

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: 2009-22666
Issue No: 2009; 4031
Case No: [REDACTED]
Load No: [REDACTED]
Hearing Date:
June 25, 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 25, 2009, in Saginaw. Claimant personally appeared and testified under oath.

The department was represented by Connie Herman (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 sent to the State Hearing Review Team (SHRT) on June 29, 2009.

Claimant waived the timeliness requirement so that her 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 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 (October 27, 2008) who was denied by SHRT (June 2, 2009) based on claimant's failure to establish an impairment which meets the department's severity and duration requirements.

(2) Claimant's vocational factors are: age--41; education--high school diploma, post-high school education--two semesters at [REDACTED] (physical therapy major), adult education class in retail sales; work experience--volunteer kitchen worker for a community center, volunteer aide at a nursing home, and kitchen help at a restaurant.

(3) Claimant has not performed Substantial Gainful Activity (SGA) since 2003, when she was a volunteer kitchen helper at the [REDACTED] community center.

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

- (a) Back dysfunction;
- (b) Unable to stand for long periods;
- (c) Unable to sit for long periods;
- (d) Diabetes;
- (e) Morbid obesity (351 pounds);
- (f) Sleep apnea;
- (g) Status post uterine cancer;
- (h) Unable to take deep breaths.

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

OBJECTIVE MEDICAL EVIDENCE (June 2, 2009)

Claimant was diagnosed in 9/2008 with well differentiated endometrial adenocarcinoma (page 15). Treatment options were discussed and claimant preferred to start radiation therapy, because

she previously had some complications during a laparoscopic cholecystectomy (page 14).

In 10/2008, claimant's examination was grossly unremarkable, except for morbid obesity. She was to start radiation treatments (page 39). Claimant was 5' 1" tall and 355 pounds. There was no tenderness of the spine and no neurological abnormalities (page 44).

ANALYSIS: Claimant was diagnosed with endometrial cancer in 9/2008, and did not want surgery due to previous complications during a laparoscopic cholecystectomy. She wants to undergo radiation treatments. However, the treatments would not be expected to prevent all kinds of work for 90 days or more. Claimant has a history of scoliosis, but there was no tenderness or neurological abnormalities. Claimant's weight does cause some limitation and she should avoid heavy lifting.

* * *

(6) Claimant lives with her step-sister and performs the following Activities of Daily Living (ADLs): dressing, bathing, cooking, dish washing, light cleaning, vacuuming (sometimes), laundry and grocery shopping. Claimant does not use a cane, a walker, or a wheelchair. She uses a shower stool approximately 15 times a month. Claimant does not wear braces. Claimant was hospitalized in 2009 for seven days to obtain treatment for pneumonia and a blood infection.

(7) Claimant's driver's license has expired. She plans to renew it when she has the cash to be so. She is computer literate.

(8) The following medical records are persuasive:

(a) A [REDACTED] consultative internal medicine narrative report was reviewed.

The internist provided the following history:

This is a 40-year-old female who has a complex past medical history, significant for Type II diabetes mellitus, scoliosis, spurs on the spine, stress fracture on the left tibia, hiatal hernia, gastroesophageal reflux disease, migraines, morbid obesity, arthritis in right shoulder, night blindness, diplopia, right knee effusion. Claimant says that she has been on oral

hypoglycemic agent and with that, her diabetes has been under control. However, she says that because of her diplopia and night blindness, she has been unable to drive at nighttime. If she takes off her glasses, her diplopia becomes very severe. She also gives a history of spurs on L4, L5 vertebra, she says that she has a history of migraines, currently under control with medications.

The consulting internist provided the following assessment:

- (1) Type II diabetes mellitus;
- (2) Fairly stable blood sugar;
- (3) History of diplopia and night blindness;
- (4) History of stress fractures in left tibia;
- (5) History of gastroesophageal reflux disease;
- (6) History of migraines;
- (7) Morbid obesity;
- (8) Arthritis in the right shoulder;
- (9) History of scar tissue in right ear secondary to perforation of tympanic membrane;
- (10) Hypertension;
- (11) Osteoarthritis in L4, L5 vertebra.

* * *

The consulting physician did not report that claimant is totally unable to work.

* * *

(9) Claimant does not allege a mental impairment as the basis for requesting disability benefits. Claimant did not provide a recent psychological report. Claimant did not provide a DHS-49D or a DHS-49E to establish her 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. Claimant testified that she has difficulty sitting and standing due to back dysfunction, diabetes, morbid obesity, sleep apnea, status-post uterine cancer and difficulty breathing. The consulting internist provided the following diagnoses: (1) Type II diabetes mellitus; (2) fairly stable blood sugar; (3) morbid obesity; (4) arthritis in right shoulder; (5) hypertension; (6) osteoarthritis in L4, L5 vertebrae. The physician did not state that claimant

was totally unable to work. There is no current probative medical evidence to establish that claimant is totally unable to work based on her exertional impairments.

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

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 failed to provide evidence that meets the severity and duration requirements for disability benefits.

The department thinks that the evidence of record shows claimant's condition is improving or is expected to improve within 12 months.

The department denied MA-P benefits based on lack of duration under 20 CFR 416.909. SDA benefits were denied based on PEM 261 because claimant's impairments do not preclude all work for 90 days.

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 disabled for MA-P/SDA 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 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 at least 12 months, and totally prevents all basic work activities. 20 CFR 416.909.

Also, to qualify for MA-P/SA, 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 eligibility test.

STEP 4

The issue at Step 4 is whether claimant is able to do her previous work. Claimant last worked as a volunteer kitchen helper for a community center.

The medical evidence of record establishes that claimant's back dysfunction, in combination with her diabetes and other impairments, preclude her from doing work which requires heavy lifting and constant standing.

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 a 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 disability based on a mental impairment. Claimant did not submit any clinical assessments from a psychologist. Claimant did not submit a DHS-49D or a DHS-49E to establish her mental residual functional capacity.

Second, claimant alleges disability based on diabetes mellitus Type II, status post uterine cancer, and back dysfunction. The consulting internist who examined claimant provided the following diagnoses: (1) Type II diabetes mellitus; (2) fairly stable blood sugar; (3) morbid obesity; (4) arthritis in right shoulder; (5) hypertension; (6) osteoarthritis in L4, L5 vertebrae. The consulting physician did not state that claimant was totally unable to work.

Third, claimant testified that a major impediment to her return to work was her shoulder and back 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 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 many activities of daily living, has an active social life with her step-sister and is computer literate. Currently, claimant does not drive because her license has expired; she plans to renew her license and to drive an automobile.

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 the workplace.

Based on this analysis, the department correctly denied claimant's MA-P/SDA 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/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: October 8, 2009

Date Mailed: October 12, 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/cv

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