

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: 2009-16899
Issue No: 2009; 4031
Case No: [REDACTED]
Load No: [REDACTED]
Hearing Date:
July 28, 2009
Presque Isle 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 in Rogers City on July 28, 2009.

Claimant was represented by [REDACTED].

The department was represented by Janelle Fantini (ES).

The Administrative Law Judge appeared by telephone from Lansing.

Claimant requested additional time to submit new medical evidence. Claimant's medical evidence was sent to the State Hearing Review Team (SHRT) on August 17, 2009. Claimant waived the timeliness requirement so his new medical evidence could be reviewed by SHRT. After SHRT's second non-disability determination, the Administrative Law Judge issued the decision below.

ISSUE

(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/Retro/SDA applicant (November 7, 2008) who was denied by SHRT (April 14, 2009) based on claimant's ability to perform unskilled light work. SHRT relied on Med-Voc Rule 202.18 as a guide. Claimant requests retro-MA for August, September and October 2008.

(2) Claimant's vocational factors are: age—43; education—7th grade, post-high school education—training as a journeyman plasterer and stone mason; work experience—worked as a foam board applicator/independent contractor in August 2007, employed for 20 years as a stone mason and exterior plasterer technician.

(3) Claimant has not performed Substantial Gainful Activity (SGA) since August 2007 when he worked as a foam board technician.

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

- (a) Degenerative disc disease in the back;
- (b) Degenerative disc disease in the neck;
- (c) Bipolar disorder;
- (d) Depression.

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

OBJECTIVE MEDICAL EVIDENCE (APRIL 14, 2009)

SHRT decided that claimant was able to perform unskilled light work. SHRT evaluated claimants' impairments using the SSI Listings at 20 CFR 404, Subpart P, Appendix. SHRT decided that claimant does not meet any of the applicable SSI Listings. SHRT denied disability based on 20 CFR 416.967(b) due to claimant's ability to perform unskilled light work.

(6) Claimant lives with his parents and performs the following Activities of Daily Living (ADLs): dressing, bathing, cooking, dishwashing, light cleaning (sometimes), and grocery shopping. Claimant uses a cane approximately 10 times a month. He does not use a walker, a wheelchair or a shower stool. Claimant wears braces on his right leg approximately 6 times a month. He wears a back brace approximately 10 times a month. Claimant received inpatient hospital care in August 2008 for a staph infection (MRSA). Claimant did not receive inpatient hospitalization in 2009.

(7) Claimant has a valid driver's license and drives an automobile approximately 8 times a month. Claimant is not computer literate.

- (8) The following medical records are persuasive:

- (a) A February 16, 2009 Psychiatric/Psychological Examination Report (DHS-49D) was reviewed. The PhD psychologist provided the following mental status examination: Claimant was appropriate and oriented x3 during our interview. His mood was depressed.

The PhD psychologist provided the following diagnoses: Axis I-Depression. Axis V/GAF—37.

Note: The PhD psychologist did not state, unequivocally, that claimant was totally unable to work.

- (b) A December 5, 2008 Psychiatric/Psychological Examination Report (DHS-49D) was reviewed. The PhD psychologist provided the following mental examination assessment: Claimant was appropriate and oriented x3 during our interview. The only symptoms evident were his history of bipolar disorder.

The PhD psychologist provided the following diagnoses: Axis I—Bipolar disorder; Axis V/GAF—35.

- (c) A December 4, 2008 Mental Residual Functional Capacity Assessment (DHS-49E) was reviewed. The PhD psychologist reported that claimant was markedly limited in 9 of a possible subsets.

The PhD provided the following comments: Claimant suffers from Bipolar disorder and his fluctuations and mood (even when taking his meds) will be very likely to severely impact his ability to function.

* * *

- (d) A September 17, 2007 Medical Examination Report (DHS-49) was reviewed. The physician provided the following diagnoses: (1) Bipolar disorder; (2) illegible; (3) degenerative arthritis of the back with radiculopathy.

The physician provided the following limitations; claimant is able to lift 25 pounds occasionally. He is able to sit/walk less than 2 hours in an 8 hour day; able to sit/walk about 6 hours in an 8 hour day; able to sit less than 6 hours in an 8 hour day and able to sit about 6 hours in an 8 hour day. He has normal use of his hands/arms and normal use of his feet/legs.

