

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: 2009-24050
Issue No: 2009; 4031
Case No: [REDACTED]
Load No: [REDACTED]
Hearing Date:
July 22, 2009
Oscoda 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 22, 2009, in Mio. Claimant personally appeared and testified under oath.

The department was represented by Kim Lauterwasser (FIS) and Bonnie Ewaald (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/retro/SDA applicant (February 6, 2009) who was denied by SHRT (June 11, 2009) due to claimant's failure to establish an impairment which meets the department's severity and duration requirements. Claimant requests retro MA for November and December 2008 and January 2009.

(2) Claimant's vocational factors are: age—53; education—high school diploma; post high school education—none; work experience—custodian at [REDACTED], self-employed horse-breeder and trainer, and self-employed housecleaner.

(3) Claimant has not performed substantial gainful activity (SGA) since 1997 when she worked as a church custodian.

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

- (a) Unstable vertebra;
- (b) Arthritis of the knee;
- (c) Chronic back pain;
- (d) Fibromyalgia;
- (e) Needs pain medications;
- (f) Bowel and bladder incontinence;

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

OBJECTIVE MEDICAL EVIDENCE (June 11, 2009)

Claimant underwent gastric bypass surgery in 9/2006 without complications. She has lost 220 pounds since the surgery. An emergency room visit occurred due to abdominal pain, which an endoscope evaluation revealed a marginal ulcer. (Page 101.)

The ulcer was cauterized and there was no further bleeding at the source. She was released in stable condition. (Page 108.)

ANALYSIS:

Claimant's abdominal pain/ulcer condition is not expected to last more than 12 months.

* * *

(6) Claimant lives with her husband and performs the following Activities of daily living (ADLs): dressing, bathing, cooking (needs help), dishwashing (sometimes), light cleaning (sometimes), laundry (sometimes) and grocery shopping (needs help). Claimant uses a cane on a daily basis. Claimant does not use a wheelchair or walker. Claimant uses a shower stool on a daily basis. Claimant does not wear braces. Claimant did not receive inpatient hospital in 2008. In 2009, she received inpatient hospital care for a bleeding ulcer.

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

(8) The following medical reports are persuasive:

(a) A [REDACTED] and Physical Report was reviewed.

(b) The physician provided the following background:

This is a 53-year-old female who was admitted to the hospital through the emergency department passing black stool without any vomiting. She denies any abdominal pain.

She has a previous episode of ulcer disease after a gastric bypass. She states the ulcer was repaired. She has been on long-term Proton pump inhibitors and Carafate without any improvement noted. She has lost more than 200 pounds weight. In the last month, she has lost almost 20 pounds, she is very upset that she was not able to gain weight.

* * *

IMPRESSION:

- (1) Melena status post-gastric bypass;
- (2) Gastrojejunal ulcer.

(c) A [REDACTED] Report was provided.

The surgeon provided the following background:

Chief complaint: morbid obesity.

History of present illness: Claimant is a 49-year-old female who was referred to my bariatric clinic for consultation and evaluation for weight-loss surgery. Claimant currently weighs 325 pounds with a BMI of 57 kilograms/meter. She now has significant osteoarthritis of the knees, and has also developed hypercholesterolemia and hypertension. She has been followed closely by her primary care physician for a long period of time and has tried multiple diets including the [REDACTED] diet, [REDACTED], [REDACTED], and [REDACTED].

IMPRESSION/PLANS:

49-year-old female with super-morbid obesity with associated comorbid conditions, including hypercholesterolemia, hypertension and severe osteoarthritis. She has tried nonsurgical attempts at weight-loss and has been unable to lose a significant amount of weight or keep weight off. She now desires to proceed with surgical evaluation for long-term success.

* * *

(9) Claimant does not allege an acute (non-exertional) mental impairment as the basis for her disability application. Claimant did not provide a recent clinical evaluation from a psychiatrist or a psychologist. Claimant did not provide a DHS-49D or DHS-49E to establish a 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 recorded the following impairments: unstable vertebra in the back; arthritis of the knees, chronic back pain, fibromyalgia, bowel and bladder incontinence and needs pain medication. The medical records establish that claimant has significant osteoarthritis of the knees and also has hypercholesterolemia and hypertension. She recently had bariatric surgery (2005). The recent history and physical (January 19, 2009) provided a diagnosis of melena status post gastric bypass and gastrojejunal ulcer. The physician did not report that

claimant is totally unable to work. There is no current probative medical evidence in the record to establish that claimant is totally unable to work based on her combined physical impairments, at this time.

(11) Claimant recently applied for federal disability benefits based on the Social Security Administration. Social Security denied claimant's application. Claimant did not 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 has a residual functional capacity to perform a wide range normal work activities.

The department decided that claimant's condition/alleged impairment(s) is not expected to last for a continuous period of 12 months, or, claimant's impairment is expected to improve post-operatively. 20 CFR 416.909.

The department also decided that the medical evidence of record indicates claimant's condition has improved and should continue to improve with treatment and does not prevent all work activity for 12 months from the date of onset or from the date of surgery.

The department denied MA-P/SDA benefits due to lack of severity/duration.

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 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.

Based on the medical evidence of record, claimant does not meet any of the applicable SSI 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 church custodian. This was medium work.

The medical evidence of record establishes that claimant has had recent abdominal surgery, and was recently treated for an ulcer. Medical records also establish that claimant has significant osteoarthritis of the knees and also has hypercholesterolemia and hypertension.

Because of claimant's osteoarthritis of the knees, she is not able to return to her previous work as a church custodian.

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 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 a mental impairment as the basis of her disability.

Second, claimant alleges disability based on arthritis, unstable vertebra, and fibromyalgia and bowel/bladder incontinence. Claimant's current physical impairments, in combination, prevent her from doing the medium work required of a church custodian. Although, claimant is

precluded from heavy lifting and medium work, the medical evidence of record does not show that claimant is totally unable to perform any work.

Third, claimant testified that a major impediment to her return to work was the arthritic pain in her knees, chronic back pain and fibromyalgia. 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 physical impairments. Claimant performs a significant number of activities of daily living (ADLs), has an active social life with her husband and relatives, and is able to drive an automobile approximately six times 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 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 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 18, 2009

Date Mailed: November 18, 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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