

**STATE OF MICHIGAN
STATE OFFICE OF ADMINISTRATIVE HEARINGS & RULES
FOR THE DEPARTMENT OF HUMAN SERVICES**

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IN THE MATTER OF:

SOAHR Docket No. 2009-7527 REHD
DHS Reg. No: 2009-6838

██████████

Claimant

_____ /

RECONSIDERATION DECISION

This matter is before the undersigned Administrative Law Judge pursuant to MCL 24.287(1) and 1993 AACS R 400.919 upon the request of the Claimant.

ISSUE

Did the Administrative Law Judge err when he determined Claimant was not disabled for Medical Assistance (MA-P) and retro Medical Assistance (retro MA-P)?

FINDINGS OF FACTS

This Administrative Law Judge, based upon the competent, materials and substantial evidence on the whole record finds as material fact:

1. On November 25, 2008, ALJ William A. Sundquist issued a Hearing Decision in which the ALJ affirmed the Department of Human Services' (DHS) denial of Claimant's July 31, 2006, applications for MA-P and retro MA-P.
2. On December 23, 2008, the State Office of Administrative Hearings and Rules (SOAHR) for the Department of Human Services received a request for Rehearing/Reconsideration submitted by Claimant's representative ██████.
3. On January 15, 2009, SOAHR granted Claimant's request for reconsideration and issued an Order for Reconsideration.
4. Findings of Fact 1-10 (the entire Findings of Fact) from the Hearing Decision, mailed on November 25, 2008 are hereby incorporated by reference.

CONCLUSIONS OF LAW

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 Family Independence Agency (FIA or agency) administers the MA program pursuant to MCL 400.10, *et seq.*, and MCL 4000.105; MSA 16.490 (15). Agency 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 435.50, the Family Independence Agency 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

The person claiming a physical or mental disability has the burden to establish it through the use of competent medical evidence from qualified medical sources such as his or her medical history, clinical/laboratory findings, diagnosis/prescribed treatment, prognosis for a recovery and/or medical assessment of ability to do work-related activities or ability to reason and to make appropriate mental adjustments, if a mental disability is being alleged. 20 CFR 416.913. An individual's subjective pain complaints are not, in and of themselves, sufficient to establish disability. 20 CFR 416.908 and 20 CFR 416.929. By the same token, a conclusory statement by a physician or mental health professional that an individual is disabled or blind is not sufficient without supporting medical evidence to establish disability. 20 CFR 416.929.

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 aptitude necessary to do most jobs. Examples of these include –

- (1) Physical functions such as walking, standing, sitting, lifting, pushing, 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).

The Residual Functional Capacity (RFC) is what an individual can do despite limitations. All impairments will be considered in addition to ability to meet certain demands of jobs in the national economy. Physical demands, mental demands, sensory requirements and other functions will be evaluated....20 CFR 416.945(a).

To determine the physical demands (exertional requirements) of work in the national economy, we classify jobs as sedentary, light, medium, and heavy. These terms have the same meaning as they have in the ██████████, published by the ██████████... 20 CFR 416.967.

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).

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).

If an individual fails to follow prescribed treatment which would be expected to restore their ability to engage in substantial gainful activity without good cause, there will not be a finding of disability... 20 CFR 416.994(b)(4)(iv).

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).

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 416.920(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, §§ 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 ALJ correctly found that the Claimant not ineligible for disability at Step 1 because the Claimant had not been engaged in substantial gainful activity since 2007. Department exhibit p. 24. Therefore, the Claimant is not disqualified from receiving disability at Step 1. The ALJ properly considered the Claimant's eligibility at Step 2.

On ██████████, an outside CT of the Nasal Cavity was performed at ██████████ ██████████ ██████████, of the radiology staff interpreted the scan as carcinoma of the right nasal ala, and recommended another study. Department exhibit p. 19.

On ██████████ examined the Claimant and confirmed that the Claimant had a 4-month history of a right-sided progressive nasal lesion which was positive for squamos cell carcinoma. ██████████, recommended surgery for resection and reconstruction as the likely course of treatment. Department exhibit pp. 27-28.

On ██████████ made a report for the ██████████ ██████████ stating that the Claimant had a 2.5 cm lesion involving the right naris. The ██████████ recommended a partial rhinectomy without neck dissection as there was no evidence of neck disease. The ██████████ also recommended postoperative radiation therapy. Department exhibit p. 80.

On ██████████, the Claimant underwent a right hemi-rhinectomy, performed by ██████████ ██████████, to remove a large exophytic lesion. Also, frozen sections were taken from all superficial areas of skin and internal lining of the nose and deep margins of the facial tissues. ██████████ reported that there were no complications from the procedure. Department exhibit pp. 31-32.

On ██████████ reviewed and interpreted the materials removed from the Claimant and found that six of the seven frozen section materials were negative for carcinoma. The right nasal skin was found to have invasive, well-differentiated squamos cell carcinoma associated with sebhorreheic keratosis. Department exhibit p. 18.

On ██████████, the Claimant was admitted to the ██████████ for a nasal reconstruction procedure which was performed that day by ██████████, ██████████, the procedure involved a right septal hinge flap, right paramedian forehead flap, right auricular cartilage graft, and right cheek advancement flap. The Claimant was discharged on April 13, 2007 with no postoperative complications noted. Department exhibit pp. 25-26; 35-36.

On ██████████, the Claimant attended a consultation with ██████████ rch, ██████████ noted that the Claimant had no squamos cell carcinoma of the right nasal ala. ██████████ also noted that the previous lesion had been resected with clear margins, but recommended radiotherapy to reduce the risk of a local recurrence. Department exhibit p. 38.

On ██████████, the Claimant underwent an operation performed by ██████████, which involved a forehead flap detachment and septal hinge flap detachment. The Claimant was noted to be in stable condition following the operation. Department exhibit pp. 42-43.

On ██████████, the Claimant met with ██████████ to discuss further treatment and agreed upon a course of radiation therapy. The report also stated that the Claimant denied any non postoperative symptoms. Department exhibit p. 47.

In Claimant's DHS 49-B form, completed by a Medicaid advocate on May 24, 2007, the advocate determined that the Claimant had a significant medical history of epilepsy, lumbar injury, a learning disability, and nasal carcinoma. The information also noted that the Claimant underwent a right hemi-rhinectomy on March 30, 2007 with reconstructive surgery on April 12, 2007. The form further notes that Claimant had developed light sensitivity and head pain and required additional post-operative radiation therapy. Department exhibit pp. 21-22.

The DHS 49-B form completed on May 24, 2007, also lists the Claimant's past work history as car detailing and powerwashing from 2002 to 2007, as well as a history of working as a truck driver and diesel mechanic. Department exhibit p. 24.

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On ██████████, the Claimant met with ██████████ for a consultation in which ██████████ noted that the forehead flap was healing nicely, but that there was considerable lymphedema. The Claimant was injected with 3/10 ml of Kenalog 40 mg/ml. ██████████ noted no evidence of a recurrent tumor. It was also noted that the nostril was restricted and the Claimant was to receive postoperative radiotherapy. Department exhibit p. 45.

On ██████████ completed the Claimant's DHS 49-A Medical Examination Report and stated that the Claimant was unable to work, but could return to work in November of 2007. Department exhibit pp. 75-76.

On ██████████ reported that the Claimant had completed radiation therapy which provided from ██████████. ██████████ noted that the Claimant had brisk erythema and along the skin and primary site area, as well as epistaxis. ██████████ noted that overall, the Claimant had tolerated the radiation therapy very well. Department exhibit p. 66.

On ██████████ again examined the Claimant noted in his report that the Claimant's skin looked well healed, there was no residual erythema, and no obvious irritation within the nasal ala. ██████████ indicated in his report that the Claimant had recovered from all of the acute side effects of radiation therapy. Department exhibit p. 68.

On ██████████ completed a DHS 49-A Medical Examination Report ██████████ noted that the Claimant had a history of a right-sided progressive nasal lesion which extended intranasally and incurred bleeding at times. ██████████ diagnosed the Claimant's condition as post-nasal reconstruction with septal hinge flap, auricular cartilage graft, and paramedian forehead flap. ██████████ also stated in the report that Claimant was unable to work, but could meet his needs in the home. Department exhibit pp. 15-16.

On January 11, 2008, the DHS MRT completed a review of the Claimant's eligibility for MA-P and retro MA-P per the Claimant's August 31, 2007 application. The MRT found that the Claimant was not disabled because of a failure to meet the requisite criteria and duration. Department exhibit p. 5.

On July 9, 2008, the SHRT issued a decision in which it found that the Claimant was not disabled. The SHRT determined that the Claimant's condition had improved with treatment and was expected to continue to improve. The SHRT further determined that the Claimant's impairment would not inhibit the Claimant's ability to work for the requisite 12 month period. Department exhibit p. 202.

The medical evidence presented shows that the Claimant underwent a right hemi-rhinectomy to remove a right-sided progressive nasal lesion on March 30, 2007. Department exhibit pp. 31-32. The lesion was tested and found to have invasive, well-differentiated squamous cell carcinoma. Department exhibit p. 18.

On April 12, and May 8, of 2007 the Claimant underwent subsequent reconstructive surgeries. Department exhibit pp. 25-26; 42-43. On June 14, 2007, the Claimant was healing, and had no recurrence of any tumor. Department exhibit p. 45.

The medical evidence presented also shows that Claimant underwent a course of postoperative radiotherapy to prevent any further recurrence of the lesion. Department exhibit p. 66.

As of September 19, 2007, the medical evidence shows that Claimant had recovered from all acute side effects of the radiation therapy. Furthermore, there was no notation of any recurrence of a nasal lesion. Department exhibit p. 68.

To be found disabled at Step 2, the Claimant must have a severe impairment or combination of impairments that has lasted or is expected to last 12 months or more. 20 CFR 416.920(c). The Claimant's DHS 49-B form alleged impairments of epilepsy, lumbar injury, and a learning disability. This form was completed by a Medicaid advocate, and not an acceptable medical source. Department exhibit p. 22. The medical evidence presented is devoid of medically determined evidence from an acceptable medical source which detailed the nature and extent of the Claimant's epilepsy, back injury and learning disability.

The medical record presented does contain ample evidence of the Claimant's right-sided nasal squamous cell carcinoma lesion. While this impairment may have stopped the Claimant from performing basic work activities while the lesion was surgically removed and the area repaired, there is no medical evidence presented which shows that the Claimant's ability to perform basic work activities was impinged for the requisite 12 month period.

As of September 19, 2007, there is evidence that the Claimant's impairment and subsequent complications were either healed or improving. Department exhibit p. 68.

██████████ did complete two DHS 49-A Medical Examination Reports stating first that the Claimant could not work from July 10, 2007 until November 2007, and second, on December 11, 2007, that the Claimant could not work for an undisclosed period of time. Department exhibit pp. 75-76; 15-16. However, per 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 this program. Furthermore, a conclusory statement by a physician or mental health professional that an individual is disabled or

blind is not sufficient without supporting medical evidence to establish disability. 20 CFR 416.929.

The Claimant is not found disabled at Step 2. because there is no medical evidence presented which shows that the Claimant's nasal impairment would have prevented him from doing any basic work for the requisite 12 month period, There is evidence that the Claimant has a medically determined impairment. The finding of a severe impairment at Step 2 is a *de minimis* standard, Therefore, the ALJ was correct in finding that Claimant was not disabled at Step 2 and proceeding to Step 3.

At Step 3, the Claimant's impairment of a right-sided squamos cell carcinoma nasal lesion could arguably meet or equal the requirements of listing 13.00, Malignant Neoplastic Diseases, and specifically, listing 13.02, Soft tissue tumors of the head and neck. Listing 13.02 provides:

13.02 Soft tissue tumors of the head and neck (except salivary glands 13.08 – and thyroid gland – 13.09).

A. Inoperable or unresectable.

OR

B. Persistent disease following initial multimodal antineoplastic therapy.

OR

C. Recurrent disease following initial antineoplastic therapy, except local vocal cord recurrence.

OR

D. With metastases beyond the regional lymph nodes.

OR

E. Soft tissue tumors of the head and neck not addressed in A-D, with multimodal antineoplastic therapy. Consider under a disability until at least 18 months from the date of diagnosis. Thereafter, evaluate any residual impairment(s) under the criteria for the affected body system.

The medical evidence shows that Claimant's had lesion covered by the listing nothing in the medical evidence presented shows that the lesion or tumor was inoperable,


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recurrent or persistent. The Claimant's lesion did not metastasize to any other parts of the body beyond the nasal area. The Claimant's impairment does not meet or equal the listing. Therefore, the ALJ was correct in finding the Claimant not disabled at Step 3 and continuing the analysis at Step 4.

According to Claimant's DHS 49-F form, the Claimant was formerly employed as a car detailer and powerwasher from 2002 to 2007. The form also shows that Claimant has had previous employment as a truck driver and diesel mechanic. I find that the Claimant's former work was light work. Department exhibit p. 24.

As noted above, on ██████████ completed a DHS 49-A Medical Examination Report in which he stated that the Claimant was unable to work. Department exhibit pp. 15-16. This form was not accompanied by any statement which detailed the Claimant's limitations or medical evidence which documented why the Claimant was not able to work. The Claimant has the burden at Step 4 to produce medical evidence from medically acceptable sources which shows that the Claimant's impairments prevented him from performing his former work. The evidence presented shows that the Claimant has not met this burden. Therefore, the ALJ correctly concluded that the Claimant had the Residual Functional Capacity to perform his former work, and was ineligible for disability at Step 4. Despite this finding, the ALJ correctly considered the ALJ's disability at Step 5.

At Step 5, the DHS has the burden of establishing that despite the claimant's limitations, he has the Residual Functional Capacity to perform work in the national economy. Residual Functional Capacity is defined as what the claimant can do despite his limitations. Residual Functional Capacity also includes an assessment of the claimant's physical and mental abilities. The physical demands of jobs in the national economy are classified as sedentary, light, medium, heavy, or very heavy. The more physically demanding classification includes all less demanding classifications. For example, a classification of very heavy includes all other less physically demanding classifications. Sedentary work is defined as work which involves the lifting of no more than 10 pounds at a time and the occasional lifting or carrying of files, ledgers, small tools, and similar items. Sedentary work presumptively includes sitting but also includes some necessary walking and standing. Light work involves the lifting of no more than 20 pounds at a time and the frequent lifting or carrying of objects weighing less than 10 pounds. Light work may involve significant walking or standing. Absent a loss of dexterity or other limiting factors, typically those who can do light work can do sedentary work. Medium work involves the lifting of objects of 50 pounds or less with frequent lifting or carrying of objects which weigh 25 pounds or less. A person who can do medium work can typically do light and sedentary work. Heavy work involves the lifting of 100 pounds or less with frequent lifting of objects weighing 50 pounds or less. People who can do heavy work can typically do medium, light, and sedentary work. Very heavy work involves the lifting of objects weighing 100 pounds or more and the frequent carrying or


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lifting of objects weighing 50 pounds or more. A person who can do very heavy work can typically do heavy, medium, light, and sedentary work.

The evidence presented shows that the Claimant is a 49 year-old who has a high school education and past light skilled and semi-skilled work experience. Department exhibit pp. 23-24. The objective medical evidence in the record does not show that the Claimant's physical limitations are so severe that those limitations would prevent the Claimant from performing light or sedentary work. Given the Claimant's vocational profile, the applicable vocational rules render the Claimant not disabled. 20 CFR 404, Subpt. P. App. 2, § 202.21.

Also, because the Claimant was not found disabled for each of the three months prior to the date of his application, he was ineligible for retro MA-P. Therefore, the MRT, the SHRT, and the ALJ all correctly denied retro MA-P.

DECISION AND ORDER

This Administrative Law Judge, based on the above findings of fact and conclusions of law, decides that the Administrative Law Judge did not err when he found that the Claimant was not disabled.

IT IS THEREFORE ORDERED that:

The Administrative Law Judge's decision mailed August 14, 2008, is AFFIRMED.

/s/ _____
Martin D. Snider
Administrative Law Judge
for Michigan Department of Human Services

cc:



Date Signed: August 28, 2009
Date Mailed: August 31, 2009

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*****Notice*****

The Claimant may appeal this Rehearing Decision to Circuit Court within 30 days of the mailing of this Rehearing Decision.