

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: 2009-22984
Issue No: 2009; 4031
Case No: [REDACTED]
Load No: [REDACTED]
Hearing Date:
July 23, 2009
Newaygo 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 23, 2009, in White Cloud. Claimant appeared and testified under oath.

The department was represented by Kimberly Polasek (Lead 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) 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 (January 14, 2009) who was denied by SHRT (June 6, 2009) due to claimant's ability to perform a wide range of sedentary work. SHRT relied on Med-Voc Rule 201.28 as a guide.

(2) Claimant's vocational factors are: age--41; education--high school diploma; post high school education--[REDACTED] from [REDACTED] and B.A. degree in Business from [REDACTED]; work experience--waitress at several restaurants over a 26 year period; volunteer work--worked as a volunteer translator for Spanish-speaking inmates while serving a jail sentence.

(3) Claimant has not performed Substantial Gainful Activity (SGA) since May 2008 when she worked as a waitress.

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

- (a) Two frozen shoulders;
- (b) Left rotor cuff tear;
- (c) Right rotor cuff dysfunction;
- (d) Doctor states she is unable to work;
- (e) Unable to sit more than two hours;
- (f) Unable to stand more than two hours;
- (g) Unable to pull up her own pants;
- (h) Unable to dress herself.

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

OBJECTIVE MEDICAL EVIDENCE (June 6, 2009)

An MRI on 1/2009 showed inflammation of the tendons without evidence of a rotor cuff tear. (Page 13.) The left shoulder showed a full thickness tear. (Page 14.) The treatment note on 12/2008 states she has limited range of motion bilaterally with an intact neurological examination. (Page 51.)

MENTAL:

On 2/2008, claimant was hospitalized for depression and thoughts of suicide. She was medically treated and released in stable condition. Her mental examination on 8/2008 was normal. (Pages 20 to 29.) Her mental capacity assessment completed by her therapist stated her physical condition has impacted her mental state and she has no mental limitations. (Page 18-19.)

ANALYSIS:

Claimant's treating physician gave her lifting restrictions of up to 20 pounds occasionally with sedentary work (page 17). The objective medical evidence presented does not establish a disability at the listing or prevalence level. The collective medical evidence shows claimant is capable of performing a wide range of sedentary work.

* * *

(6) Claimant lives with her mother and performs the following activities of daily living: bathing (sometimes), cooking, dishwashing (sometimes), and laundry. Claimant does not use a cane, walker, or wheelchair. She uses a shower stool approximately 15 times a month. Claimant does not wear braces. Claimant was hospitalized in [REDACTED] [REDACTED] for bipolar disorder. Claimant was not hospitalized in 2009.

(7) Claimant has a valid driver's license and drives an automobile approximately ten times a month. Claimant is computer literate. Claimant is fluent in Spanish and active as an interpreter for Spanish-speaking inmates while incarcerated. Claimant plays several musical instruments.

(8) The following medical/psychiatric/psychological records are persuasive:

(a) A February 3, 2009 Medical Examination Report prepared by claimant's physician's assistant was reviewed.

The physician's assistant provided the following physical diagnoses:

- (a) Bilateral shoulder pain;
- (b) Rotator cuff tear;
- (c) Diabetes Mellitus I.

The physician's assistant provided the following mental diagnoses: Bipolar disorder, with mood swings.

The physician's assistant reported the following work limitations: Claimant is able to lift ten pounds occasionally, sit up to a maximum of six hours, and stand a maximum of two hours. He reported that claimant is able to use her hands and arms only to do simple grasping with her right hand. Claimant is right hand dominant. Claimant is able to use her feet/legs normally.

- (b) A February 3, 2009 Medical Needs form (DHS-54A) prepared by claimant's physician's assistant was reviewed.

The physician's assistant certified that claimant does not have a medical need for assistance with any of her personal care activities. The physician's assistant reported that claimant is able to work at any job, with limitations. The physician's assistant reported the following work limitations: no repetitive lifting of more than ten pounds. No repetitive standing. No more than two hours on her feet or sitting without changes in position.

- (c) A [REDACTED] MRI of the left shoulder was reviewed.

The MRI shows a full thickness tear of the left rotor cuff tendon with degenerative and/or posttraumatic changes in the left shoulder.

- (d) A [REDACTED] Mental Residual Functional Capacity (DHS-49E), prepared by claimant's [REDACTED] was reviewed.

The [REDACTED] reported that claimant had no mental limitations.

The [REDACTED] provided the following comments:

The consumer has been able to keep a job consistently in the past due to her present health limitations--two torn rotator cuffs--she is physically unable to work. Both the physical pain and the feelings of uselessness/dependency are negatively impacting her present mental state.

* * *

- (f) A December 30, 2008 psychiatric progress note was reviewed.

The psychiatrist provided the following mental status report:

PROGRESS:

Claimant was accompanied today by [REDACTED]. Claimant is alert, oriented x3. Affect fairly pleasant. Mood stable. She is filing for her TSH. She has been following with her primary doctor who placed her on Synthroid. She has been released from jail. **She is baby-sitting to help her mother out.** She has some ongoing chronic pain. But, for the most part, overall, she is stable. Maintaining her Lithium Carbonate 300 mg two tablets twice daily; Seroquel 100 mg, twice daily; AIMS testing is within normal limits. Will maintain her current treatment after return to the clinic in six weeks.

* * *

- (i) A November 17, 2008 psychiatric assessment was reviewed.

The psychiatrist provided the following background:

Claimant has a history of addictive behaviors, most notably gambling. She has sought mental health services in the past, but did not experience her first psychotic break until February, 2008. She denied any previous suicidal or homicidal ideation. She was placed in [REDACTED] because of her mania. When unmedicated, she becomes manic and expresses irritation with those around her (primarily her cellmates).

The psychiatrist provided the following psycho-social information:

This clinician met with this 40-year-old Caucasian female consumer in the [REDACTED] where she was lodged as a county inmate. She was sentenced on May 5, 2008 to serve seven months in jail for embezzlement. This was her second conviction of embezzlement; the first being when she was 20 years old.

* * *

In her manic state, she embezzled over \$2500 from her employer and gambled it away at a casino. She stated, 'I don't think about the consequences when I am really manic.' She sees her strengths as intelligence, loyalty to employer, bilingual, and being a hard worker. She believes that at times she puts too much into her job and is a perfectionist. She can get overwhelmed by too many tasks to complete (such as a totally messy, chaotic house).

* * *

Claimant is a graduate of [REDACTED]. She earned a [REDACTED] degree from [REDACTED] and an [REDACTED] from [REDACTED]. She is exploring becoming an interpreter (Spanish) to utilize these skills, which will involve taking an additional course in Spanish class. This became evident when she was utilized as an interpreter in jail for Hispanic inmates.

Claimant is presently unemployed due to her incarceration. She was working two food services jobs at 35 hours each prior to her sentencing. One of these restaurants has closed while she was in jail. She is hoping to return to the other establishment ([REDACTED]). Due to her legal issues, she is unable to handle money.

* * *

Claimant's primary goal is to get out of jail. She has had most of her psychotropic medications removed due to hoarding them in jail and she 'wants to get back on [her] medications for sure.'

* * *

Upon her release from jail, she wants to work at finding a job, securing housing and applying for insurance.

* * *

The psychiatrist provided the following diagnostic formulation:

Claimant has been diagnosed with bipolar disorder, with her most recent episode being manic by both the psychiatric staff at [REDACTED] and her private psychiatrist. This was based on her manic symptoms: prolonged tearful mood (lasting at least a week), mood disturbances including grandiosity (believing she could win back her missing funds), increased need to talk, decreased need to sleep, and excessive involvement and perceived pleasurable activities (gambling/embezzling even though it resulted in negative consequences).

* * *

(9) The probative medical 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 she was unable to work due to bipolar disorder. However, the recent psychiatric evaluation (November 17, 2008), while confirming a diagnosis of bipolar disorder, did not report that claimant was totally not able to work. To the contrary, the psychiatrist noted that claimant was employed as a baby-sitter after she was released from jail in late 2008. Also, the DHS-49E, prepared by claimant's [REDACTED] therapist states that claimant has no mental impairments.

(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. The medical evidence of record does establish that claimant has a left shoulder cuff tear. This condition prevents claimant from performing heavy lifting on a continuous basis. The claimant also has a diagnosis of Diabetes Mellitus I. Claimant's PAC reports that claimant is able to lift up to 20 pounds frequently. She is able to stand/walk less than

two hours a day and is able to sit less than six hours a day. She is able to use her right hand for simple grasping and is able to use both legs to operate foot controls. The PAC reported that claimant was able to do other work with limitations. The PAC did not state that claimant was totally unable to perform sedentary work.

(11) Claimant has recently applied for federal disability benefits with the Social Security Administration. Claimant's SSI application is currently pending.

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 has a Residual Functional Capacity (RFC) to perform a wide range of sedentary work.

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

The department denied claimant's MA-P/SDA application based on claimant's vocational profile [younger individual (age 41) with a college education and a work history as a waitress and baby-sitter]. The department relied on Med-Voc Rule 201.28 as a guide.

SDA was denied based on PEM 261 because the nature and severity of claimant's do not preclude all sedentary work activity 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).

To determine to what degree claimant's 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 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 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 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 earning substantial income, she 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/vocational evidence of record shows that claimant is not currently performing SGA. There is evidence in the record that claimant worked after she was released from jail in late 2008, but the record does not indicate the duration of that employment. Claimant did not testify truthfully about her baby-sitting in late 2008.

However, based on the record as a whole, 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 at least 12 months, and prevents all basic work activities. 20 CFR 416.909.

Also, to qualify for MA-P/SDA, the 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. The department decided that claimant does not meet any of the applicable SSI 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 previously worked as a waitress and baby-sitter. Claimant also has worked as a volunteer interpreter for Spanish-speaking inmates at the county jail. Claimant's work as a waitress was light work. Claimant's work as a baby-sitter and interpreter was sedentary work.

The medical evidence of record shows that claimant has a physical impairment of left rotator cuff tear in combination with diabetes. She has a mental impairment of bipolar disorder.

The medical evidence of record establishes that claimant is unable to return to her previous work as a waitress due to the lifting limitations imposed by her PAC. The medical record does not establish that claimant is unable to return to sedentary work, including baby-sitting and acting as an interpreter for Spanish-speaking clients.

Since claimant is able to return to her previous work as a baby-sitter, 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 the medical evidence in the record that her combined impairments meet the department's definition of disability for MA-P/SDA purposes.

First, claimant alleges disability based on a mental impairment: Bipolar disorder. The medical reports in the record do establish a diagnosis of bipolar disorder. However, claimant's [REDACTED]-therapist reported on the DHS-49E that claimant has no significant mental residual functional impairments. Second, claimant alleges disability based on a bilateral shoulder pain and a left rotator cuff tear. The report submitted by claimant's PAC reports a limited ability to lift, sit and stand; and a limited ability to use her hands. The PAC did not report that claimant is totally unable to perform sedentary work.

During the hearing, claimant testified that a major impediment to her return to work was her bilateral shoulder pain secondary to her bilateral shoulder dysfunction. 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 profoundly 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 six activities of daily living, drives an automobile approximately ten times a month, attends [REDACTED], and has an active social life with her mother. Claimant is also a college graduate, computer literate, and is fluent in Spanish.

In considering the medical record, in combination with claimant's testimony, the Administrative Law Judge concludes that claimant is able to perform unskilled sedentary work (SGA). In this capacity, she is able to work as a ticket taker for a theater, as a greeter for [REDACTED], as a baby-sitter, as a child care provider and as an interpreter for Spanish-speaking clients.

Also, it should be noted that the Administrative Law Judge does not find claimant's testimony to be credible or persuasive due to the fact that she has been convicted twice for embezzlement and did not report her work as a child care provider during her sworn testimony at the hearing.

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, his 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: February 25, 2010

Date Mailed: February 25, 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 receipt date of the rehearing decision.

JWS/tg

cc:

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