

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

IN THE MATTER OF THE CLAIM OF:

[REDACTED]

Reg. No.: 201041120
Issue No.: 2009
Case No.: [REDACTED]
Load No.: [REDACTED]
Hearing Date: August 4, 2010
Wayne County DHS

ADMINISTRATIVE LAW JUDGE: Jeanne VanderHeide

HEARING DECISION

This matter was conducted by in person hearing on August 4, 2010 pursuant to MCL 400.9 and MCL 400.37 upon the Claimant's request for hearing received by the Department on April 28, 2009. Claimant was present via telephone and testified along with her mother, [REDACTED]. [REDACTED], MCW appeared on behalf of the Department.

ISSUE

Whether the Department properly determined that the Claimant was not disabled for purposes of Medical Assistance ("MA") program?

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 applied for MA as of 9/29/10. No request for retroactive benefits was made.
2. Claimant is 5'4" tall and weighs 105 pounds.
3. Claimant is right handed.
4. Claimant is 40 years of age.

5. Claimant's impairments have been medically diagnosed as migraine headaches, chronic daily headaches, fibromyalgia, chronic fatigue syndrome and neck pain.
6. Claimant's physical symptoms are migraines (severe pain 2-3x/week which last 48-72 hours, sensitive to light and noise, vomiting) chronic daily headaches (dull pain requires rest b/c can turn into a migraine if exacerbated), physical pain throughout body primarily in joints ranging from dull to severe plus additional pain in back and neck, difficulty engaging in activities, pain in arms and hands, constant fatigue, difficulty sustaining activities for more than an hour, generalized and extreme sensitivity to light, noise, and activity.
7. Claimant testified that the day of the hearing was a relatively good day – she had a daily headache, but was only in moderate pain and was able function.
8. Claimant's mental symptoms are very poor concentration, foggy head "fibro fog", anxiety, sleep disturbances (hard time falling asleep, wakes during the night and has difficulty falling back asleep – poor sleep is a trigger for a migraine), fatigue, hard time being in public due to noise and sound sensitivity and difficulty talking too long – exhausting (leads to migraine).
9. Claimant was admitted to the hospital for acute migraines in April, 2009; December, 2006; March, 2001 and May, 1999.
10. Claimant takes the following prescriptions:
 - a) Neurontin – migraine prevention
 - b) Verapaxil – “
 - c) Indetral – “
 - d) Frovatriptan – Migraine abortive
 - e) Relpax – Migraine abortive
 - f) Naproxen Sodium – migraine/headache/fibromyalgia
 - g) Ibuprofen – fibromyalgia
11. Claimant's impairments will last or have lasted for a continuous period of not less than 12 months.
12. Claimant has college degree in BA in Art History.
13. Claimant is able to read/write/perform basic math skills. Claimant testified that she can read if not in too much pain; however, Claimant experiences

pain in arm, back and head with writing. Fibromyalgia pain is exacerbated to extreme by use of computer or mouse and Claimant will get a migraine within 15 minutes if she tries to use the computer.

14. Claimant last worked as a self employed graphic designer. Claimant's job duties involved sitting for most of the day on computer (8-10 hours per day) and managing a small staff. Claimant last worked in the fall of 2004 which is when her health really began to deteriorate. At that point, Claimant began to experience daily headaches and fatigue. Claimant found that she was no longer able to use the computer and so was unable to perform her job duties.
15. Claimant testified to the following physical limitations:
 - Sitting: 15-20 minutes without pain getting worse, then needs to move.
 - Standing: 15-20 minutes and then needs to lie down
 - Walking: around the block
 - Bend/stoop: difficult, cannot stay down
 - Lifting: cannot lift anything b/c of neck pain – can lift gallon of milk, but would not be able to hold for a prolonged period of time.
 - Grip/grasp: hands and fingers are very tight and painful. Claimant can pick things up, but cannot type and cannot hold for a period of time (affects the pain in her neck which triggers a migraine).
16. Claimant lives by herself. Her parents live 5 blocks away and help her significantly. What Claimant can do herself depends on how she is feeling. Claimant testified that she is unable to do anything with migraine. When she has a daily headache, Claimant is able to do a minimal amount such as get something to eat. If she has no headache (which is rare), Claimant will make a light meal. Claimant's mother usually brings dinner. Claimant cannot vacuum or wash floors. Claimant's mom does the laundry. Claimant's dad does grocery shopping. Claimant will go to the grocery store sometimes just to get out; however, by the time she gets back from the store she needs to lie down and rest. Claimant has someone cut grass and water the grass. Claimant's sister takes out the trash.
17. Claimant testified that she used to play tennis, ski, do photography, draw, write, ride bike, roller blade and cook. Claimant is no longer able to do any of these activities.

18. Claimant is still able to read and watch television when she feels well. Claimant testified that it takes all that she has just to do basic things – get something to eat, straighten up around house. Claimant will try to take a walk around the block if she is feeling well. However, Claimant finds it hard to keep a schedule of anything because it all depends on how she is feeling.
19. The Department found that Claimant was not disabled and denied Claimant's application on March 31, 2010.
20. The Department received Claimant's request for a hearing on April 28, 2010.
21. Medical records examined are as follows, in part:

4/15/10 Chronic Pain and Fatigue Research Center (Exhibit A, p. 22)

HX: By 2004 she became extremely fatigued. She states it was so severe that she was not able to work. She also had difficulty with sleeping. She also developed hypersensitivity to light, noises and smell. In the past, it was associated with headaches. However, at this time, it is not. Headaches include holocranial pain moderate to mildly severe in severity with associated photophobia, phonophobia and nausea 2-3x/week.

IMPRESSION: Fibromyalgia, chronic daily headaches, migraines without aura, chronic fatigue, hypersensitivity

PLAN: Possibly visit to Mayo Clinic for an intense 1 week fibromyalgia clinic.

3/29/10 Medical Report (Exhibit A, p. 15 – 21)

Pain diagram

ASSESSMENT: neck pain, migraine, LBP, fibromyalgia

3/10/10 Internal Medicine IME (Exhibit A, p. 6)

HX; Migraine headaches. Pt has been on Dapakote, Inderal, Relpax and Frova for headaches. Sees neurologist every three months. Also inpatient at [REDACTED] in 2009 for severe headaches. Headaches occur 2-3x/week and sometimes every day. Tests have all been normal. She does have stress and anxiety and was advised to see a psychiatrist.

CONCLUSION: 1. Severe recurrent migraine headaches, neurological evaluation is recommended. 2. Anxiety; rule out psychiatric problems.

2/1/10 Physical Medicine & Rheumatology Report (Exhibit A, p. 12)

HX: increasing pain and fatigue over the last several years and has had issues with increasing difficulty with function over that period of time. Her pain is of

chronic generalized basis and is described by the patient as being constant, dull and aching. There are associated headaches and dizziness on almost all clinical activities worsen the pt's clinical symptoms including sitting, standing, bending, walking, lifting, cold, heat, household chores, dampness and weather changes. The pain does disturb her sleep and she describes the presence of both limited range of motion of muscle weakness.

APPT: to see Dr. at [REDACTED] and the [REDACTED] [REDACTED] in near future.

PHYSICAL EXAMINATION: Tenderness to palpation was noted in multiple areas including but not limited to the cervical spine, lumbosacral spine, chest wall, medial aspect of both knees and lateral epicondyles.

IMPRESSION: Fibromyalgia syndrome, chronic and longstanding with failure to multiple therapies.

11/23/09 Internist Medical Exam Report (Exhibit 1, p. 22)

HX: Daily headaches, requiring abortive medications for migraines, chronic weakness and fatigue

DX: chronic recurrent migraine headaches, chronic fibromyalgia

GENERAL EXAM: Continued current pain multiple trigger point – occipital trapezius, sacral, etc.

PHYSICAL LIMITATIONS: Lifting less than 10 lbs occasionally, stand/walk less than 2 hours in 8 hour work day, no reaching, pushing or pulling, no operating leg/foot controls. Stimulatory activity provokes exacerbation of headaches with severe pain.

MENTAL LIMITATIONS: Limited in sustained concentration and social interaction. Social and environmental stimulation provoke exacerbation of migraine headaches.

Dr. Report (Exhibit A, p. 1)

9/21/09: COMPLAINTS: Complains of headaches that appear to arise from neck area, but is bothered by pain diffusely such that her activities are extremely limited.

PLAN: Referral to PT

11/23/09: PLAN: Referral to acupuncture as well as pain clinic

3/17/10: Poorly controlled migraine and daily headache – 2-3 attacks per week which respond to Relpax within 2 hours in about 70% of the time.

PLAN: Consideration to occipital nerve blocks

2/25/10: Referral to pain neuropsychiatrist

4/3/09 – 4/6/09 Hospital Admission (Exhibit 1, p. 11)

HOSPITAL COURSE: Pt has chronic migraines. She previously did very well with intravenous DHE which resulted in almost complete and prolonged relief. However, a year and a half ago, she was involved in a minor car accident

resulting in a whiplash injury which resulted in increasing headache frequency and severity. She experiences constant neck pain posterior and anterior.

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 Bridges Administrative Manual (BAM), the Bridges Eligibility Manual (BEM) and the Reference Tables (RFT).

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 CFR 416.905.

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, under the first step, client has not worked since 2004. 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 (6th 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 (6th Cir. 1988); *Farris v Sec’y of Health & Human Servs*, 773 F.2d 85, 90 (6th Cir. 1985).

In this case, the Claimant has presented medical evidence of migraine headaches, chronic daily headaches, fibromyalgia, chronic fatigue and anxiety. One or more of the following medical signs must be clinically documented over a period of at least six consecutive months to establish the existence of a medically determinable impairment for individuals with Chronic Fatigue Syndrome:

- Palpably swollen or tender lymph nodes on physical examination;
- nonexudative pharyngitis;
- Persistent, reproducible muscle tenderness on repeated examinations, including the presence of positive tender points:

SSR 99-2p. There is a considerable overlap of symptoms between CFS and Fibromyalgia Syndrome (FMS), but individuals with CFS who have tender points have a medically determinable impairment. Individuals with impairments that fulfill the American College of Rheumatology criteria for FMS (which includes a minimum number of tender points) may also fulfill the criteria for CFS. However, individuals with CFS who do not have the specified number of tender points to establish, will still be found to have a medically determinable impairment. SSR 99-2p, Footnote (3).

In the present case, Claimant has been diagnosed by a Rheumatologist with both CFS and FMS. On 11/23/09 Claimant's internist indicated that Claimant exhibited continued current pain at multiple trigger points. A recent rheumatologist physical exam revealed tenderness to palpation in multiple areas including the cervical spine, lumbosacral spine, chest wall, medial aspect of both knees and lateral epicondyls. Furthermore, an examination in March of 2010, revealed pain at various FMS trigger points, including occiput, low cervical, trapezius, knees and supraspintus (Exhibit A, p. 15). Claimant's medical records show that she has persistent muscle tenderness on multiple examinations including multiple tender points. Therefore, the medical evidence has established that Claimant has a physical and mental impairments that have more than a minimal effect on basic work activities and Claimant's impairments have lasted continuously for more than twelve months. Therefore, it is necessary to continue to evaluate the Claimant's impairments under step three.

2. 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 a finding that the Claimant's mental impairments are "listed impairment(s)" or medically equivalent to a listed impairment. 20 CFR 416.920(a) (4) (iii). In this matter, the medical records establish a diagnosis of Migraines, Chronic Fatigue Syndrome and Fibromyalgia none of which qualify as a listed impairment. According to the medical evidence, alone, the Claimant cannot be found to be disabled.

Appendix I, Listing of Impairments discusses the analysis and criteria necessary to a finding of a listed impairment. The Listing 12.06 *Anxiety Related Disorders* was reviewed. 20 CFR 404, Subpart P, Appendix 1, Rule 12.06. In this case, 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 medical evidence

reviewed does not show that the physical impairments do not meet the intent or severity of the listings. Sequential evaluation under step four or five is necessary. 20 CFR 416.905.

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 one can do in a work setting. RFC is the most one can still do despite limitations. All the relevant medical and other evidence in the case record applies in the assessment.

Claimant has presented medical evidence supporting Chronic Fatigue Syndrome and Fibromyalgia. Claimant's prior employment included working as a graphic designer and managing her own business. Both of these jobs are considered skilled and sedentary in exertional level. Claimant has been placed on physical limitations by her treating physician of lifting less than 10 lbs occasionally, stand/walk less than 2 hours in an 8 hour day, no reaching, pushing or pulling, no operating leg/foot controls and limited environmental stimulation due to provocation of headaches. Based on these physical limitations, Claimant would be limited to sedentary work which would allow Claimant to be able to return to past relevant work in the above listed prior occupations. Taking into consideration Claimant's residual functional capacity, however, the undersigned finds that Claimant is not capable of sedentary work as set forth below. Accordingly, evaluation under step five will be made according to the law.

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 below the level of sedentary work. In addition, to the physical limitations placed on Claimant in section four above, Claimant testified that she suffers from debilitating migraine headaches. When Claimant experiences a migraine, she is basically unable to function and relies on family members to help her clean, cook, grocery shop and manage her household. Claimant testified that she is extremely sensitive to environmental activity, light and noise. When Claimant is exposed to environmental activity, it triggers a migraine. In order to deal with a migraine, Claimant testified that she lies in a dark quiet room. Claimant testified that she experiences migraines 2-3x/week lasting from 24 – 72 hours per week. In addition, Claimant has been admitted to the hospital 4 times over the past ten years for extreme pain due to migraines. The migraines exist on top of Claimant's other chronic daily headaches, fibromyalgia pain, chronic fatigue and "fibro fog".

In addition, Claimant's treating physician indicated that Claimant is limited in sustained concentration and social interaction as social and environmental stimulation provoke exacerbation of migraine headaches. Claimant's mother testified that Claimant's limitations prevent her from attending social family functions if it includes more than the immediate family. Claimant herself testified that prolonged talking will trigger a migraine. Claimant also testified that any activity on the computer due to use of the keyboard or mouse will trigger a migraine.

Claimant at forty (40) years of age is considered a *younger individual*; a category of individuals in age group 18-44 when age is a more advantageous factor for making adjustment to other work. "It is usually not a significant factor in limiting such individual's ability to make an adjustment to other work, including an adjustment to unskilled sedentary work, even when the individuals are unable to communicate in English or are illiterate in English." 20 CFR 404, Appendix 2 to Subpart P, Rule 201.20. Claimant has a college education and her previous work was considered skilled.

Residual Functional Capacity is what an individual can still do despite his or her limitations. It is essentially an assessment of an individual's ability to do sustained work-related physical and mental activities in a work setting on a regular and continuing basis. A "regular and continuing" basis means 8 hours a day, for 5 days a week, or an equivalent work schedule. SSR 96-8P. Only medical determinable impairments must be considered in assessing an individual's limitations and restrictions. Id. In the present case, Claimant would be unable to do any type of work on a regular and continuing basis based on her fibromyalgia, migraine headaches and limits on environmental activity.

The Administrative Law Judge finds that the combination of Claimant's mental and physical impairments and limitations has a major effect upon claimant's ability to

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perform basic work activities on a regular and continuing basis. Claimant is unable to perform the full range of activities for even sedentary work as defined in 20 CFR 416.967(a) because of the nature of the limitations. The total impact caused by the combination of medical problems suffered by the claimant must be considered. The combination of claimant's impairments results in a severe impairment which limits claimant's ability to work. 20 CFR 404.1529.

In this case, there is sufficient evidence to support a finding that the combination of Claimant's impairments is disabling her under SSI disability standards. This Administrative Law Judge finds the Claimant is "disabled" for purposes of the MA program.

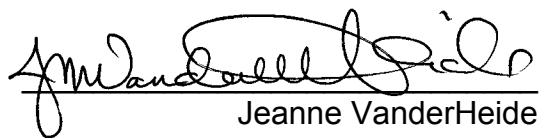
DECISION AND ORDER

The Administrative Law Judge, based on the findings of fact and conclusions of law, decides that the Claimant is "disabled" for purposes of the Medical Assistance program including any retroactive benefits applied for.

It is ORDERED; the Department's determination in this matter is REVERSED.

Accordingly, The Department is ORDERED to initiate a review of the 9/29/09 application to determine if all other non-medical eligibility criteria are met. The Department shall inform Claimant of its determination in writing. Assuming Claimant is otherwise eligible for program benefits, the Department shall review Claimant's continued eligibility for program benefits in August, 2011.

/s/



Jeanne VanderHeide
Administrative Law Judge
For Ismael Ahmed, Director
Department of Human Services

Date Signed: August 9, 2010

Date Mailed: August 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

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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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