

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: 2009-3617  
Issue No: 2009, 4031  
Case No: [REDACTED]  
Load No: [REDACTED]  
Hearing Date:  
April 13, 2009  
Kent County DHS

ADMINISTRATIVE LAW JUDGE: Jeanne M. VanderHeide

HEARING DECISION

This matter is before the undersigned Administrative Law Judge pursuant to MCL 400.9 and MCL 400.37 upon the Claimant's request for hearing received by the Department. After due notice, a telephone hearing was conducted from Detroit, Michigan on April 13, 2009. At the hearing, the Claimant was present and testified. Elsie Colbert, FIM appeared on behalf of the Department.

ISSUE

Whether the Department properly determined that the Claimant was not disabled for purposes of Medical Assistance ("MA") and State Disability Assistance ("SDA") programs.

FINDINGS OF FACT

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

1. Claimant filed for MA and SDA on August 14, 2008. Claimant requested MA and SDA retroactive to May, 2008.
2. Claimant is 5'4" tall and weighs 360 pounds.
3. Claimant is right handed.

4. Claimant is 27 years of age.
5. Claimant's impairments have been medically diagnosed as sleep apnea, obesity, asthma and high blood pressure.
6. Claimant's physical symptoms are shortness of breath, constantly falling asleep and difficulty sleeping at night.
7. Claimant was hospitalized in 2007, at [REDACTED], in [REDACTED] for one week as a result of an upper respiratory infection. During this time, Claimant went to the ICU due to sleep apnea.
8. Claimant takes the following prescriptions:
  - a) Met Formin – diabetes & regular periods (constantly goes to restroom)
  - b) Fenopril – HBP
  - c) Asmthacort
  - d) Albuteral
9. Claimant's impairments will last or have lasted for a continuous period of not less than 12 months.
10. Claimant completed high school and obtained a high school diploma.
11. Claimant is able to read, write and perform basic math skills.
12. Claimant last worked doing day care [REDACTED] of 2008, 4 days/week/5-6 hrs/day. Claimant left this position as she fell asleep while kids were there and no one could wake her up. Claimant was fired in [REDACTED] of 2009. Physical exertion required lifting 20-25 lbs, mostly sitting and some bending/stooping.
13. Claimant has prior employment experience as a department store fitting room area attendant from [REDACTED]. Claimant's job duties included keeping the fitting room clean, lifting clothes and hanging them on hangers (lifting 20-25 lbs, bending/stooping). Claimant worked mostly standing. Claimant was fired for sitting down on the job. Claimant also has experience telemarketing. Claimant held five different telemarketing jobs totaling 5 months of work. Claimant's job duties included sitting down behind a desk. Claimant was caught sleeping on the job quite a few times.
14. Claimant testified to the following physical limitations:
  - Sit - 15 min. before starts dozing off
  - Stand – 20-30 min.
  - Walk – less than a block before really short of breath
  - bend/stoop – yes due to weight
  - lift – 50 lbs.
  - grip/grasp – sometimes hands cramp up.

15. Claimant testified that her sister helps her with grocery shopping and sometimes cooks for her. Claimant's sister also helps with cleaning and laundry.
16. Claimant testified that she watches her sister's kids (nieces), ages 3 & 1 while her sister works 3-7 p.m. 3x/week.
17. The Department found that Claimant was not disabled and denied Claimant's application on January 9, 2009.
18. Medical records examined are as follows:

██████████ Pulmonary Clinic Report (Exhibit 2, p. 6-9)

HX: Asthma, OSA, HTN and obesity who presented to the ██████████ on ██████████ with increasing shortness of breath. She did not have improvement after two Albuteral treatments. She had been non-compliant with her medications and without Bipap due to insurance issues. Discharged home on ██████████. She readily admits that she did not realize the importance of her asthma medications and is ready to stay committed to a plan of care. She has been compliant with her Bipap set up for her on discharge with settings 16/12.

PULMONARY CHEST EXAM: Effort normal. No respiratory distress. She has no wheezes.

PLAN: She states willingness to improve her health. I spend an additional 20 minutes on asthma education and smoking cessation. We reviewed the difference between controller medications and rescue medications. She will continue on Symbicort 80/4.5mcg two puffs twice a day. We will stop the Qvar. She will utilize ProAir 2 puffs and/or Albuterol nebulizer every 4 hours as needed. She will notify us if she has any difficulty this medication management plan. I am attempting to arrange Bipap titration follow-up. Awaiting insurance recommendation for sleep center since she is unable to follow through Sleep Center due to her insurance.

