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: 2009-22673
Issue No: 2009; 4031
Case No: [redacted]
Load No: [redacted]
Hearing Date:
July 8, 2009
Jackson 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 Jackson. Claimant personally appeared and testified under oath.

The department was represented by Don Vaivak (FIM).

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/retro/SDA applicant (March 13, 2009) who was denied by SHRT (May 28, 2009) based on claimant's ability to perform unskilled medium work. SHRT relied on Med-Voc Rule 203.28 as a guide. Claimant requests retro MA for November and December 2008 and January 2009.

(2) Claimant's vocational factors are: age—45; education—high school diploma; post high school education—none; work experience—prep cook for local restaurant.

(3) Claimant has not performed substantial gainful activity (SGA) since 2005 when she worked as a prep cook.

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

(a) Degenerative disc disease;
(b) Radiculopathy;
(c) Parasthesis of right arm and left arm.

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

OBJECTIVE MEDICAL EVIDENCE (May 28, 2009)

Claimant had several ER visits due to alcohol-related issues (pages 28-44).

In 1/2009, claimant complained of low back pain radiating down to bilateral hips. On examination, she had tenderness in the spine (page 19). Straight leg raising was negative, there was no sensory loss and no motor weakness. The right patellar reflex was decreased. Depression was lumbar disc degeneration, cervical disc displacement and alcohol abuse—unspecified (page 20).

In 2/2009, claimant reported her low back pain had improved (page 17).

> A DHS-49 form, dated 2/2009 showed claimant had lumbago from painful gait, brachial neuritis and left upper and lower extremity numbness and pain (page 7). The doctor gave less than sedentary limitations (page 8). On examination, dated 5/2009, showed claimant's power was 5/5 in all four limbs. Muscle bulk and tone were normal. Deep tendon reflexes were intact and symmetrical. Gait was normal. Range of motion was normal except decreased in the cervical and lumbar spine. There was tenderness in paraspinal muscle spasms in the cervical and lumbar area. She did have crepitus on movement of the knees (new information from DDS).
>
> **ANALYSIS:**
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> Claimant has a history of alcohol abuse and back pain. She had some tenderness and limitation of motion and muscle spasm. However, there were no significant neurological abnormalities. Gait was normal. Claimant's physician has given less than sedentary work restrictions based on claimant's physical impairments. However, this medical source opinion (MSO) is inconsistent with the great weight of the objective medical evidence, and for 20 CFR 416.927(c) and (d) will not be given controlling weight. The collective objective medical evidence shows that claimant is capable of performing medium work.

* * *

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

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

(8) The following medical reports are persuasive:

(a) A [redacted] narrative consultative report was reviewed.

The physician provided the following chief complaint: Claimant is seen for alleged disability due to back pain, neck pain, arthritis with hip and knee pain.

The physician provided the following history:

Claimant is a 44-year-old female who was evaluated due to the above complaints. She has had low back pain for about five years. The pain radiates up to and involves the mid-back area between the shoulder blades and the neck. The pain is present all the time as a dull ache, but gets worse. Sometimes there is radiation of the pain into the hip area bilaterally into the upper legs. The MRI scan showed degenerative disc disease according to claimant. No surgery was recommended. Claimant had physical therapy, without much benefit. She denies epidural injections. She cannot stand for long and has to sit down and wash dishes. She has to stop in the middle of grocery shopping due to back pain. She has not fallen.

She has had neck pain for five years in the posterior part. It is worse if she lifts anything heavy or has to use her arm. The pain radiates down both arms, worse on the right. She was told she has radiculopathy. She has some numbness and tingling in the right arm from the neck, with numbness and tingly in the hands also. She sometimes drops things from the right hand. She has had an MRI scan that showed degenerative disc disease in the neck. She had physical therapy, but no injections.

She has arthritis with knee and ankle pain off and one, especially if she stands or walks. There is no joint swelling. Her hips also hurt if she has been standing or walking for long periods of time.

* * *

The internist provided the following assessment:

(1) Back pain;

(2) Neck pain;

(3) Degenerative Disc Disease;

(4) Radiculopathy/right arm;

(5) Osteoarthritis.

* * *

(9) Claimant does not allege disability based on a mental impairment. Claimant did not provide any clinical evidence of a mental impairment. Claimant did not provide a DHS-49D or DHS-49E to establish a 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 degenerative disc disease, radiculopathy of the right arm, paresthesias of the right and left arms. The consulting physician provided the following diagnoses: back pain, neck pain, degenerative disc disease, radiculopathy of right arm, osteoarthritis. The consulting physician did not state the claimant was totally unable to work.

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

CONCLUSIONS OF LAW

CLAIMANT'S POSITION

Claimant thinks she is entitled to MA-P/SDA 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.

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

In lieu of a detailed work history, claimant will be returned to other work.

Finally, based on claimant's vocational profile [younger individual, high school graduate and unknown work history] the department denied MA-P using Med-Voc Rule 203.28 as a guide. Retroactive MA-P was considered and denied.

The department denied SDA per PEM 260/261 because the nature and severity of claimant's impairments do not preclude all work activities for at least 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).

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 –
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> (1) Medical history.
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> (2) Clinical findings (such as the results of physical or mental status examinations);
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> (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 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 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 at least 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, 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, the department did evaluate claimant's eligibility using the SSI Listings. The department decided that claimant does not meet the applicable 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 prep cook for a local restaurant. This was medium work.

The medical evidence of record establishes that claimant has degenerative disc disease and radiculopathy. These conditions prevent claimant from standing continuously for an eight-hour shift and from doing heavy lifting.

Since claimant is no longer able to meet the requirements of a prep cook, due to her combination of impairments, she 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 preponderance of 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 disability based on a mental impairment. Claimant did not submit any clinical reports to establish a severe mental impairment. Claimant did not submit a DHS-49D or DHS-49E to establish her mental residual functional capacity.

Second, claimant alleges disability based on degenerative disc disease and radiating pain and numbness down both arms. Claimant was evaluated by a consultant internist who provided the following assessment: (1) back pain; (2) neck pain; (3) degenerative disc disease; (4) radiculopathy in right arm; (5) osteoarthritis. The consulting physician did not state claimant was totally unable to work.

Third, claimant stated that a major impediment to her return to work was her low back pain, neck pain, hip pain and bilateral leg 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 a significant number of activities of daily living (ADLs), has an active social life with her boyfriend, and drives an automobile twice 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, she is 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 provide claimant a sit-stand option.

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: November 6, 2009

Date Mailed: November 9, 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: [redacted]