The physician reports that claimant has limitations in his ability to perform sustained concentration and social interaction.

- (e) An [REDACTED] narrative report was reviewed. The consulting physician provided the following information:

Chief Complaints: degenerative arthritis, Bipolar disorder and depression.

Claimant states he has a history of degenerative arthritis to his neck and back over the past 10 years. He attributes this mostly to wear and tear working as a bricklayer and plastic installer, but also states he has been involved in motor vehicle accidents in the past. He has undergone a lumbar laminectomy by [REDACTED] between L3 and L5 as well as surgery by [REDACTED]. He does use a cane on occasion for pain.

* * *

He states he has recently developed Bipolar disorder and manic depression and has been on Seroquel. He was hospitalized in August due to a MRSA wound that was found in his right buttocks and right interior thigh requiring surgical excision.

* * *

Claimant has not worked since 2007. He tried working for a plastic installation over a period of 3 weeks, but stopped because of his back pain. He now lives with his parents. He can do his activities of daily living. He is still able to drive. He is still able to hunt and fish and he hangs-out with his 13 year-old son. He used to enjoy playing softball and baseball. He states he does not know how long he can sit and stand. He does not know how much he lift, but states his most comfortable position is laying on his left side. He states he can walk about one block.

The consulting physician reported that claimant is able to perform the following activities:

Sit, stand, bend, stoop, carry (up to 20 repetitions), push up to repetitions, pull up to 20 repetitions, bend and close tie shoes, dress-undress, dial telephone and open door.

* * *

- (f) A July 20, 2008 DDS psychiatric/psychological medical report was reviewed. The PhD psychologist provided the following history:

Claimant stated his problems revolve around back injuries that occurred subsequent to surgery in 1998, and then 4 months later a snowmobile accident, when he reinjured his back and neck, fracturing his back in 4 places. He stated he has had difficulty working since then, and stopped completely in 2002 because of chronic pain. He stated he has a 5 pound restriction, and his pain is so bad now that it is “like a stabbing pain with a knife going down my leg.”

He stated he was told by his physician and surgeon that there is no further surgery possible to correct his problem.

He also complained his concentration is poor due to the chronic pain and he is following instructions, and he does not like to see people or meet them. He stated he has a hard time talking to people and prefers to be alone.

He claims he was recently diagnosed with Bipolar disorder and Manic Depression, and his depression includes symptoms in which he has had occasional suicidal thoughts, but none now. He wants to be alone and finds it hard to concentrate, and is always depressed. He worries a lot and cannot focus. He stated at times he also has episodes of overspending. He claims he has problems sleeping and is up a lot, cannot sleep through the night, sleeps 3-4 hours so, but relates this primarily to pain.

Claimant reported to the consulting psychologist that he was recently released from jail for drugs and had not seen a doctor since January 2008. The consulting report by the PhD psychologist ended precipitously on page 3 and did not contain a diagnosis.

(9) The probative psychological evidence does not establish an acute (non-exertional) mental condition expected to prevent claimant from performing all customary work functions for the required period of time. Claimant testified that he is unable to work due to his mental impairments (Bipolar disorder and depression). The reports provided by claimant's Ph.D. psychologist provided a diagnosis of depression (February 16, 2009) and Bipolar Disorder (December 5, 2008). Claimant's Ph.D. psychologist reports that claimant would have a difficult time working because of his mental impairments. However, the Ph.D. psychologist did not state unequivocally that claimant was totally unable to work. The psychologist submitted a Mental Residual Functional Capacity (February 16, 2009) which showed marked limitations in five employment subsets. The same psychologist submitted a DHS-49E (December 4, 2008)

showing mental impairments in nine subsets. There is conflict and uncertainty between the psychological reports about the degree of claimant's mental residual functional capacity.

(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. While it is true that claimant's treating physician reports Bipolar disorder and degenerative arthritis of the back with radiculopathy, the physician also reports that claimant can occasionally lift up to 25 pounds, stand and walk 2 to 6 hours and sit 6 hours. The physician also reported that claimant has normal use of his hands/arms and feet/legs. The physician did not state unequivocally that claimant is totally unable to work (DHS-49 September 17, 2008). Also, [REDACTED] did not state on the physical that claimant was totally unable to 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/SDA based on the impairments listed in paragraph #4, above.

DEPARTMENT'S POSITION

The department thinks that claimant has the residual functional capacity to perform on a scale of light work.

The department thinks that claimant's impairments do not meet/equal the intent or severity of Social Security Listing at 20 CFR 404, Subpart P, Appendix.

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).

To determine to what degree claimant's mental impairments limit his ability to work, the following regulations must be considered.

(a) Activities of Daily Living.

...Activities of daily living including adaptive activities such as cleaning, shopping, cooking, taking public transportation, paying bills, maintaining a residence, caring appropriately for one's grooming and hygiene, using telephones and directories, using a post office, etc. 20 CFR, Part 404, Subpart P, App. 1, 12.00(C)(1).

(b) Social Functioning.

...Social functioning refers to an individual's capacity to interact independently, appropriately, effectively, and on a sustained basis with other individuals. 20 CFR, Part 404, Subpart P, App. 1, 12.00(C)(2).

Social functioning includes the ability to get along with others, such as family members, friends, neighbors, grocery clerks, landlords, or bus drivers. You may demonstrate impaired social functioning by, for example, histories of altercations, evictions, firings, fear of strangers, avoidance of interpersonal relationships, or social isolation. You may exhibit strength in social functioning

by such things as your ability to initiate social contacts with others, communicate clearly with others, or interact and actively participate in group activities. We also need to consider cooperative behaviors, consideration for others, awareness of others' feelings, and social maturity. Social functioning in work situations may involve interactions with the public, responding appropriately to persons in authority (e.g., supervisors), or cooperative behaviors involving coworkers. 20 CFR, Part 404, Subpart P, App. 1, 12.00(C)(2).

(c) Concentration, Persistence or Pace

...Concentration, persistence or pace refers to the ability to sustain focused attention and concentration sufficiently long to permit the timely and appropriate completion of tasks commonly found in work settings. 20 CFR, Part 404, Subpart P, App. 1, 12.00(C)(3).

Limitations in concentration, persistence, or pace are best observed in work settings, but may also be reflected by limitations in other settings. In addition, major limitations in this area can often be assessed through clinical examination or psychological testing. Wherever possible, however, a mental status examination or psychological test data should be supplemented by other available evidence. 20 CFR, Part 404, Subpart P, App. 1, 12.00(C)(3).

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 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 medical 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, has existed for a continuous period of 12 months and 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* test, 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 a Listing. However, the department reviewed claimant's eligibility using all of the SSI Listings. Claimant does not meet any of the applicable SSI Listings at this time.

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

STEP 4

The issue at Step 4 is whether claimant is able to do his previous work. Claimant previously worked as a foam and plaster technician for building exteriors.

Claimant's work as a foam installer and plaster was medium work and required him to climb ladders and work from dangerous heights. The medical evidence of record shows that claimant has severe arthritis of the back and neck. This would make it dangerous for him to climb ladders and perform work activities from dangerous heights.

Since claimant is unable to return to his previous work as a foam applier and plaster, he 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 his combined impairments meet the department's definition of disability for MA-P/SDA purposes.

First, claimant alleges disability based on a mental disorder (Bipolar disorder and depression). The psychological evidence in the record is contradictory. Claimant's personal PhD psychologist provided a diagnosis of Bipolar disorder and depression. The DHS-49D and the DHS-49E provided by claimant's psychologist have conflicting findings and are not persuasive on the issue of mental residual functional capacity.

Second, claimant alleges disability based on back and neck dysfunction due to degenerative arthritis. The information provided by the physicians of record, do not provide uncontroverted evidence that claimant is totally unable to work. The medical evidence does establish that claimant is no longer able to perform his previous work as a foam and plaster technician for building exteriors.

During the hearing, claimant testified that a major impediment to his return to work was his back and neck pain. Unfortunately, evidence of headaches, 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 impairments. Claimant currently performs many Activities of Daily Living, has an active social life with his parents and his minor son and drives an automobile 8 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 at 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 12, 2010

Date Mailed: March 12, 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

