

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: 2009-22612
Issue No: 2009
Case No: [REDACTED]
Load No: [REDACTED]
Hearing Date:
July 8, 2009
Sanilac 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 July 8, 2009 in Sandusky. Claimant personally appeared and testified under oath.

The department was represented by Linda Courter (Program Supervisor).

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)?
- (2) Did claimant establish a severe physical impairment expected to preclude her 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 (December 29, 2008) who was denied by SHRT (June 2, 2009) based on claimant's ability to perform medium work. SHRT relied on Med-Voc Rule 203.29 as a guide. Claimant requests retro MA for September, October, and November 2008.

(2) Claimant's vocational factors are: age—43; education—high school diploma; post high school education—has a certificate in massage therapy; work experience—daycare provider, group home direct care provider, group home supervisor.

(3) Claimant has not performed substantial gainful activity (SGA) since February 2009 when she was a daycare provider in a private home.

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

- (a) Fibromyalgia;
- (b) Chronic back pain;
- (c) Severe depression.

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

OBJECTIVE MEDICAL EVIDENCE (June 2, 2009):

Lumbar x-ray showed mild disc disease (page 85). The physical examination showed good muscle strength in the hips and shoulders. She has no joint swelling. (Page 58).

MENTAL:

In 9/2008, claimant was hospitalized for depression and found to have cocaine in her system. She was later released in stable condition. The mental examination in 1/2009 reported claimant's affect was appropriate. Her thought process was goal directed and logical. The doctor noted she continues do well with her medication. (Page 4.)

ANALYSIS:

The objective medical evidence presented does not establish a disability at the Listing or equivalence level. Collective medical evidence shows that claimant is capable of performing a wide range of medium work.

* * *

(6) Claimant lives with her two adult sons and performs the following Activities of Daily Living (ADLs): dressing, bathing, cooking (sometimes), dishwashing (sometimes), light cleaning, laundry (sometimes), and grocery shopping (sometimes). Claimant does not use a cane, walker, wheelchair or a shower stool. She does not wear braces. Claimant received inpatient hospital care in 2008 for depression with suicidal tendencies.

(7) Claimant has a valid drivers' license and drives an automobile approximately 20 times a month. Claimant is not computer literate.

(8) The following medical reports are persuasive:

(a) A [REDACTED] medication review was considered.

The psychiatrist provided the following background:

Claimant comes in for a follow-up appointment. She reports that she is doing well. She states that her mood is good. She still has some bad days, but she states that she is able to pull herself out of them. She states that she has not cut since the last time she saw me, and this is a huge improvement for her. She reports that normally on bad days, she has the urge to cut, but lately she has not even had that. She just keeps herself busy, talks herself out of

her bad days. They don't last more than a day at all. She also reports that the suicidal ideation is much better. She has no intent and no plans and usually has no suicidality, unless she has a very bad day, in which case she will have fleeting thoughts, but she distracts herself from this and is able to pull herself out of it as well. She reports that she has recently started baby-sitting for a friend in [REDACTED], who was having severe pain, and cannot take care of her 10-month old. Claimant has been looking after the child and states that this actually is going well for her because she is keeping herself busy and she has another responsibility, so she is not focused on herself as much. She notes that she is also appealing the insurance issue and hopes to have an appointment to get an appeal in a few weeks. She denies psychotic symptoms. She denies homicidality. She denies manic symptoms. She reports she is sleeping well and states that the extra Seroquel is definitely helpful. She has had to take it about five times in the last month and it calms her down and helps her if she gets overwhelmed. She has no concerns for the medication, no side effects. She is eating well and her interest and motivation are much better than they used to be.

* * *

(b)

A [REDACTED] was reviewed.

The physician reports the following chief complaints:
Fibromyalgia and depression.

The physician provided the following impressions:

- (1) Fibromyalgia;
- (2) Headaches;
- (3) Anxiety;
- (4) Depression;
- (5) Restless legs syndrome;
- (6) Back pain;
- (7) Nausea;
- (8) Sleep disturbance.

* * *

The physician did not state the claimant was totally unable to work.

(9) The probative psychiatric 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.

(10) Claimant testified that she has severe depression. A recent [REDACTED] [REDACTED] states that claimant denies psychotic symptoms, homicidality and manic symptoms. She reports she is sleeping well and states that the extra Seroquel is definitely helpful. The consulting psychiatrist did not state that claimant was totally unable to work due to her mental impairments. Claimant did not provide a DHS-49D or DHS-49E to establish a residual functional capacity.

(11) 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 that she had fibromyalgia and chronic back pain. A recent [REDACTED] reports the following diagnoses: (1) Fibromyalgia; (2) Headaches; (3) Anxiety; (4) Depression; (5) Restless leg syndrome; (6) Back pain; (7) Nausea; (8) Sleep disturbance. The physician did not state that claimant is totally unable to work based on her combined exertional impairments.

(12) Claimant currently receives SDA benefits under the auspices of the [REDACTED] [REDACTED]. Claimant's ability to obtain services from [REDACTED] [REDACTED] shows that claimant's ability to work has been evaluated by [REDACTED] and claimant has the capacity to perform SDA.

CONCLUSIONS OF LAW

CLAIMANT'S POSITION

Claimant thinks she is entitled to MA-P based on the impairments listed in Paragraph #4, above.

DEPARTMENT'S POSITION

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

Based on the medical evidence of record, the department thinks claimant retains the capacity to perform a wide range of medium work.

Therefore, based on claimant's vocational profile [younger individual, high school graduate, and semi-skilled work history] the department denied MA-P eligibility based on Med-Voc Rule 203.29 as a guide.

LEGAL BASE

The Medical Assistance (MA) program is established by Title XIX of the Social Security Act and is implemented by Title 42 of the Code of Federal Regulations (CFR). The Department of Human Services (DHS or department) administers the MA program pursuant to MCL 400.10, *et seq.*, and MCL 400.105. Department policies are found in the Program Administrative Manual (PAM), the Program Eligibility Manual (PEM) and the Program Reference Manual (PRM).

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 alleged mental impairments limit her 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, a history 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 and 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 her 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 consideration of all factors in each particular case.

STEP #1

The issue at Step 1 is whether claimant is performing substantial gainful activity (SGA). 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. However, the claimant is receiving services from [REDACTED] department; the ultimate goal is that she will return to work.

However, claimant meets the Step 1 disability test at this time.

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 at least 12 months, and totally prevents all basic 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, the 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 last worked as a daycare provider for a private client. This work was light work.

The medical evidence of record establishes that claimant has fibromyalgia and headaches. Occasionally, she does not want to get out of bed. However, the medical evidence does not establish that claimant is totally unable to work as a daycare provider.

Since claimant is able to return to her previous work as a daycare provider, for a private client, she does not meet the Step 4 disability test.

STEP #5

The issue at Step 5 is whether claimant has the residual functional capacity (RFC) to do other work.

Claimant has the burden of proof to show by a preponderance of the medical evidence in the record that her combined impairments meet the department's definition of disability for MA-P purposes.

First, claimant alleges disability based on a mental impairment: depression. Claimant was recently evaluated by a [REDACTED] psychiatrist. The psychiatrist reported that claimant has been working as a childcare provider and this activity is going well because it keeps claimant busy and gives her another responsibility so she does not focus on herself. The psychiatrist reported that claimant denied psychotic, homicidal and manic symptoms. The psychiatrist reported claimant is sleeping well, eating well and her interest and motivation are much better than they used to be. The psychiatrist did not report that claimant was totally unable to work. Also, claimant did not provide a DHS-49D or DHS-49E to establish her mental residual functional capacity.

Second, claimant alleges disability based on fibromyalgia and spinal dysfunction. A recent report from [REDACTED] shows diagnoses of fibromyalgia, headache, anxiety, depression, restless leg syndrome, back pain, nausea and sleep disturbance. However, the physician did not state that claimant was totally unable to perform substantial gainful employment due to severe physical impairments.

Third, claimant testified that a major impediment to her return to work was her chronic back pain, and fibromyalgia pain. Unfortunately, evidence of pain, alone, is insufficient to establish disability for MA-P purposes.

The Administrative Law Judge concludes that claimant's testimony about her 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 her combination of impairments. Claimant performs a significant number of activities of daily living (ADLs), has an active social life with her two adult sons and drives an automobile approximately 20 times a month.

In addition, claimant is currently receiving services from [REDACTED] department; the ultimate goal is that she will be able to find gainful employment.

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 able to work as a ticket taker for a theatre, as a parking lot attendant, and as a greeter for [REDACTED], and as a secretary/receptionist. Work of this type would provide claimant a sit-stand option.

Based on 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: November 9, 2009

Date Mailed: November 10, 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 receipt of the Decision and Order or, if a timely request for rehearing was made, within 30 days of the receipt date of the rehearing decision.

JWS/tg

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