

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: 2009-16337
Issue No: 2009; 4031
Case No: [REDACTED]
Load No: [REDACTED]
Hearing Date:
June 10, 2009
Saginaw 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 June 10, 2009 in Saginaw. Claimant personally appeared and testified under oath.

The department was represented by Valerie Carter (ES).

The Administrative Law Judge appeared by telephone from Lansing.

ISSUES

(1) Did claimant establish a severe mental impairment expected to preclude her 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 her 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 (July 21, 2008) who was denied by SHRT

(April 1, 2009) based on claimant's ability to perform unskilled sedentary work. SHRT relied on Med-Voc Rule 201.22 as a guide.

(2) Claimant's vocational factors are: age—49; education—high school diploma, post-high school education—[REDACTED] in Accounting; work experience—direct sales representative for [REDACTED]; representative for [REDACTED].

(3) Claimant has not performed Substantial Gainful Activity (SGA) since 2008.

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

- (a) All over body pain;
- (b) Chronic fatigue;
- (c) Fibromyalgia;
- (d) Neuropathy
- (e) Bone growth in right knee;
- (f) Edema;
- (g) Memory lapses;
- (h) Status post MRSA infection;
- (i) Unable to perform activities of daily living.

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

OBJECTIVE MEDICAL EVIDENCE (APRIL 1, 2009)

SHRT decided that claimant was able to perform sedentary work. SHRT evaluated claimant's impairments using all SSI Listings at 20 CFR, Subpart P, Appendix. SHRT decided that claimant does not meet any of the applicable Listings.

SHRT denied disability based on 20 CFR 416.967(a).

(6) Claimant lives with her parents but sleeps at the homes of her relatives. Claimant performs the following Activities of Daily Living (ADLs): dressing, bathing, laundry (sometimes) and grocery shopping (needs help). Claimant uses a cane approximately 20 times a month, she uses a walker approximately 5 times a month. Claimant uses a shower stool

approximately 20 times a month. Claimant does not wear braces. Claimant received inpatient hospital care in 2008 for MRSA infection and to have surgery to remove an abscess in her breast.

- (7) Claimant does not have a valid driver's license and does not drive an automobile.

Claimant is computer literate.

- (8) The following medical records are persuasive:

- (a) An [REDACTED] and Physical was reviewed. The physician provided the following history:

Claimant is a 48-year-old female with diabetes mellitus and with a history of smoking 1-1½ packs per day for 25 years, who presents with a 2 month history of a right breast mass. She has also had increasing erythema and has a prior history of cellulites in the right breast. She had this evaluated by ultrasound and there was concern for an inflammatory cancer, therefore she had a biopsy performed, as well as a punch biopsy of the skin. Both biopsies showed organized fat necrosis. She had the biopsy done [REDACTED] by [REDACTED], and she noted that she had increasing erythema and tenderness to the breasts since then. She began having drainage early this morning and was seen at [REDACTED]'s office. A significant amount was drained at the time and further drainage was performed in our office including an incision and drainage. The area was packed and she was admitted to the hospital.

* * *

The physician provided the following assessment:

Right breast abscess is methicillin resistant; staphylococcus positive.

* * *

- (b) An [REDACTED] consultation report was reviewed.

The physician provided the following history: This is a 48-year-old obese white female with significant past medical history for diabetes and hypertension and peripheral neuropathy. Claimant was admitted by the surgical team because of the right breast drainage, a status post biopsy. Apparently, the patient started to have redness and induration

in her right breast about 2 months ago when she was seen by her doctor and an evaluation was done to rule-out malignancy. Claimant received a biopsy which apparently did not show any malignancy, but later on claimant started to have drainage, pain and infection in that area. Claimant was admitted for further evaluation and treatment of this abscess.

* * *

The physician provided the following assessment:

- (1) Diabetes;
- (2) Hypertension;
- (3) Peripheral neuropathy;
- (4) Rule-out any kidney complications;
- (5) Status post right breast abscess.

- (c) A [REDACTED] was reviewed. The physician reported the following diagnoses: neuropathy, fibromyalgia and obesity.

The physician provided the following limitations:

Claimant is able to lift less than 10 pounds frequently. She is able to stand/walk less than 2 hours in an 8 hour day. No limitations on her ability to use her hands/arms; unable to use her feet/legs. Claimant has no mental limitations.

- (d) A [REDACTED] was reviewed.

The physician provided the following history:

Claimant reported toes being numb on left foot. Claimant is a 46-year-old female who presents with new patient visit. General Health: Feels well with minor complaints, has decreased energy, and is sleeping well. The patient's appetite is normal. Nutrition: Supplemental vitamins and iron. Sleeps on average 8 hours per night. Her problems include depression, hypertension and joint pain.

The physician provided the following diagnoses: Diabetes mellitus Type II, hypothyroidism, hypercholesterolemia, hypertension benign, depression.

(9) There is no probative psychiatric evidence in the record to establish an acute (non-exertional) mental condition expected to prevent claimant from performing all customary work functions for the required period of time. Claimant does not allege depression as the basis for her application for disability. Also, claimant did not provide a DHS-49D or a DHS-49E to show her mental residual functional capacity. Claimant did allege memory lapses, however there is no clinical documentation for this.

(10) The probative medical evidence does not establish an acute (exertional) physical impairment expected to prevent claimant from performing all customary work functions for the required period of time. Claimant testified she has chronic fatigue, fibromyalgia, neuropathy, abnormal bone growth on knee, edema and memory lapses. A recent Medical Examination Report (DHS-49) states the following diagnoses: Neuropathy, fibromyalgia and obesity. The physician who provided the DHS-49 examination report did not say that claimant was totally unable to work.

(11) Claimant recently applied for federal disability benefits with the Social Security Administration. Her application is pending.

(12) Claimant is acting against medical advise by continuing to smoke thereby exacerbating her current physical impairments.

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.

DEPARTMENT'S POSITION

The department thinks that claimant has the Residual Functional Capacity (RFC) to perform sedentary work. The department evaluated claimant's impairments using all Listings found at 20 CFR 404, Subpart P, Appendix.

The department denied MA-P/SDA applications using Med-Voc Rule 201.22.

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 her 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, she 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. Claimant must establish an impairment which is expected to result in death, has existed for 12 months, and totally prevents all basic 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.

Therefore, claimant does not meet the Step 3 disability test.

STEP 4

The issue at Step 4 is whether claimant is able to do her previous work. Claimant previously worked as a photographer for [REDACTED]. This work was sedentary work.

The medical evidence of record establishes that claimant has fibromyalgia, neuropathy and obesity. Because of claimant's obesity and neuropathy, she is unable to stand constantly for long periods of time. Since claimant's previous job as a photographer required that she stand continuously, she is unable to return to her previous work as a photographer for [REDACTED]. 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 evidence in the record, that her combined impairments meet the department's definition of disability for MA-P/SDA purposes.

First, claimant does not allege a mental impairment as the basis for her disability. Also, claimant did not present a DHS-49D or a DHS-49E to establish her mental residual functional capacity.

Second, claimant alleges disability based on fibromyalgia, chronic fatigue, neuropathy, edema and memory lapses. A recent DHS-49 Medical Examination Report states the following diagnoses: Neuropathy, fibromyalgia and obesity. The physician does not report that claimant is totally unable to work based on her physical impairments.

Third, claimant testified that a major impediment to her return to work was her fibromyalgia/chronic 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 her pain is 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 her combination of impairments. Claimant performs several activities of daily living, has an active social life with her parents, and is computer literate.

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, she is physically able to work as a ticket taker for a theatre, as a parking lot attendant, and as a greeter for [REDACTED]. Work of this type would afford claimant a sit/stand option at work. Also, claimant has an [REDACTED] and is computer literate. This shows that claimant would be able to perform accounting work via a computer using a home based employment setting.

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.

Finally, the ALJ is not able to award disability benefits to claimant because she is acting against medical advice by continuing to smoke even though her smoking exacerbates the conditions which she alleges as the basis for her disability.

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: September 18, 2009

Date Mailed: September 21, 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 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:



