

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: 2009-26565
Issue No: 2009
Case No: [REDACTED]
Load No: [REDACTED]
Hearing Date:
August 27, 2009
Huron 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 August 27, 2009, in Bad Axe. Claimant was represented by [REDACTED] from [REDACTED].

The department was represented by Julie Booms (FIM).

The Administrative Law Judge appeared by telephone from Lansing.

Claimant requested additional time to submit new medical evidence. The new medical evidence was received and submitted to the State Hearing Review Team on August 31, 2009. Claimant waived the timeliness requirement 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 applicant (February 26, 2009) who was denied by SHRT (July 1, 2009) based on claimant's failure to establish an impairment which meets the department's severity and duration requirements.

(2) Claimant's vocational factors are: age--58; education--high school diploma; post high school education--one semester at [REDACTED] (restaurant management); work experience--short order cook at [REDACTED] restaurant, cook at [REDACTED], cook at [REDACTED], and restaurant manager.

(3) Claimant has not performed Substantial Gainful Activity (SGA) since November 2008 when she was a short order cook at [REDACTED].

- (4) Claimant has the following unable-to-work complaints:
- (a) Left knee dysfunction;
 - (b) Status post cancer surgery;
 - (c) Status post spleen removal;
 - (d) Inability to stand for long periods.

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

OBJECTIVE MEDICAL EVIDENCE (July 1, 2009)

Claimant had a fall on her knee in 7/08. She was found to have a meniscal tear and was also found to have a large soft tissue mass in the lateral knee which was removed at the time of her arthroscopy. The mass turned out to be a liposarcoma (page 21).

In 3/09 she underwent further surgery to get clear margins (page 26).

A DHS-49 form dated 3/09 shows the claimant's examination is normal, except for the left knee (page 19).

ANALYSIS:

The claimant was found to have a soft tissue sarcoma of the knee which was removed and the margins were clear after the second surgery. There is no evidence of metastases or recurrence and therefore her cancer does not meet the listing level of severity. Her condition is not expected to prevent all types of work for 12 months in a row.

* * *

- (6) Claimant lives alone and performs the following Activities of Daily Living (ADLs): dressing, bathing, cooking, dishwashing, light cleaning, laundry and grocery shopping (sometimes). Claimant uses a cane 28 times a month. She does not use a walker, wheelchair, or shower stool. She does not wear braces. Claimant was hospitalized in 2009 for removal of her spleen. She was not hospitalized in 2008.

- (7) Claimant has valid driver's license and drives an automobile approximately eight times a month. Claimant is not computer literate.

- (8) The following medical records are persuasive:
- (a) An August 26, 2009 Medical Examination Report (DHS-49) was reviewed. The physician provided the following diagnoses:
- (1) Left knee pain
 - (2) Major depression;
 - (3) Status post resection of a liposarcoma from left knee.

The physician provided the following functional limitations:

Claimant is able to lift 10 pounds frequently. She is able to lift 20 pounds occasionally. She is able to stand/walk less than two hours in an eight-hour day. She is able to sit about six hours in an eight-hour day. Claimant is able to use her hands/arms normally. She is able to use her right leg normally, but unable to use her left leg due to recent surgery.

The physician did not state that the claimant is totally unable to work.

- (b) On April 24, 2009, Medical Examination Report was reviewed.

The physician provided the following subjective assessment:

Claimant returns back to the office today. I received a phone call from [REDACTED] today that has seen the patient and follow up. Evidently, claimant was breaking down crying. This has been going on for quite sometime. A lot of anxiety. She is now having trouble sleeping. Things are just getting progressively worse. She is dealing with the death of her mother and this pain in her leg and now liposarcoma that they found. She is finished having her surgeries with that, but they have also found a spot on her spleen.

We have an appointment for her to see [REDACTED] next week in regards to that, but in terms of the patient breaking down and crying for any good reason, she has lost her zest for life. She does not want to do anything. She is not

motivated. She reports a lot of fatigue. There are times she cannot sleep at night and there are times she is so exhausted she will take frequent naps. She is not working at this time because of her leg.

The physician provided the following assessment:

- (1) Major depression;
- (2) Generalized anxiety disorder;
- (3) Mass on spleen;
- (4) History of liposarcoma of her left knee.

* * *

The physician did not report that claimant is totally unable to work.

* * *

(9) The probative medical evidence does not establish an acute (non-exertional) mental condition expected to preclude claimant from performing all customary work functions for the required period of time. Claimant did not submit any evidence of a mental impairment from a clinician.

Claimant did not allege a mental impairment as the basis for her disability. There is no clinical evidence of a severe mental impairment in the record. Claimant did not provide a DHS-49D or DHS-49E to establish her 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 reported the following physical impairments:

- (a) Left knee dysfunction;
- (b) Status post cancer surgery on left knee;
- (c) Status post spleen removal;
- (d) Inability to stand for long periods.

At this time, the medical records do not establish a severe functional limitation arising out of claimant's physical impairments.

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

CONCLUSIONS OF LAW

CLAIMANT'S POSITION

Claimant thinks she is entitled to MA-P/SDA 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 normal work activities. The department thinks there is no evidence of metastases for recurrence of the liposarcoma, and therefore, her cancer does not meet a listing level of severity.

The department does not expect that claimant's recent cancer surgeries (two) will prevent all types of substantial gainful employment for 12 months in a row.

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).

A statement by a medical source (MSO) that an individual is “disabled” or “unable to work” does not mean that 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. “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 and the Step 2 disability criteria.

STEP #3

The issue at Step 3 is whether the 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 the applicable SSI Listings.

Claimant does not meet any of the applicable SSI Listings.

STEP #4

The issue at Step 4 is whether claimant is able to do her previous work. Claimant previously worked as a short order cook for a restaurant.

Claimant's work as a short order cook required that she be able to stand continuously for the entire eight-hour shift. Because claimant recently had surgery on her left knee, she is unable to do the standing required of her previous job as a short order cook.

Therefore, claimant met her burden of proof to establish that she is unable to return to her previous work as a short order cook.

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/SDA purposes.

First, claimant does not allege disability based on a mental impairment. Also, claimant did not submit a DHS-49D or DHS-49E to establish her mental residual functional capacity. Claimant did not submit any clinical evidence of a severe impairment from a Ph.D. psychologist. For these reasons, claimant is not entitled to MA-P disability based on mental impairments.

Second, claimant alleges disability based on her physical impairments: left knee dysfunction, status post left knee cancer surgery; status post spleen cancer surgery and inability to stand for long periods. There is no probative medical evidence in the record to show that claimant's physical impairments totally prevent her from performing normal work activities.

In summary, claimant performs many activities of daily living, and drives an automobile approximately eight times a month. Claimant has ongoing social contacts with members of her church, and she drives an automobile approximately eight 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 was able to work as a ticket taker for a theater, as a parking lot attendant, and as a greeter for [REDACTED]. Work of this type would afford claimant a sit-stand option while her left leg is recovering from surgery.

Based on 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 standards under PEM 260.

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

SO ORDERED.

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

Date Signed: March 29, 2010

Date Mailed: March 30, 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.

JWS/tg

cc:

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