

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: 2009-252
Issue No: 2009; 4031
Case No: [REDACTED]
Load No: [REDACTED]
Hearing Date:
March 5, 2009
Bay 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, an in-person hearing was held on March 5, 2009 in Essexville, Michigan. Claimant was represented by [REDACTED] [REDACTED]). The department was represented by Gary Bremer (Midland County/FIS).

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)?
- (3) Did the department establish that claimant's physical/mental impairments have improved to the point the claimant is now able to return to substantial gainful activity for SDA purposes?

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 (March 27, 2008) who was denied by SHRT (October 19, 2008) due to claimant's ability to perform medium unskilled work. SHRT relied on Med-Voc Rule 203.28 as a guide. Claimant requests retro MA for December 2007 and January 2008.

(2) Claimant received SDA benefits from May 2004 to June 21, 2008. The department decided to close claimant's SDA, based on a May 2008 SDA eligibility review and a subsequent decision by MRT denying ongoing SDA benefits. Claimant's SDA was terminated because she did not file a hearing request within ten days of the negative action notice (June 9, 2008).

(3) Claimant has not performed substantial gainful activity (SGA) since January 2009 when she worked as a cashier and counter representative for [REDACTED].

(4) Claimant had the following unable-to-work complaints

- (a) Degenerative arthritis of the lower back;
- (b) Degenerative arthritis of the hips;
- (c) Fibromyalgia;
- (d) Depression;
- (e) Anxiety;
- (f) Post-traumatic stress disorder.

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

OBJECTIVE MEDICAL EVIDENCE [REDACTED]

The department decided that claimant did not meet SSI listings 1.02 and 1.04. The department decided that claimant was able to perform unskilled medium work, based on Vocational Rule 203.28, as a guide.

* * *

(6) Claimant lives in a homeless shelter in Saginaw and performs the following activities of daily living: dressing, bathing, cooking, dishwashing, light cleaning, laundry and grocery shopping. Claimant does not use a cane, walker, wheelchair or a shower stool. She does not wear a brace on her neck, back, arms or legs. Claimant received inpatient hospital treatment in [REDACTED] for a post operation infection.

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

- (8) The following medical/psychiatric reports are persuasive:

(a) A [REDACTED] psychiatric/psychological examination report (DHS-49D) was reviewed. The psychiatrist provided the following mental status examination: Claimant reports being depressed, angry and irritable. Sleep varies from too little to too much. She is overweight. She also experiences anxiety and once a day panic.

The psychiatrist provided the following DSM diagnoses: Bipolar disorder II, panic disorder, and OCD. Axis V/GAF—55.

(b) A [REDACTED] office note was reviewed.

The physician provided the following history:

Claimant is a 42-year-old in my office with generalized aches and pains and fatigue. Claimant has been diagnosed with fibromyalgia. She states she is also feeling hot and cold. Claimant was scheduled to see her regular physician, [REDACTED] this afternoon, but because of some acute health issue with [REDACTED], she seeing me this morning. Claimant states that she was referred to [REDACTED] for her fibromyalgia, but [REDACTED] referred her to a pain clinic. Claimant went to the pain clinic, but she was told to go back to her regular family doctor for chronic pain management. After looking at claimant's chart, her CDC was done back in [REDACTED], showing some mild anemia. Her TSH back in [REDACTED] was 0.01. Claimant is on Ferrosulfate two times a day. She is on Synthroid everyday. The claimant also mentioned that for the last two months, she has a chronic cough. She is not bringing out any sputum or phlegm. She denies any fever, she states she has been able to eat and sleep fine. She is a nonsmoker. She denies regular use of alcohol or illicit drug use. She denies any shortness of breath or any runny nose. No ear pain, no headache.

The physician provided the following assessment:

- (1) Generalized weakness and fatigue with fibromyalgia.

* * *

For chronic pain management, claimant is instructed to follow up with [REDACTED]. In between, claimant will take Tylenol and Motrin.

* * *

- (2) Chronic cough without any fever.

* * *

(9) The probative psychiatric evidence does not establish an acute (non-exertional) condition which prevents claimant from performing all customary work functions for the required period of time. Claimant testified that she is unable to work because of her depression, anxiety and bipolar disorder. She also testified that she quit her job at [REDACTED] because she

became homeless and had no transportation to work. The psychiatrist who prepared the DHS-49D [REDACTED] did not state that claimant was totally unable to work. He did state that claimant was able to manage her funds. The psychiatric record at this time, does not establish an impairment that fully precludes substantial gainful activity.

