

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: 2009-22657
Issue No: 2009
Case No: [REDACTED]
Load No: [REDACTED]
Hearing Date:
July 9, 2009
Cheboygan 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 9, 2009, in Cheboygan. The claimant appeared and testified under oath.

Claimant was represented by [REDACTED]

The department was represented by Jenne Bieau (ES) and Lydia Schenk (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)?
- (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 applicant (November 21, 2008) who was denied by SHRT (June 2, 2009) based on claimant's ability to perform a wide range of medium work. SHRT relied on Med-Voc Rule 203.29 as a guide.

(2) Claimant's vocational factors are: age—46; education—high school diploma; post high school education—none; work experience—cashier/stocker for a gas station, seasonal waitress.

(3) Claimant has not performed substantial gainful activity (SGA) since 2000 when she worked as a cashier stocker for a gas station.

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

- (a) Chronic pain;
- (b) Back pain;
- (c) Migraine headaches;
- (d) Seizures;
- (e) Fibromyalgia;
- (f) Depression.

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

OBJECTIVE MEDICAL EVIDENCE (June 2, 2009):

Claimant had a normal range of motion of all joints. Her motor strength and tone were normal. She walked with a normal gait without the use of an assistive device. She has been seizure free for the past five years. (Pages 45-49.)

MENTAL:

Claimant had a faint smell of alcohol, but did not appear to be intoxicated. She was somewhat tangential, but easily redirectable. Her immediate, recent remote memory was intact. Her insight and judgment did appear impaired. She was able to take care of her activities of daily living with no problems. (Page 48.)

ANALYSIS:

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

* * *

(6) Claimant lives with her mother and performs the following Activities of Daily Living (ADLs): Dressing, bathing, cooking, dishwashing, light cleaning, laundry and grocery shopping (sometimes). Claimant does not use a cane, walker, wheelchair, or shower stool. She does not wear braces. Claimant did not receive in-patient hospital care in 2008 or 2009.

(7) Claimant does not have a valid drivers' license and does not drive an automobile. Claimant is not computer literate.

(8) The following medical reports are persuasive:

(a) A [REDACTED] was reviewed.

The internist provided the following background:

Chief complaints: Seizures, back pain, fibromyalgia.

Claimant has a history of lower back pain over the past 33 years. She attributes this to a history of scoliosis as well as a slip and fall injury when she was 13 years old. She states her back pain does radiate down both legs, but is not aggravated by coughing or sneezing. She is on Neurontin, Tramadol, and Zanaflex. She does do heat therapy at home, but otherwise has not had any physical therapy. She does not use an assistive device.

Claimant has also had a history of seizures. She is not on any seizure medication. She states she thinks her last seizure was in 2004. She does not drive.

Patient has not worked since 2003. She used to work as a waitress and stopped because of her back. She lives in a home. She can do her activities of daily living. She is able to drive. She does do some light chores such as dishes and dusting, but does not do any gardening. She used to enjoy gardening and going for walks. She can walk about 15 minutes, sit about one hour, stand about 20 minutes, and lift about 20 pounds.

* * *

SOCIAL HISTORY:

Claimant smokes one-half pack per day for 25 years. Alcohol: none. Used to garden, walk. Occupation: waitress, last worked in 1999.

EDUCATION:

12th grade.

PHYSICAL EXAMINATION:

Appearance/mental status: Claimant does have a faint smell of alcohol, but did not appear intoxicated. She was somewhat tangential, but easily redirectable. She is cooperative in answering questions and following commands. The claimant's immediate recent and remote memory is intact, but normal concentration. Claimant's insight and judgment are limited. Claimant provides a good effort during the examination.

* * *

A consulting internist provided the following conclusions:

- (1) Scoliosis. Claimant has mild scoliotic disease today. Her range of motion was stable. She had minimal difficulty doing orthopedic maneuvers. Her gait was normal. At this point, continued supported care would be indicated.

- (2) Seizures. There have not been any seizures over the past five years. Whether this is due to alcohol withdrawal seizures is a possibility. She did smell of alcohol today, and does admit to drinking on occasion. At this point, further evaluation with a neuropsych evaluation may be help. Physically, she appears relatively stable.

* * *

NOTE: The consulting internist did not state that claimant was totally unable to work.

(9) The probative psychological/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. Claimant thinks she is disabled based on her depression. However, claimant did not submit a clinical evaluation by a Ph.D. psychologist or by an M.D. psychiatrist. Also, claimant did not provide a DHS-49D or DHS-49E to establish her mental residual functional capacity. The internist who did comment on claimant's mental status indicated that claimant had a faint smell of alcohol, but was cooperative in answering questions and following commands. The internist did not provide a DSM diagnosis. The internist did not state that claimant is totally unable to work based on her depression.

(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 that she has chronic pain, migraines, seizures and fibromyalgia. The consulting internist provided the following diagnoses: (1) scoliosis (mild) and seizures (no seizures over the past five years). The consulting internist did not state that claimant is totally unable to work based on her combined exertional impairments.

(11) Claimant recently applied for federal disability benefits with the Social Security Administration. Social Security denied her application. Claimant has not filed a timely appeal.

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

Claimant's impairments do not meet/equal the intent or severity of a Social Security Listing.

The medical evidence of record shows that claimant retains the capacity to perform a wide range of medium work.

The department denied MA-P based on claimant's vocational profile [younger individual, high school graduate and unskilled work history]. The department relied 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). If claimant is working and is earning substantial income, she is not disabled for MA-P purposes.

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 lasted for 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. However, SHRT did evaluate claimant's eligibility using the relevant SSI Listings. Claimant does not meet any of the relevant 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 cashier/stocker at a gas station. This was medium work.

The medical evidence of record establishes that claimant has back pain and difficulty comprehending the computer. Both of these skills are required in order to work as a gas station cashier and stocker.

Since claimant is no longer able to perform the duties of a cashier/stocker, she does 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 did not submit a formal clinical evaluation by a Ph.D. psychologist or psychiatrist. There is a transitory reference to her mental state in the medical consultant's report dated January 30, 2009. The internist did not state that claimant was depressed. Also, he did not provide a DSM diagnosis. Finally, claimant did not provide a DHS-49D or DHS-49E to establish her mental residual functional capacity.

Second, claimant alleges disability based on physical impairments: Migraines, seizures and fibromyalgia. The medical consultant provided a diagnosis of scoliosis (mild) with a stable range of motion. He also reported that claimant has not had any seizure activity over the past five years and that claimant's seizure activity may have an alcohol component.

Third, claimant testified that a major impediment to her return to work was her fibromyalgia pain and back 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 mother and relatives.

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 theater, as a parking lot attendant, and as a greeter for [REDACTED]. Work of this type would afford claimant with a sit/stand option.

The Administrative Law Judge is not convinced that claimant testified truthfully at the hearing. Her responses during the hearing about smoking and drinking are not consistent with the information provided by the medical consultant and his report dated January 30, 2009.

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

cc:

