

STATE OF MICHIGAN
STATE OFFICE OF ADMINISTRATIVE HEARINGS AND RULES

ADMINISTRATIVE HEARINGS FOR THE
DEPARTMENT OF HUMAN SERVICES

IN THE MATTER OF:

██████████,

Claimant

Reg. No: 2009-25090

Issue No: 2009

Case No:

██████████

Load No:

██████████

Hearing Date:

August 26, 2009

Arenac 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 hearing was held on August 26, 2009, in Standish. The claimant personally appeared and testified under oath.

Claimant was represented by Georgia Patthanacharoenphon from L&S Associates, Inc.

The department was represented by Rick Joles (FIM).

Claimant requested additional time to submit new medical evidence. This medical evidence was receive and submitted to the State Hearing Review Team (SHRT) on August 31, 2009. Claimant waived the timeliness requirements so her new medical evidence could be reviewed by SHRT. After SHRT's second disability denial, the Administrative Law Judge made the final 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)?

(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/retro applicant (September 29, 2008) was denied by SHRT (June 15, 2009) based on claimant's ability to perform unskilled sedentary work. SHRT provided a Med-Voc Rule 201.24 as a guide. Claimant requested retro MA for June, July and August 2008.

(2) Claimant's vocational factors are: age—24; education—11th grade; post high school education—none; work experience—telemarketer, school kitchen aide, public library assistant.

(3) Claimant has not performed Substantial Gainful Activity (SGA) since February 2005 when he was in telemarketing.

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

- (a) Sciatica;
- (b) Two herniated discs;
- (c) Arthritis;
- (d) COPD;
- (e) Muscle spasms;
- (f) Chronic pain;
- (g) GERD;
- (h) Diabetes II;
- (i) Asthma;
- (j) ADD;
- (k) Osteoarthritis;
- (l) Post-traumatic stress disorder (PTSD).

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

OBJECTIVE MEDICAL EVIDENCE (June 15, 2009)

Claimant was admitted in 9/2008 due to claimant's acute exacerbation of asthma. She has bilateral pneumonia and uncontrolled diabetes (page 187).

In March 2009, claimant was 66.75 inches and 374 pounds. Breath sounds were clear. Grip strength was intact and was unimpaired (page 6). Motor strength and tone were normal. Sensory function was intact. She walks with a mild left-sided limp without the use of ambulatory device. Pulmonary function study showed her best at one was 2.5 and PVC was 2.9 (page 7).

A mental status in 10/2008 shows the claimant is logical and goal directed. She described her mood as fine and her affect was fine. Diagnosis included mood disorder, NOS and posttraumatic stress disorder (PTSD) (page 211). A comprehensive psychiatric assessment in 7/2008 shows the diagnostic impression was PTSD, mood disorder, hyperactive disorder, marijuana abuse and borderline personality disorder (page 20).

ANALYSIS:

Claimant was admitted due to acute respiratory failure that acute exacerbation of asthma and had bilateral pneumonia. In January 2009, the claimant was 374 pounds. Her FEV 1 of 2.5 was more above the Listing level of 1.35. Her FVC of 2.0 was also above the listing level of 1.5 or less for her height. She did walk with a limp. Her mental status revealed no evidence of a significant thought disorder. Claimant can do simple, unskilled sedentary work.

* * *

Claimant's with alone can perform the following Activities of Daily Living (ADLs): dressing, bathing, cooking (needs help), dishwashing (needs help), light cleaning, grocery shopping (needs help). Claimant does not use a cane, a walker, a wheelchair or shower stool. She wears a brace about three times a month on her left ankle. Claimant was hospitalized three times in 2008. Her last hospitalization was for a herniated disc. Claimant was hospitalized twice in 2009. The last hospitalization was bronchitis and asthma.

(6) Claimant has a valid driver's license but does not drive an automobile. Claimant is computer literate.

(7) The following medical records are persuasive:

(a) A [REDACTED] Narrative Report was reviewed. A consulting internist reported the following:

CHIEF COMPLAINTS:

Herniated discs, sciatica, arthritis in both hips, chronic pulmonary disease, fracture to left ankle.

The claimant states that she had a history with bilateral hip pain and she points to the bilateral greater trochanteric bursa. She also states that she thinks she fractured her left ankle in 2002. She states that her stepfather did not let her have radiographs taken until actually last week and does not have the results yet and still does not know if she is walking on a fractured ankle. She wears a soft brace around her ankle. She can walk for about a block, can stand for about 30 minutes and can sit for about 60 minutes. Her back has been bothering her as well. She states that she has herniated discs which were diagnosed in October 2008. She is dealing with sciatic pain for the past seven years. The MRI has showed the herniated discs. She has had some physical therapy but she states that her stepfather states that it is all in her head and she stopped physical therapy. She has had one injection treatment to her back, a pain block that actually made it worse in the past 6 months. She weighed at one point 452 pounds and is currently at 374 pounds.

Claimant also relates a history of diabetes. Her sugars range from 120 to 200. She has occasional hypoglycemic events. There has been no history of end organ damage. She is on Glyburide unknown dose, Metformin 500 mg BID, Lantus 50 units and Humalog sliding scale as well as hypertensive medications and for hypercholesterolemia as well.

* * *

The claimant also relates a history of emphysema and asthma. She has smoked for the past five years and has currently cut down to 3 cigarettes daily from one pack per day. She states that she easily gets short of breath climbing a flight of stairs. She wheezes on occasion. She has an occasional cough. She is not on inhaler therapy. She uses nebulized Albuterol about twice daily. She also has CPAP that she uses for her obstructive sleep apnea.

The consulting internist provided the following diagnoses:

- (1) Back pain.

There were no radicular on exam to date. The biggest problem here is the left ankle as far as mobility.

* * *

- (2) Asthma.

I do not believe that there is any emphysema here. Breath sounds on exam today were normal. Pulmonary function studies are enclosed for your review and they showed an obstructive ventilatory defect with a mild degree of reversibility with bronchodilation. Again, it would be unlike that she would have emphysema with her short history of smoking.

- (3) A [REDACTED] clinical assessment was reviewed.

* * *

The psychiatrist provided the following:

MENTAL HEALTH STATUS:

States I had a good head on my shoulders. I am not as impulsive as most people my age.

CLINICAL SUMMARY:

Claimant reports that she has had depression since she was about five years old. The onset of that depression occurred within the year after she witnessed her brother's death. She

has an extensive history of abuse and neglect; her childhood as well as a traumatic instability and home life, going from one person to another. She sometimes hears whispers and sees figures which she believes to be ghosts. She has had a history of easily being angered and trouble concentrating.

She has had a recent breakup and was evicted which shadows her previous losses. She is clearly depressed at this time, with daily suicidal thoughts. She reports that her depression has deepened with her recent losses, suggesting a diagnosis of Adjustment Disorder with depressed mood. The longer term problems with mood modulation, concentration, compulsive behavior, irritability and history of trauma are more difficult to pinpoint in a brief meeting. I would suggest a temporary diagnosis of Mood Disorder NOS and will defer to the psychiatrist for further assessment.

The consulting psychiatrist provided the following DSM diagnoses:

Axis I—mood disorder, NOS; adjustment disorder/depressed mood.

Axis V/GAF—50 (moderate).

(8) 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 has the following mental impairments: manic depression, difficulty concentrating, and post-traumatic stress disorder (PTSD). The CMH psychologist provided the following diagnoses: Axis I—mood disorder, NOS; adjustment disorder was depressed mood. Axis V/GAF—50 (moderate). The consulting psychiatrist did not report any functional limitations due to claimant's mental impairments. Claimant did not provide a DHS-49D or DHS-49E to establish her mental residual functional capacity.

(9) 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 reported the following diagnosis: sciatica, degenerative disc disease, arthritis, COPD, muscle spasms, GERD, diabetes II, asthma, ADD, osteoarthritis, and pain. The consulting internist provided the following diagnoses: (1) back pain; (2) asthma. The consulting internist did not say that claimant was totally unable to work due to her physical impairments.

(10) Claimant recently applied for federal disability benefits (SSI) for 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 benefits 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 unskilled sedentary work.

The department denied MA-P benefits based on Med-Voc Rule 201.24 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).

The department decides eligibility based on mental impairments using the following standards:

(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).

(d) Sufficient Evidence:

The evaluation of disability on the basis of a mental disorder requires sufficient evidence to: (1) establish the presence of a medically determinable mental impairment(s); (2) assess the degree of functional limitation the impairment(s) imposes; and (3) project the probable duration of the impairment(s). Medical evidence must be sufficiently complete and detailed as to symptoms, signs, and laboratory findings to permit an independent determination. In addition, we will consider information from other sources when we determine how the established impairment(s) affects your ability to function. We will consider all relevant evidence in your case record. 20 CFR 404, Subpart P, App. 1, 12.00(D).

(e) Chronic Mental Impairments:

...Chronic Mental Impairments: Particular problems are often involved in evaluating mental impairments in individuals who have long histories of repeated hospitalizations or prolonged outpatient care with supportive therapy and medication. For instance, if you have chronic organic, psychotic, and affective disorders you may commonly have your life structured in such a way as to minimize your stress and reduce your signs and symptoms.... 20 CFR 404, Subpart P, App. 1, 12.00(E).

A statement by a medical source (MSO) that an individual is “disabled” or “unable to work” does not mean that a disability exists for purposes of the MA-P program.

20 CFR 416.927(e).

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 260/261. “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.

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.

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. Unless an impairment is expected to result in death, it must have existed or be expected to exist for a continuous period of at least 12 months. 20 CFR 416.909.

Also, to qualify for MA-P, the claimant must satisfy both the gainful work and the duration criteria. 20 CFR 416.920(a).

If claimant does not have an impairment or combination of impairments that profoundly limit her physical/mental ability to do basic work activities, she does not meet the Step 2 criteria. However, under the *de minimus* rule, claimant meets the severity and duration requirements; she also 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 a Listing.

SHRT evaluated claimant's impairments and decided that claimant does not meet any of the SSI Listings. 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 previously worked as a telemarketer operating a computer and talking to customers over the phone.

Claimant's work as a telemarketer was sedentary work.

Although claimant alleges that she is unable to work based on a combination of her mental and physical impairments, the medical records do not establish an overriding functional limitation that precludes claimant's ability to perform her previous work as a telemarketer.

Claimant's recent GAF score is 50 (moderate symptoms).

Therefore, claimant has not met her burden of proof to establish that she is totally unable to return to her previous work as a telemarketer.

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 mental/physical impairments meet the department's definition of disability for MA-P purposes.

First, claimant alleges disability based on a combination of mental impairments: manic depression, difficulty concentrating, and PTSD. The clinical evidence provided by the CMH psychiatrist does not establish that claimant was totally unable to work. Furthermore, claimant did not submit a DHS-49D or DHS-49E to establish her mental residual functional capacity. For these reasons, claimant is not entitled to MA-P based on her mental impairments.

Second, claimant alleges disability based on a combination of physical impairments: sciatica, degenerative disc disease, arthritis, COPD, muscle spasms, GERD, diabetes II, asthma, and osteoarthritis chronic pain. The medical evidence of record provided by the consulting internist does not show that claimant's physical impairments totally preclude all work activities.

Third, claimant alleges disability based on her chronic hip and ankle pain. Unfortunately, evidence of pain, alone, is insufficient to establish disability for MA-P not 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. Currently, claimant performs several activities of daily living, has an active social life with her mother, and is computer literate.

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].

Consistent with this analysis, the department correctly denied claimant's MA-P 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 disability requirements under PEM 260.

Accordingly, the department's denial of claimant's MA-P application, hereby,
AFFIRMED.

SO ORDERED.

/s/ _____
Jay W. Sexton
Administrative Law Judge
for Ismael Ahmed, Director
Department of Human Services

Date Signed: February 17, 2010

Date Mailed: February 17, 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 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.

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