Internist, Medical Exam Report, ██████████, in part (Exhibit 1, pp. 22-25)

CHIEF COMPLAINTS: Asthma, osteoarthritis, sleep apnea and hypertension.

CONCLUSIONS: Asthma, obstruct sleep apnea and obesity.

Tobacco cessation I think would improve her symptoms. Fortunately she is on Azmacort already and the addition of Singulair may also be of benefit. Weight loss would also be helpful.

██████████, Medical Exam Report, in part (Exhibit 1, pp. 12-13)

Patient has a history of morbid obesity and development of severe obstructive sleep apnea requiring oxygen at night. Also has PCOS and currently on Mettonnin. Has intermittent problems with asthma as well. Fatigued all the time.

PHYSICAL LIMITATIONS:

Lifting - up to 20 lbs. 1/3 of the day

Stand/walk – less than 2 hrs/day

Sit – less than 6 hrs/day

Limited on account of . . . fatigue from OSA with limited ability to maneuver due to morbid obesity. Currently able to meet her needs in home.

██████████ Sleep Study Results, in part (Exhibit 1, p. 15)

Sleep efficiency 88%.

Respiratory Analysis: There were 159 obstructive apneas for an apnea index of 75.1 events per hour. There were 81 hypopneas for a hypopnea index of 38.3 events per hour. Respiratory disturbance index based on 240 total events is 113.4 events per hour.

Sleep Disorder Center, ██████████, in part, (Exhibit 1, p. 14)

Patient diagnosed with sleep apnea at 16 years old. Patient had a BiPAP breathing machine, but a couple years ago began to have difficulty breathing in sync with the machine. She felt as if it was hard to exhale and is increasingly waking up gasping for air ultimately to the point where she discontinued its use. She has had progressive sleepiness since that time, worsening headaches and mild snoring. She is tired all the time and she is really at the point where she could only sleep when she is sitting up in a chair. Her Epworth sleepiness scale is reported at 17/24.

PAST MEDICAL HISTORY: asthma, obstructive sleep apnea and morbid obesity.

#### 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 Department of Human Services (DHS or department) administers the MA program pursuant to MCL 400.1 *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).

Federal regulations require that the department use the same operative definition for “disabled” as used for Supplemental Security Income (SSI) under Title XVI of the Social Security Act. 42 CFR 435.540(a).

“Disability” is:

. . . 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 CFR416.905

In determining whether an individual is disabled, 20 CFR 416.920 requires the trier of fact to follow a sequential evaluation process by which current work activity; the severity of impairment(s); residual functional capacity, and vocational factors (i.e., age, education, and work experience) are assessed in that order. A determination that an individual is disabled can be made at any step in the sequential evaluation. Then evaluation under a subsequent step is not necessary.

### **1. Current Substantial Gainful Activity**

First, the trier of fact must determine if the individual is working and if the work is substantial gainful activity. 20 CFR 416.920(b). Substantial gainful activity (SGA) is defined as work activity that is both substantial and gainful. “Substantial work activity” is work activity that involves doing significant physical or mental activities. 20 CFR 416.972(a). “Gainful work activity” is work that is usually done for pay or profit, whether or not a profit is realized. 20 CFR 416.972(b). Generally if an individual has earnings from employment or self-employment above a specific level set out in the regulations, it is presumed that she has the demonstrated ability to engage in SGA. 20 CFR 416.974 and 416.975. If an individual engages in SGA, she is not disabled regardless of how severe her physical and mental impairments are and regardless of her age, education and work experience. If the individual is not engaging in SGA, the analysis proceeds to the second step. In this case, Claimant last worked in [REDACTED] of 2008. Therefore, the Claimant is not disqualified from receipt of disability benefits under Step 1.

### **2. Medically Determinable Impairment – 12 Months**

Second, in order to be considered disabled for purposes of MA, a person must have a “severe impairment” 20 CFR 416.920(c). A severe impairment is an impairment which

significantly limits an individual's physical or mental ability to perform basic work activities. Basic work activities mean the abilities and aptitudes necessary to do most jobs. Examples 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)

The purpose of the second step in the sequential evaluation process is to screen out claims lacking in medical merit. The court in *Salmi v Sec'y of Health and Human Servs*, 774 F.2d 685 (6<sup>th</sup> Cir 1985) held that an impairment qualifies as "non-severe" only if it "would not affect the claimant's ability to work," "regardless of the claimant's age, education, or prior work experience." *Id.* At 691-92. Only slight abnormalities that minimally affect a claimant's ability to work can be considered non-severe. *Higgs v Bowen*, 880 F.2d 860, 862 (6<sup>th</sup> Cir. 1988); *Farris v Sec'y of Health & Human Servs*, 773 F.2d 85, 90 (6<sup>th</sup> Cir. 1985).

In this case, the Claimant has presented medical evidence of obstructive sleep apnea, obesity, asthma and high blood pressure. The medical evidence has established that Claimant has a physical impairment that has more than a minimal effect on basic work activities; and Claimant's impairments have lasted continuously for more than twelve months.

### 3. Listed Impairment

In the third step of the sequential analysis of a disability claim, the trier of fact must determine if the Claimant's impairment is listed in Appendix 1 of Subpart P of 20 CFR, Part 404. Based on the hearing record, the undersigned finds that the Claimant's medical record will not support findings that the Claimant's physical and mental impairment are "listed impairment(s)" or equal to a listed impairment. 20 CFR 416.920(a) (4) (iii). According to the medical evidence, alone, the Claimant cannot be found to be disabled.

Appendix I, Listing of Impairments (Listing) discusses the analysis and criteria necessary to a finding of a listed impairment. The Listing 3.03 *Asthma* was reviewed which states as follows:

#### 3.03 *Asthma*. With

- A. Chronic asthmatic bronchitis. Evaluate under the criteria for chronic obstructive pulmonary disease in 3.02A; or
- B. Attacks (defined in 3.00(C) as prolonged symptomatic episodes lasting one or more days and requiring intensive treatment, such as intravenous bronchodilator or prolonged bronchodilator therapy in a hospital, emergency room or equivalent setting. Hospital admissions are defined as inpatient hospitalizations for longer than 24 hours) in spite of treatment and requiring physician intervention, occurring at least once every 2 months or at least six times a year. Each inpatient hospitalization for longer than 24 hours for control of asthma counts as two attacks, and an evaluation period of at least 12 consecutive months must be used to determine the frequency of attacks.

20 CFR 404, Subpart P, Appendix 1, Rule 3.03.

In this matter, the medical records establish a diagnosis of Asthma with a hospital admission on [REDACTED]. Claimant testified that she was previously hospitalized on in 2007 for an upper respiratory infection and sleep apnea. Claimant has not required six emergent asthma treatments in the last year. Furthermore, Claimant was not compliant with her medications as required by the listing. Therefore, this Administrative Law Judge finds the Claimant is not

presently disabled at the third step for purposes of the Medical Assistance (MA) program because the physical impairment does not meet the intent or severity of the listings.

#### **4. Ability to Perform Past Relevant Work**

In the fourth step of the sequential evaluation of a disability claim, the trier of fact must determine if the claimant's impairment(s) prevent him/her from doing past relevant work. 20 CFR 416.920(e). Residual functional capacity (RFC) will be assessed based on impairment(s), and any related symptoms, such as pain, which may cause physical and mental limitations that affect what you can do in a work setting. RFC is the most you can still do despite your limitations. All the relevant medical and other evidence in your case record applies in the assessment.

Claimant's previous employment was classified as unskilled and light work with the exception of telemarketer which is unskilled and sedentary. Light work requires lifting up to 20 lbs. and a good deal of walking or standing. As Claimant has been placed under physical exertional limitations of occasionally lifting up to 20 lbs. frequently but minimal standing/walking at less than 2 hours/day, Claimant would be restricted to sedentary work.

As Claimant is capable of doing sedentary work, 20 CFR 416.967, this Administrative Law Judge finds that Claimant is able to perform her past work of telemarketer. However, Claimant claims additional limitations due to sleep apnea and obesity. The combination of these factors will be evaluated at step five below.

#### **5. Ability to Perform Other Work**

In the fifth step of the sequential evaluation of a disability claim, the trier of fact must determine: if the claimant's impairment(s) prevent him/her from doing other work. 20 CFR 416.920(f). This determination is based on the claimant's:

- (1) "Residual function capacity," defined simply as "what you can still do despite your limitations," 20 CFR 416.945.

- (2) Age, education and work experience, and
- (3) The kinds of work which exist in significant numbers in the national economy which the claimant could perform despite his/her impairments.

20 CFR 416.960. *Felton v. DSS*, 161 Mich. App. 690, 696-697, 411 N.W.2d 829 (1987).

It is the finding of the undersigned, based upon the medical evidence, objective physical findings, and hearing record that Claimant's RFC for work activities on a regular and continuing basis is functionally limited to sedentary work based [REDACTED] physical functional evaluation as signed [REDACTED] 2007. Appendix 2 to Subpart P of Part 404—Medical-Vocational Guidelines 20 CFR 416.967(a) describes sedentary work:

*Sedentary work.* Sedentary work involves lifting no more than 10 pounds at a time and occasionally lifting or carrying articles like docket files, ledgers, and small tools. Although a sedentary job is defined as one which involves sitting, a certain amount of walking and standing is often necessary in carrying out job duties. Jobs are sedentary if walking and standing are required occasionally and other sedentary criteria are met.

In addition to her asthma, the Claimant is morbidly obese and has sleep apnea. As with any other medical condition, if obesity is a "severe" impairment alone or in combination with another medical determination physical or mental impairment(s), it can significantly limit an individual's physical or mental ability to do basic work activities. SSR 01-1p. For example, obesity affects the cardiovascular and respiratory systems because of the increased workload the additional body mass places on these systems. Obesity makes it harder for the chest and lungs to expand. This means that the respiratory system must work harder to provide needed oxygen. This in turn makes the heart work harder to pump blood to carry oxygen to the body. Because the body is working harder at rest, its ability to perform additional work is less than would otherwise be expected. *Id.* Claimant's obesity contributes to her asthma and sleep apnea; however, even with the obesity, the asthma would not meet a listing.

It should be noted, that Claimant's 2009 hospitalization was as a result of not taking her asthma medication. Claimant's recent sleep apnea exacerbation also was a result of Claimant not using the Bipap machine. 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 undersigned finds Claimant able to engage in substantial gainful activity if she continues with her asthma medication and Bipap machine therapy.

Claimant at twenty-seven is considered a *younger individual*; a category of individuals in age group 18-44 when age is more advantageous factor for making adjustment to other work; Rule 201.21. Claimant testified that she is able to read and write and perform simple math calculations. Claimant is also able to perform household chores such as cooking and washing dishes. These activities indicate that Claimant is already doing sedentary type activities at home. Accordingly, the undersigned finds that Claimant is able to perform sedentary work with a sit/stand option. Claimant is "not disabled" per Rule 201.21. It is the finding of the undersigned, based upon the medical data and hearing record that Claimant is "not disabled" at the fifth step.


The State Disability Assistance (SDA) program which provides financial assistance for disabled persons is established by 1939 PA 280, as amended. The Department of Human Services (formerly known as the Family Independence Agency) administers the SDA program pursuant to MCL 400.1 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). A person is considered disabled for purposes of SDA if the person has a physical or mental impairment which meets federal SSI disability standards for at least ninety days. Receipt of SSI or RSDI benefits based on disability or blindness or the receipt

of MA benefits based on disability or blindness (MA-P) automatically qualifies an individual as disabled for purposes of the SDA program. Other specific financial and non-financial eligibility criteria are found in PEM 261.

In this case, there is insufficient evidence to support a finding that Claimant's impairment has disabled her under SSI disability standards. This Administrative Law Judge finds the Claimant is not "disabled" for purposes of the MA program.

DECISION AND ORDER

The Administrative Law Judge, based upon the above findings of fact and conclusions of law finds that the Department was correct in determining that the claimant was not disabled for the purposes of the MA / SDA program and IT IS ORDERED that the Department's decision in this matter is AFFIRMED.



Jeanne M. VanderHeide  
Administrative Law Judge  
for Ismael Ahmed, Director  
Department of Human Services

Date Signed: 02/01/10

Date Mailed: 02/02/10

**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.

JV/dj

2009-8617/JV

cc:

