

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: 2007-20888;  
2009-278

Issue No: 2009; 4031

Case No: [REDACTED]

Load No: [REDACTED]

Hearing Date:

April 2, 2009

Mackinac 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 St. Ignace on April 2, 2009. Claimant personally appeared and testified under oath.

The department was represented by Stephanie Newreither (ES); Amber Tuzinowski (ES) and Elsie McDonald (ES).

Claimant requested additional time to submit new medical evidence. Claimant's new medical evidence was sent to the State Hearing Review Team (SHRT) on April 6, 2009. Claimant waived the timeliness requirement so that her 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 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/SDA applicant (March 1, 2007 and April 30, 2008) who was denied by SHRT (March 23, 2007, August 19, 2007 and October 7, 2008) due to insufficient medical evidence.

(2) Claimant's vocational factors are: age—45; education—high school diploma, post-high school education—2 years at [REDACTED] and coursework at a community college (Medical Assistant program); work experience—cook and salad bar assistant at [REDACTED], concrete construction worker (pour and finish), heavy equipment operator (loader and backhoe).

(3) Claimant has not performed Substantial Gainful Activity (SGA) since 2008 when she worked at [REDACTED] as a cook and salad bar assistant.

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

- (a) Seizures;
- (b) Unable to drive due to seizures;
- (c) I don't know who I am;
- (d) TMJ;
- (e) Memory dysfunction;
- (f) Clumsy when walking;
- (g) Frequent unexpected falls;
- (h) Fibromyalgia;
- (i) Inability to write.

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

**OBJECTIVE MEDICAL EVIDENCE (AUGUST 9, 2007)**

From 7/2006 to 3/2007, claimant was seen by a psychiatrist and therapist for alcohol and drug abuse, eating disorder and depression. Her mental status examinations were normal with depressed affect. She was diagnosed with eating disorder, alcohol dependence, polysubstance abuse (pages 46-65). Additional medical records show frequent for TMJ pain and headaches (page 4a and 42a).

**ANALYSIS:**

The objective medical evidence presented does not establish a disabling mental or physical impairment that would preclude basic work activity. Her primary problem appears to be ongoing drug and alcohol abuse.

**SUPPLEMENTAL MEDICAL EVIDENCE (OCTOBER 7, 2008)**

The department evaluated claimant's impairments using the following SSI Listings: 1.02, 1.04, 3.01, 12.02, 12.04, 12.06, and 12.08.

SHRT decided that claimant did not qualify for MA-P/SDA due to insufficient evidence.

SHRT also requested a complete independent physical consultative examination by an internist; and an independent consultative psychiatric examination.

\* \* \*

(6) Claimant lives with a friend and performs the following Activities of Daily Living (ADLs): dressing, bathing, cooking (sometimes), dish washing, vacuuming (sometimes), laundry and grocery shopping (needs help). Claimant uses a cane approximately 5 times a month. She uses an electric wheelchair at the grocery store approximately twice a month. She does not use a walker or a shower stool. She wears ankle braces approximately twice a month. Claimant received inpatient hospitalization in 2008 and 2009 for her seizure disorder.

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

(8) The following medical records are persuasive:

1: A [REDACTED] consultative physical examination was reviewed.

The consulting internist provided the following background:

Chief Complaints: Fibromyalgia, TMJ and seizures.

Claimant was diagnosed with Fibromyalgia over the past 7 years. She generally complains of pain in her knees, ankles, legs and hands. She had arthroscopic intervention to both knees in the past. She has had physical therapy for about 2 months, but is not undergoing any treatment now. She takes Lortab, up to 5 tablets a day, and Xanax, 1mg as needed. She does not use a walking stick to ambulate.

Claimant has also had a history of seizures over the past. She states her last seizure was 2 weeks ago. She states post ictally. She is lethargic with diminished memory and confusion. She does complain of intermittent urinary incontinence. She denies any lacerations or fractures. She is not on any seizure agents. She does have a history of alcoholism. She states she drinks about one-half pint of liquor per day and occasional beer and wine, but states she has not drank since one night ago.

Claimant has not worked since 2008. She used to work for [REDACTED], mostly doing "a sit-down job." She now lives with a friend. She states she is currently looking for housing. She does drive due to her seizures, but can do her activities of daily living. She does not know how long she can sit. She can stand about 20 minutes and walk about one block. She cannot lift anything more than 10 pounds.

\* \* \*

#### CONCLUSIONS:

(1) Fibromyalgia. Much of her symptomatology does not appear to be organic in origin. She does have a history of alcoholism and depression. Her seizures appear to be withdrawal seizures. There were no findings of cirrhotic disease today. She did not appear encephalopathic, but was somewhat belligerent. She was not tremulous. A neuropsych evaluation would be helpful; she does continue to actively drink. X-ray of her lumbar spine is enclosed for your review.

\* \* \*

II: A February 11, 2009 psychiatric/psychological medical report was reviewed.

The psychologist provided the following history:

- (a) **Complaints and Symptoms:** Claimant was previously involved in construction. She has applied for Social Security Disability Benefits and is represented by an attorney.

In person, claimant indicated she could not work because she has seizures and fibromyalgia. The onset of her seizure disorder has been within the past year. She noted she was kept in the hospital for 5 days in [REDACTED]. She reported there was an abnormal test (EEG)? Claimant could not be specific about the frequency of her seizures stating, "It's so sporadic, I can't really give you", and then noted she had 5 the first day that she experienced seizures. Her fibromyalgia has been getting worse. She was diagnosed with that condition 3 years ago. She indicated she experiences joint pain and has trouble with stairs and picking things up. She noted that she has fallen downstairs and suffered bruises. Her usual pain level is 7/10 because she is fairly tolerant of pain.

- (b) **Treatment/Medications:**

\* \* \*

Claimant is not involved in mental health treatment at this time. She has no history of inpatient psychiatric care as she, "wouldn't do that." Claimant was previously was involved in outpatient mental health treatment but, "it didn't work for me." She indicated she went to a blue building in St. Ignace, but gave up counseling, because she could not get anybody to see her. She stated, "I don't give a shit anymore." Claimant also was kind of depressed after a motor vehicle accident in 2003. She was a passenger in a vehicle that was hit by a kid who fell asleep at the wheel. She had bilateral knee surgery and continues to experience pain.

III: **Personal History:**

\* \* \*

Claimant attended public school. She was never retained or enrolled in special education services. She was suspended from school and/or was always in the principal's office. She stated she did not know why she was in trouble for, "just normal stupid shit kids do." She participated in

swimming. She believed she could get A's if she wanted to, but she didn't like school. Consequently, her grades were mostly D-E except for an A in Biology which she liked and she did most poorly in math. She graduated from high school with the Class of 1981. She subsequently attended [REDACTED] for a year, later attended [REDACTED] and also attended [REDACTED]. She estimated that she has roughly 3 years of college credits. She was initially interested in pursuing a nursing degree until AIDS came out and then she decided that she didn't want to pursue nursing. Once again her grades were poor in math but otherwise she did fine.

\* \* \*

Claimant reported that she has always worked in construction, all the way from concrete work to doing clean-up side jobs. She estimated she had been in construction the last 10 to 15 years. When she was younger, she was a waitress, but because she cannot handle people, she got pissed-off and squirted ketchup on a guy.

\* \* \*

IV: Mental Status, Description of:

\* \* \*

When the examiner asked claimant about her self-esteem, she stated that despite everything she did not know and then noted she has both good and bad days. Her motivation is "not much there." She indicated that she is motivated when she has to be. Her insight appears to be markedly impaired. She complained that her energy level is not too high. She described her sleep as horrible as she wakes up all the time. She described early and middle insomnia and experiences horrible nightmares. With respect to her appetite, she stated she doesn't eat. In regard to sex drive and interest she stated she doesn't see anybody that she likes right now.

\* \* \*

V: Diagnosis:

Axis I—polysubstance abuse including alcohol whiskey, marijuana and Xanax.

Pain Disorder with Medical and Psychological Factors.

Probable substance abuse induced hallucinations.

Alcohol induced mood disorder.

Rule-out cognitive disorder, NOS, due to chronic polysubstance abuse.

\* \* \*

Axis V/GAF—48.

(9) The probative psychological 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 did not allege a mental impairment as the basis for disability. The consulting psychological evaluation provides the following diagnoses: Axis I—polysubstance abuse; pain disorder with medical and psychological factors; probable substance abuse hallucinations; alcohol induced mood disorder; rule out cognitive disorder NOS. Claimant did not provide a DHS-49D or a DHS-49E to show 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. The consulting internist provided the following impairments: Fibromyalgia. Much of her symptomatology does not appear to be organic in origin. She does have a history of alcoholism and depression. Her seizures appear to be withdrawal seizures. There was no finding of cirrhotic disease today.

(11) Claimant recently applied for federal disability benefits with the Social Security Administration. Social Security denied her application; claimant has filed a 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 does not meet the requirements for MA-P/SDA due to a lack of relevant/current medical information.

The department also requested that claimant provide a complete independent physical consultative exam and an independent consultative psychiatric exam.

### **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).

To determine to what degree a mental impairment limits claimant's 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 Functions.**

...**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).

**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 eligible for MA-P/SDA.

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 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 at least 12 months, thereby preventing all current 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, 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 evaluated claimant's disabilities using the following SSI Listings: 1.02; 1.04; 3.01; 12.02; 12.04; 12.06; 12.08.

SHRT determined that claimant does not meet the requirements of the applicable 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 cook and a salad bar aid at [REDACTED]. Claimant's work at [REDACTED] was sedentary work.

There is no medical evidence in the record to establish that claimant is unable to return to her work at [REDACTED]. The consultative examination by the internist provides a diagnosis of fibromyalgia. However, the internist states that much of claimant's symptomatology does not appear to be organic in origin. She does have a history of alcoholism and depression. He also states that claimant's seizures appear to be withdrawal seizures.

Therefore, based on the combined medical evidence, claimant is able to return to her previous work at [REDACTED].

Claimant 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/psychological evidence in the record, that her combined impairments meet the department's definition of disability for MA-P/SDA purposes.

First, claimant alleges disability based on poor memory and for I don't know who I am. However, claimant does not specifically allege disability based on a mental impairment. The consulting psychologist provided the following diagnoses: Axis I—polysubstance abuse; pain disorder with medical and psychological factors; probable substance abuse hallucinations; alcohol induced mood disorder; rule-out cognitive disorder, NOS. Also, claimant did not submit a DHS-49D or a DHS-49E to establish her mental residual functional capacity.

Second, claimant thinks he is disabled based on her medical impairments (seizures, TMJ, clumsiness, frequent falls, and fibromyalgia). However, the consultative report prepared by the internist does not indicate a severe impairment that would totally preclude all employment. His only diagnosis is fibromyalgia and he states that much of her symptomatology does not appear to

be organic in origin. Furthermore, he states that claimant has a history of alcoholism and depression and her seizures appear to be withdrawal seizures. Clearly, the medical evidence provided by the consulting internist does not establish a severe impairment that precludes all work activities.

During the hearing, claimant testified that a major impediment to her return to work was body pain (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 combined impairments. Claimant currently performs many activities of daily living and has an active social life with her roommate.

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 physically able to work as a ticket taker at a theatre, as a parking lot attendant, and as a greeter at [REDACTED] and as a salad bar aid for [REDACTED].

Based on this analysis, the department correctly denied claimant's MA-P/SDA 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/SDA disability requirements under PEM 260/261.

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

Date Signed: August 6, 2009

Date Mailed: August 6, 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 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/sd

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