

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: 2009-26372
Issue No: 2009
Case No: [REDACTED]
Load No: [REDACTED]
Hearing Date:
October 7, 2009
Saginaw 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 in Saginaw on October 7, 2009. Claimant personally appeared and testified under oath. Claimant was represented by [REDACTED].

The department was represented by Erlinda Martinez (FIM) and Annie McLaurin (ES).

Claimant requested additional time to submit new medical evidence. The new medical evidence was mailed to the State Hearing Review Team (SHRT) on October 8, 2009. Claimant waived the timeliness requirement so his new medical evidence could be reviewed by SHRT. After SHRT's second disability denial, the Administrative Law Judge issued the decision below.

ISSUES

- (1) Did claimant establish a severe mental impairment expected to preclude him from substantial gainful work, **continuously**, for one year (MA-P)?
- (2) Did claimant establish a severe physical impairment expected to preclude him 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 (November 12, 2009) who was denied by SHRT (June 25, 2009) based on claimant's ability to perform unskilled light work. SHRT relied on Med-Voc Rule 202.20 as a guide. Claimant requests retro MA to July 2008. However, claimant's retro application (DHS-3243) was received in the Saginaw DHS Mailroom on November 12, 2008. Therefore, claimant did not establish retro eligibility for July.

(2) Claimant's vocational factors are: age--45; education—high school diploma, post-high school education—one semester at [REDACTED] (accounting and data processing major; work experience—car wash attendant and car wash assistant manager.

(3) Claimant has not performed Substantial Gainful Activity (SGA) since 2002, when he was a car wash attendant.

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

- (a) Bulging discs;
- (b) Neuropathy of lower legs and feet;
- (c) Status-post right big toe amputation;
- (d) Diabetic sore on left foot;
- (e) Back pain
- (f) Diabetes;
- (g) Major depression;
- (h) Personality disorder;
- (i) Alcohol dependence; and
- (j) Diabetes mellitus with neuropathy.

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

OBJECTIVE MEDICAL EVIDENCE (June 25, 2009)

The department thinks that claimant is able to perform light, unskilled work. 20 CFR 416.967(b).

The department denied MA-P benefits based on claimant's vocational profile [younger individual (age 45) with a high school education and a history of semi-skilled work].

* * *

(6) Claimant lives with a friend in a house owned by his mother. The friend receives free room and board in return for doing household and landscaping chores. Claimant performs the following Activities of Daily Living (ADLs): dressing, bathing, cooking, laundry and grocery shopping (needs help). Claimant uses a cane approximately 15 times a month. He does not use a walker, a wheelchair or a shower stool. He does not wear braces. Claimant was hospitalized in 2008 to receive treatment for a broken jaw. He was hospitalized twice in 2009 for injuries arising out of an attempted robbery.

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

(8) The following medical records are persuasive:

(a) A [REDACTED] physical examination report was reviewed. The internist provided the following background:

This is a 45-year-old Hispanic gentleman, who presented today with a chief complaint of a wound in his right second toe. Claimant has a history of diabetic neuropathy and also a history of osteomyelitis of the right first toe for which he had an amputation in the past. This was 5-7 years ago. After this, claimant mentioned that he predominantly used to bear the weight on his second toe and that was his main weight-bearing foot. Claimant does not have any sensation in his distal part of the foot and keeps having this thickening of the skin. Claimant mentioned that he would peel off the skin by himself in order to remove the dead skin. Claimant complains of wound in his right second toe, which was insidious in onset, due to plaquing of the skin and gradually worsened. Claimant went to his primary care physician this morning to evaluate him and refer him to the emergency department for probable osteomyelitis. Claimant was evaluated in the emergency department.

Claimant denies any pain in the wound. He did mention sensations in his lower extremities. Claimant also complains of claudication type of pain in both the calf muscles with claudication distance being two blocks. He denied any history of fever, chills or rigors. He denies any cough or shortness of breath. No dysuria, no pain in the abdomen. No nausea, no vomiting, no headache, no blurring of vision.

The internist provided the following assessment: (1) Acute osteomyelitis of the right second toe secondary to wound infection. (2) Hyperkalemia secondary to acute versus acute-on-chronic kidney injury. (3) Acute versus acute-on-chronic kidney injury. (4) Diabetes mellitus for which the patient will be continuing on his home medications. (5) Hypertension. (6) History of hyperlipidemia. (7) Anxiety and depression. (8) History of first toe osteomyelitis, status-post amputation. (9) History of tooth abscess. (10) History of diabetic neuropathy. (11) History of chronic back pain. (12) Erectile dysfunction. (13) History of hepatitis C. (14) Nicotine abuse for which claimant was counseled. (15) Alcoholism for which claimant was counseled. (16) GI and DVT prophylaxis.

* * *

NOTE: The [REDACTED] internist did not state that claimant was totally unable to work.

(9) Claimant alleges disability based on a combination of mental impairments: anxiety and depression. Claimant did not submit any clinical evidence, from a psychiatrist or Ph.D. psychologist, to establish his current mental status. In addition, claimant did not provide a DHS-49D or a DHS-49E to establish his mental residual functional capacity.

(10) Claimant alleges disability based on a combination of physical impairments (bulging discs, neuropathy in the lower legs and feet, status-post big toe amputation (right), left foot-toe infection, diabetes, and chronic back pain). At this time, the medical records do not establish any severe functional limitations arising out of claimant's physical impairments. The medical records do show claimant has difficulty walking. Claimant is currently ambulating with the assistance of a cane.

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

CONCLUSIONS OF LAW

CLAIMANT'S POSITION

Claimant's position is summarized by [REDACTED]

* * *

Claimant is a 45-year-old male who has the following health issues: acute and severe renal insufficiency, long-standing diabetic, markedly hypertensive, and partial amputation of right foot, neuropathy, depression, anxiety, chronic back pain and hepatitis C.

DEPARTMENT'S POSITION

The department thinks that claimant has the Residual Functional Capacity (RFC) to perform unskilled light work.

The department denied MA-P benefits based on Med-Voc Rule 202.20 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 statement by a medical source (MSO) that an individual is "disabled" or "unable to work" does not mean that disability exists for the 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 his 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 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, he is not disabled 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 claimant must satisfy both the gainful work and the duration criteria. 20 CFR 416.920(a).

Using the *de minimus* rule, claimant meets the severity and duration requirements and 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 using all the listings at 20 CFR 404, Subpart P. Claimant does not meet any of the applicable 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 his previous work. Claimant previously worked as a car wash attendant. Claimant's work as a car wash attendant was light work and required him to stand on his feet constantly.

Since the amputation of claimant's right big toe, he has difficulty standing without the assistance of a cane. Given claimant's difficulties standing and walking, he is not able to return to his previous work as a car wash attendant.

Therefore, claimant has met his burden of proof to establish that he is unable to return to his work as a car wash attendant.

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 his 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 (depression and anxiety). Claimant did not submit any clinical evidence from a psychiatrist or a Ph.D. psychologist to delineate exactly what claimant's mental capacity currently is. Furthermore, claimant did not submit a DHS-49D or a DHS-49E to establish his mental residual functional capacity. For these reasons, claimant is not entitled to MA-P based on his mental impairments.

Second, claimant alleges disability based on a combination of physical impairments: bulging discs, neuropathy in both legs and feet, status-post right big toe amputation, diabetic sore on left foot, and diabetes. The medical examination report ([REDACTED]) from [REDACTED] [REDACTED] provides the following diagnoses: (1) Acute osteomyelitis of the right second toe secondary to wound infection. (2) Hyperkalemia secondary to acute versus acute-on-chronic kidney injury. (3) Acute versus acute-on-chronic kidney injury. (4) Diabetes mellitus for which the patient will be continuing on his home medications. (5) Hypertension. (6) History of hyperlipidemia. (7) Anxiety and depression. (8) History of first toe osteomyelitis, status-post amputation. (9) History of tooth abscess. (10) History of diabetic neuropathy. (11) History of chronic back pain. (12) Erectile dysfunction. (13) History of hepatitis C. (14) Nicotine abuse. (15) Alcoholism. (16) GI and DVT prophylaxis.

The medical evidence of record does establish that claimant has difficulty walking and standing for more than 15 minutes at a time. However, there is no probative medical evidence in the record to show that claimant's physical impairments totally preclude him from performing all work activities.

Third, claimant testified that a major impediment to his return to work was his chronic back pain. Unfortunately, evidence of pain, alone, is insufficient to establish disability for MA-P purposes.

The Administrative Law Judge concludes that claimant's testimony about his 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 his combination of impairments. Currently, claimant performs many activities of

daily living, and has an active social life with his roommate, his sister and his brother, who live nearby. In addition, claimant 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). While it is true claimant may need to use a walker or a wheelchair in the future, there are many jobs that can be performed by people who have difficulty walking and/or standing. In this capacity, claimant is able to work as a ticket taker for a theatre, as a parking lot attendant, and as a greeter for [REDACTED]. Because of the handicapper laws recently enacted in the United States, there are many jobs available for persons with handicaps similar to claimant's.

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 is, hereby,
AFFIRMED.

SO ORDERED.

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

Date Signed: March 9, 2010

Date Mailed: March 9, 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 mailing date of the rehearing decision.

JWS/tg

cc:

