

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: 2009-29525
Issue No: 2009; 4031
Case No: [REDACTED]
Load No: [REDACTED]
Hearing Date:
October 13, 2009
Otsego 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 October 13, 2009 in Gaylord. Claimant personally appeared and testified under oath.

The department was represented by Dale Terryberry (Program Manager) and Cindy Hoover (ES).

Claimant requested additional time to submit new medical evidence. Claimant's new medical evidence was mailed to the State Hearing Review Team on October 19, 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 the department provide probative psychiatric evidence to show marked improvement in claimant's mental condition to the degree that claimant is now able to perform Substantial Gainful Activity (SGA) on a **continuous** basis?

(2) Did the department provide probative medical evidence to show marked improvement in claimant's physical condition to the degree that claimant is now able to perform Substantial Gainful Activity (SGA) on a **continuous** basis?

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 a current MA-P/SDA recipient who had an eligibility review in May 2009.

(2) Claimant's MA-P/SDA benefits were scheduled for cancellation due to an MRT review and denial.

(3) On June 2, 2009, the local office notified claimant that MRT had denied ongoing MA-P/SDA benefits.

(4) On June 12, 2009, claimant filed a timely hearing request. The local office suspended the proposed closure of claimant's MA-P/SDA pending the results of this hearing.

(5) Claimant's vocational factors are: age—53; education—high school diploma; post high school education—two semesters at [REDACTED] (Journalism major); work history—broadcaster at [REDACTED] for seven years. Claimant has worked in the broadcasting industry for a total of 34 years.

(6) Claimant has not performed Substantial Gainful Activity (SGA) since 2006 when he was a broadcaster at [REDACTED].

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

- (a) Bilateral ear dysfunction;
- (b) Acute hearing loss in both ears;
- (c) Neck dysfunction;
- (d) Back dysfunction;
- (e) Lost hearing in 2007;
- (f) Left leg dysfunction;

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

OBJECTIVE MEDICAL EVIDENCE (July 29, 2009):

SHRT denied ongoing MA-P/SDA for the following reason:

Unable to assess condition. This is an SDA and MA-P claim and there is no prior file to make a comparison for potential medical improvement. Please obtain and return file when prior medical determination has been received.

* * *

(9) Claimant lives with his brother and performs the following Activities of Daily Living (ADLs): dressing, bathing, cooking (sometimes), dishwashing (sometimes), light cleaning (sometimes), laundry and grocery shopping (sometimes). Claimant does not use a cane, walker or wheelchair or a shower stool. Claimant does not wear braces. Claimant was hospitalized twice in 2008 for ear surgery. Claimant was not hospitalized in 2009.

(10) Claimant has a valid driver's license and drives an automobile approximately eight times a month. Claimant is computer literate.

(11) The following medical records are persuasive:

- (a) A [REDACTED] Narrative Report was reviewed. The physician provided the following analysis:

I had the privilege of seeing claimant back in consultation for his severe bilateral chronic otitis media.

Fortunately, following both the left and right tympanomastoidectomies last year, he has had a large improvement of hearing. He no longer needs to carry a [REDACTED] microphone and amplifier with him.

Examination reveals that both mastoids continue to accumulate significant amount creuminous debris, so a complex debridement was performed bilaterally. Once this was done, hearing improves further. He is able to communicate nowadays without a microphone or amplifier, but he is interested in trying to pursue a hearing aid. He had considered a BAHA in the past, but he says insurance will not allow that at this time.

Both grafted drums looked fine. The incrus strut is in good position on the left and conductive hearing loss is completely resolved. Sensorineural hearing loss is the same. The mixed hearing loss in the opposite ear continues to be relatively severe. There was a small perforation of the drum where they were going to consider a myringotomy, so we will simply let this act as a myringotomy for now. Gention violet powder applied.

In order to reduce the cerumen accumulations, I have asked that he try to alternate 100 strength peroxide drops with one-half strength vinegar and then some occasional Ciprodex drops. I will see him back for debridement in about four months.

* * *

(12) Claimant does not allege disability based on a severe mental impairment.

(13) The probative medical evidence establishes an acute physical impairment expected to prevent claimant from performing all customary work functions for the required period of time. Claimant continues to have a severe hearing impairment should the extent of during the hearing he used a [REDACTED] microphone and head set in order to hear the proceedings.

(14) Claimant's testimony at the hearing, in combination with the [REDACTED] [REDACTED]) establishes that while there has been some improvement in claimant's acute bilateral hearing dysfunction, claimant still has a massive hearing loss which makes it difficult for him to function socially and in a working environment. The current medical records ([REDACTED] records) establish that claimant's severe bilateral hearing loss, has improved slightly, but not to the point where claimant is totally able to perform jobs which require normal hearing acuity.

(15) Claimant recently applied for federal disability benefits (SSI) with the Social Security Administration. His application is currently pending.

CONCLUSIONS OF LAW

CLAIMANT'S POSITION

Claimant thinks he is entitled to a continuation of his MA-P/SDA benefits based on the impairments listed in Paragraph #4, above.

In particular, claimant thinks that he has a severe hearing impairment (severe bilateral chronic otitis media). Furthermore, claimant was recently hospitalized for two days (2008) in order to have ear surgery. The 2008 ear surgery did improve claimant's hearing somewhat but not to the point that he is able to perform normal work functions which require normal hearing.

DEPARTMENT'S POSITION

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

The department denied claimant's application because the medical records which were provided for SHRT review were inadequate. Although SHRT had the authority to order a recent medical examination for purposes of establishing claimant's physical condition, SHRT chose not

to request additional medical evidence on its own. **Also, the department did not obtain recent hospital records from 2008 which would provide information about claimant's recent ear surgery.**

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).

The department has the burden of proof to show by a preponderance of the medical evidence in the record that claimant's mental/physical impairments have improved to the extent that claimant is now able to perform substantial gainful activity. PEM 260/261. "Disability," as defined by MA-P/SDA standards is a legal term which is individually determined by consideration of all factors in each particular case.

MENTAL IMPAIRMENTS

Claimant does not allege disability based on a mental impairment.

PHYSICAL IMPAIRMENTS

The medical evidence of record establishes that claimant has ongoing physical impairments which have not substantially improved, and still prevent substantial gainful employment. The most important of claimant's physical impairments is his severe bilateral chronic otitis media. Claimant's hearing dysfunction is acute to the point that he requires electrical amplification through a microphone and earphones in order to participate in normal conversation. Claimant's hearing dysfunction, notwithstanding his other physical impairments, precludes claimant from performing normal work activities which includes, essentially, having a normal conversation in a work and or social setting.

In short, the department has not shown that claimant's acute hearing impairment has improved to the point that claimant is not able to perform Substantial Gainful Activity (SGA).

COMBINATION OF IMPAIRMENTS

Finally, the combination of claimant's acute hearing dysfunction in combination with his neck and back dysfunction totally prevents him from maintaining employment and marketing the required work skills necessary to perform a job confidently.

DECISION AND ORDER

The Administrative Law Judge, based upon the above findings of fact and conclusions of law, decides that the department has not established marked improvement in claimant's physical impairments to the extent that he is now able to perform SGA. PEM 260/261.

Accordingly, the department's denial of claimant's request for ongoing MA-P/SDA is, hereby, REVERSED.

SO ORDERED.

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

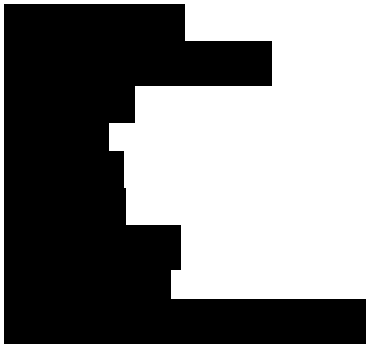
Date Signed: March 9, 2010

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 receipt date of the rehearing decision.

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