elbow operatively fixed, as there was some injury there as well, however claimant opted not to go through with that surgery, as that would limit his self care even more significantly and he would be more dependent.

The physician reported the following functional information. Claimant's functional status near the time of discharge included a rating of "7" (independence) in the following areas: eating, grooming, bathing, dressing upper body, dressing lower body, toileting, comprehension, expression, social intervention, problem solving, memory, transfers, toilet transfer, tub transfer, car transfer, walk and gait training, distance walked in feet—500, stairs,. Claimant had

a rating of “6” (modified independence for shower transfer and wheelchair).

(9) Claimant does not allege a severe mental impairment as the basis for his disability. There are no probative 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 (exertional) physical 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 is physically challenged, specifically with respect with his ability to use his right and left hands. For this reason, claimant is unable to lift any significant amounts. He is also unable to do activities which require a high level of manual dexterity. However, based on the [REDACTED], claimant does have a wide range of functional abilities and therefore is able to perform a wide range of activities of daily living. Although claimant is physically challenged with respect to his manual dexterity and use of his arms, he is not totally unable to perform all work activities. At this time, there is no reliable medical evidence to establish a severe, disabling physical condition that precludes sedentary work.

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

CONCLUSIONS OF LAW

CLAIMANT’S POSITION

Claimant thinks he is entitled to MA-P benefits based on the impairments listed in paragraph #4, above. Claimant thinks he is entitled to MA-P because he needs additional surgery on his right and left arms in order to increase his ability to use his hands and arms for normal work activities.

DEPARTMENT'S POSITION

The department thinks that claimant is able to perform normal work activities. The department evaluated claimant's impairment using the Listings at 20 CFR 404, subpart P.

The department decided that claimant does not meet any of the applicable SSI Listings.

The department provided the following comments:

Claimant sustained multiple injuries in 6/2008 after falling from a tree. He had multiple fractures, contusions and a mild traumatic brain injury. His condition was improving. While he sustained significant injuries, his condition is not expected to prevent "all types of work" for 12 months continually.

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).

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 purposes. PEM 260. "Disability," as defined by MA-P 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.

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 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.

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

Also, to qualify for MA-P, 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 all the SSI Listings. SHRT decided that claimant does not meet any of the applicable Listings.

Therefore, 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 self employed tree trimmer. This was heavy and dangerous work and required that he have the dexterity to work high up in the air. Based on the medical evidence of record, claimant is not able to use either his right or left hands and arms and is unable to lift significant amounts.

Based on claimant's current physical impairments, including physical challenges involving the use of both arms and hands, he is not able to return to his previous job as a tree trimmer.

Therefore, claimant meets 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/psychological evidence in the record, that his combined impairments meet the department's definition of disability for MA-P purposes.

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

Second, claimant alleges disability based on the injuries he sustained during a 40 foot fall from a tree that he was trimming in 2008. These injuries include left radial head fracture, left closed patella fracture, heterotrophic ossifications of the elbows bilaterally, and multiple facial fractures. As a result of these injuries, claimant has had multiple surgeries. Notwithstanding the magnitude of his injuries from the 2008 fall, claimant has made a significant recovery. While he

is still physically challenged to the extent that he is unable to use his hands and arms normally, he is able to perform activities that do not require heavy lifting or a high degree of manual dexterity.

Finally, claimant testified that a major impediment to his return to work was his pain relating to his multiple surgeries and the injuries he sustained to his legs, arms, hands and face. Unfortunately, evidence of pain, alone, is insufficient to establish disability for MA-P 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 multiple surgeries to correct multiple injuries arising out of his fall from a tree in 2008.

Claimant currently performs several activities of daily living, has an active social life with his mother and his minor children, and drives an automobile approximately 3 times a month. In addition, claimant is highly skilled in the operation of computers.

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). Although claimant does not have the ability to use his hands/arms normally, he is able to perform some elementary functions with his hands/arms. 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]. Because of the handicapper laws recently enacted in the United States, there are many jobs available for persons with handicaps similar to claimants.

Consistent with this analysis, the department correctly denied claimant's MA-P application, under 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 disability requirements under PEM 260.

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

SO ORDERED.

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

Date Signed: March 10, 2010

Date Mailed: March 10, 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/sd

cc:

