

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: 2009-33454
Issue No: 2009; 4031
Case No: [REDACTED]
Load No: [REDACTED]
Hearing Date:
October 1, 2009
Calhoun 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 1, 2009. Claimant personally appeared and testified under oath. Claimant was represented by [REDACTED].

The department was represented by Dana Glass (FIM) and Leah Bourdo (ES).

Claimant requested additional time to submit new medical evidence. The new medical evidence was submitted to the State Hearing Review Team (SHRT) on October 6, 2009. Claimant waived the timeliness requirements 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) 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/retro/SDA applicant (November 19, 2008) who was denied by SHRT (September 1, 2009) due to claimant's failure to establish an impairment which meets the department's severity and duration requirements. Claimant requests retro MA for October, November and December 2008.

(2) Claimant's vocational factors are: age—60; education—high school diploma; post high school education—completed a course in cosmetology and is a certified cosmetologist; work experience—waitress, beautician and masseuse.

(3) Claimant has not performed substantial gainful activity (SGA) since 1969 when she worked as a waitress.

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

- (a) Status post left hip fracture (October 2008);
- (b) Status post left hip corrective surgery (October 2008);
- (c) Sciatica;
- (d) Spinal disc dysfunction;
- (e) Takes prescription pain medications;
- (f) Back pain;
- (g) Mental confusion;
- (h) Sleep dysfunction;
- (i) Depressive disorder;
- (j) Bipolar disorder.

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

OBJECTIVE MEDICAL EVIDENCE (September 1, 2009):

The department thinks that claimant's impairments do not prevent claimant from performing normal work activities. Claimant does not meet SSI Listing 4.01.

* * *

(6) Claimant lives with her spouse and performs the following Activities of Daily Living (ADLs): dressing (needs help), bathing (needs help). Claimant was hospitalized in 2008 to have surgery on her left hip to receive a surgical repair of her left hip. Claimant uses a cane approximately 30 times a month. She does not use a walker, wheelchair or a shower stool. Claimant does not wear braces.

(7) Claimant has a valid driver's license but does not drive. Claimant is computer literate.

- (8) The following medical records are persuasive:

- (a) A September 17, 2008 Medical Examination Report (DHS-49) was reviewed. The orthopedic physician provided the following diagnoses: healed left hip fracture; lumbar radiculitis, chronic lumbar radiculitis with sciatica.

The orthopedic surgeon reports no functional limitations related to claimant's left hip surgery. Claimant is able to lift 20 pounds frequently and 50 pounds occasionally. There are no reported limitations on her ability to stand/walk, and sit. Claimant does not require the use of an assistive device. She has normal use of her hands and arms and normal use of her feet and legs.

- (b) A May 28, 2009 office note was reviewed.

The orthopedic surgeon provided the following background: I am seeing claimant and follow up with her [REDACTED] who is part of the practice. Claimant is now about seven months status post IMHS fixation for left hip fracture.

A concern is that she indicates she continues to have varied pain about the buttock, towards the groin, lateral aspect of the left hip. I don't think she is describing just trochanteric bursal pain. She notes she may have over did things as she started doing some single leg stances on the left last February and seems to have varying symptoms increased since. She thinks she reinjured the hip at that time, about two months postop. Still she has been able to be independent and ambulatory, except for pain for most of her activities.

She has a history of previous spinal fracture of the left tibia, with comitant fractures about the ankle and foot which apparently were treated in a cast per Med Services some 12 years ago. She notes it took her about two years to get to where she could ride a bicycle and do more normal activities. However, she indicates she has not been symptomatic for the past ten years or so. She does note that in general, left lower extremity has been shorter by nearly an inch and in fact; she was measured and had shoe modifications raise the left shoe about that much. On inquiry, she does suggest some possibility of radicular symptoms, since she tends to have radiating pain even down the lateral thigh, not quite to the knee. However, she has no significant back pain of concern that seems to have diminished left patellar reflex and absent left Achilles reflex. Motor and sensory I think is not positive, although difficult tells us subjectively. No focal findings there. Sciatic stretch signs really are negative.

I do note some stiffness at the repaired hip, internal rotation only about ten degrees, external rotation lacking final few degrees to where she feels she cannot quite her cross her legs in figure for position. She will work on those.

At present, I think hip fracture is healed and x-rays today suggest same. Hardware in satisfactory position and alignment. There is mild apex angular change at the basal neck fracture. However, all look solid and I suggested conservative measures with physical therapy to see if a low back exercise protocol would be of some benefit, along with Naprosyn on a regular dosage basis, as well as stretches to increase internal and external rotation at the hip primarily. Prescription provided and will see how she does with the chronic symptoms in about six weeks.

* * *

(9) The probative medical 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 reported a combination of mental impairments: mental confusion, depressive disorder and bipolar disorder. Claimant did not provide any clinical documentation to support her assessment. Also, 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 status post left hip surgery, sciatica, spinal disc dysfunction and back pain. However, a recent report, from an orthopedic surgeon (May 28, 2009) indicates “the hip fracture is healed and x-rays to date suggest same, hardware in satisfactory condition and alignment.

(11) There is no information in the record about a recent application for federal disability benefits (SSI) with the Social Security Administration.

CONCLUSIONS OF LAW

CLAIMANT’S POSITION

██████████ provided the following summary of claimant’s physician:

Claimant was hospitalized ██████████
██████████ for fracture of her left hip requiring surgery. In addition, claimant is significant for hypertension, hypothyroidism, COPD, anxiety and remote shingles. She suffers from shortness of breath, generalized fatigue, chronic pain and requires a cane to ambulate.

* * *

DEPARTMENT'S POSITION

The department thinks that claimant has a Residual Functional Capacity (RFC) to perform normal work activities. The department evaluated claimant's eligibility using SSI Listing 4.01 and determined that claimant was not eligible on that basis.

The department denied MA-P/SDA benefits based on claimant's failure to establish an impairment which meets the severity and duration requirements under 20 CFR 416.909.

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 decides eligibility based on mental impairments using the following standards:

(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).

(d) Sufficient Evidence:

The evaluation of disability on the basis of a mental disorder requires sufficient evidence to: (1) establish the presence of a medically determinable mental impairment(s); (2) assess the degree of functional limitation the impairment(s) imposes; and (3) project the probable duration of the impairment(s). Medical evidence must be sufficiently complete and detailed as to symptoms, signs, and laboratory findings to permit an independent determination. In addition, we will consider information from other sources when we determine how the established impairment(s) affects your ability to function. We will consider all relevant evidence in your case record. 20 CFR 404, Subpart P, App. 1, 12.00(D).

(e) Chronic Mental Impairments:

...Chronic Mental Impairments: Particular problems are often involved in evaluating mental impairments in individuals who have long histories of repeated hospitalizations or prolonged outpatient care with supportive therapy and medication. For instance, if you have chronic organic, psychotic, and affective disorders you may commonly have your life structured in such a way as to minimize your stress and reduce your signs and symptoms.... 20 CFR 404, Subpart P, App. 1, 12.00(E).

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/SDA programs. 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/SDA purposes. 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.

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/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 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/SDA, 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. Therefore, claimant meets the Step 2 disability test.

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 the Listings. SHRT evaluated the claimant's impairments using SSI Listing 4.01. Claimant does not meet any of the applicable listings. 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 waitress for a local restaurant.

Claimant's work as a waitress was light/medium work and required that claimant carry heavy trays and perform activities which require constant standing, walking, and lifting.

Because claimant recently (October 2008) had hip surgery, she is unable to perform the physical requirements required of a waitress.

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

Claimant meets the Step 4 criteria.

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 alleges disability based on a combination of mental impairments (mental confusion, depressive disorder and bipolar disorder). Claimant did not provide any clinical evidence to support her impairments.

Furthermore, claimant did not submit a DHS-49D or DHS-49E to establish her mental residual functional capacity. For these reasons, claimant is not entitled to MA-P/SDA based on her mental impairments.

Second, claimant alleges disability based on a combination of physical impairments: status post left hip fracture, status post left hip surgery, sciatica, and spinal disc dysfunction. The medical evidence of record does not establish that claimant is totally unable to work based on her combination of physical impairments.

Third, claimant testified that she is unable to return to work due to pain relating to the surgical repair of her left hip fracture. 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 combination of impairments. Currently, claimant performs several activities of daily living (with help from her husband) has an active social life with her husband, and 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) that she could perform, even though she was required to use a wheelchair. 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]. Because of 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/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.

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

SO ORDERED.

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

Date Signed: January 15, 2010

Date Mailed: January 15, 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:

A large black rectangular redaction box covers the names of the individuals listed in the 'cc:' field. The redaction is complete, obscuring all text underneath.