(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 prior period of time. The most recent physical examination report [REDACTED] reports the following chief complaints: (1) fatigue and generalized ache; (2) cough. The physician provided the following assessment: (1) generalized weakness and fatigue with history of fibromyalgia; (2) chronic cough without any fever. The recent internal medicine report does not state that claimant is totally unable to work.

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

CONCLUSIONS OF LAW

CLAIMANT'S POSITION

Claimant thinks she is entitled to MA-P based on the impairments listed in Paragraph #4, above.

DEPARTMENT'S POSITION

The department thinks that claimant has the residual functional capacity to perform unskilled medium work. The department relied on Med-Voc Rule 203.28. The department denied MA-P benefits because claimant failed to document any significant functional limitations that would support a disability determination.

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 does 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 affect 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).

The claimant has the burden of proof to prove 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. "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 is 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.

Claimant must establish an impairment which is expected to result in death or has existed for a continuous period of 12 months, thereby preventing all basic work activities. 20 CFR 416.909.

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

STEP #3

The issue at Step 3 is whether claimant meets the Listing of Impairments in the SSI regulations. SHRT considered the following Listings: 1.02 and 1.04. Claimant does not meet

the intent or severity of the relevant 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 previously worked as a cashier and counter representative for [REDACTED].

There was no medical evidence in the record to establish that claimant is unable to return to her sedentary job as a cashier and counter representative for [REDACTED].

Since claimant is able to return to her previous work, 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/vocational evidence in the record, that her combined mental/physical impairments meet the department's definition of disability for MA-P purposes.

First, claimant alleges disability based on depression, post-traumatic syndrome, and anxiety disorder. Recent medical evidence shows a diagnosis provided by a consulting psychiatrist of Bipolar Disorder II, panic disorder and OCP. The psychiatrist provided an Axis V/GAF score of 55 (moderate). The consulting psychiatrist did not state that claimant is totally unable to work due to a combination of mental impairments.

Second, claimant alleges disability based on degenerative arthritis of the low back and hips in combination of fibromyalgia. The most recent medical report ([REDACTED]) provides an assessment of generalized weakness and fatigue with a history of fibromyalgia. The

physician also provided a secondary diagnosis of chronic cough without any fever. The report of the internist, which is the most recent medical evidence of record, does not establish that claimant is totally unable to perform any work.

During the hearing, claimant testified that a major impairment to her return to work was her degenerative arthritis in the low back and bilateral hips, in combination with fibromyalgia. 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 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 back dysfunction, hip dysfunction, fibromyalgia, depression, post-traumatic stress syndrome, post-traumatic stress disorder and anxiety disorder. Claimant currently performs an extensive list of activities of daily living and has an active social life at the homeless shelter where she currently lives. Considering the entire medical record, in combination of claimant's testimony, the Administrative Law Judge concludes that claimant is able to perform unskilled sedentary work (SGA) at this time. In this capacity, claimant is able to work as a ticket taker for a theater, as a parking lot attendant and as a greeter for [REDACTED].

Based on this analysis, the department correctly denied claimant's MA-P application based on Step 5 of the sequential evaluation analysis as presented above.

DEFECTIVE SDA ELIGIBILITY REVIEW

In addition to the matter of claimant's eligibility for MA-P, the claimant objects to the denial of her request for continued SDA benefits.

In short, the credible and substantial evidence on the record shows that SHRT lumped claimant's SDA review into the consideration of claimant's MA-P application.

Claimant's SDA review requires a comprehensive review of claimant's medical/psychiatric evidence to determine whether claimant has sufficiently improved from the physical and mental impairments she had in 2007, so she is now able to perform substantial gainful activity. SHRT failed to evaluate claimant's SDA eligibility using the review standard found in PEM 260.

As a consequence, SHRT did not apply the review standard required by federal and state law and policy (PEM 260).

The burden of proof to show that claimant's physical/mental impairments have improved to the extent that claimant is now able to perform substantial gainful activity, for SDA purposes, was not done. Also, SHRT did not provide a recent physical and mental exam to show that claimant's conditions have improved to the point that she is now able to work. Due to these omissions, SHRT committed reversible error with respect to the review of claimant's SDA eligibility.

For these reasons, the Administrative Law Judge must reverse the SHRT decision denying claimant ongoing SDA benefits.

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.

For reasons explained above, the Administrative Law Judge decides that claimant's SDA cannot be terminated at this time because the department did not provide claimant with a "full

review" of her physical/mental impairments as required by federal and state law in policy (PEM 261).

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

The department's denial of the claimant's SDA application is, hereby, **REVERSED**.

The department is hereby **ORDERED** to open claimant's SDA benefits until an appropriate review, with proper current clinical evidence, has been completed.

SO ORDERED.

/s/

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

Date Signed: March 9, 2009

Date Mailed: March 10, 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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cc:

