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

IN THE MATTER OF:

[redacted]
6668 M[redacted]
[redacted]

RD Reg. No: 201054232
Reg. No: 201036707
Issue No: 2009
[redacted] [redacted]
Hearing Date: September 29, 2010
Delta County DHS

ADMINISTRATIVE LAW JUDGE: Janice G. Spodarek

RECONSIDERATION DECISION

This matter is before the undersigned Administrative Law Judge pursuant to MCL 400.9; MCL 400.37; and MAC R 400.919(3). Upon claimant's request for a "rehearing/reconsideration." Claimant was represented at the initial evidentiary hearing and on the reconsideration request by [redacted] [hereinafter AHR].

ISSUES

1. Did the original hearing decision misapply law or policy pursuant to MAC R 400.919(3)(a)?

2. In the alternative, would claimant be eligible for MA under the sequential analysis?

FINDINGS OF FACT

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

1. On June 24, 2010, a three-way telephone conference hearing was held regarding claimant's appeal of her MA denial by the Michigan DHS. Claimant's representative did not appear in person at the administrative hearing but rather appeared by conference phone.

2. On August 16, 2010, a hearing decision was issued denying claimant pursuant to jurisdictional requirements found at 42 CFR 435.

3. On September 15, 2010, claimant's representative requested a "rehearing/reconsideration" on the grounds of a misapplication of manual policy or law in the hearing decision. That section is found only under the reconsideration section of MAC R 400.919(3).

4. On September 29, 2010, Administrative Law Judge Manager Nelson-Davis issued an Order of Reconsideration assigning the case to the undersigned Administrative Law Judge.

5. Claimant testified at the June 24, 2010 evidentiary hearing under oath that she was denied SSI by SSA in October 2009 for the same medical problems and did not appeal. Claimant's AHR states on the request for "rehearing/reconsideration" that claimant had an application pending at the time of the June 24, 2010 administrative hearing. One of the parties is not credible.

6. An SOLQ ran on March 23, 2011 indicates a reapplication date of April 15, 2010.

7. Under 42 CFR 435 the triggering date is not the hearing date with the agency.

8. Claimant was not a credible witness.

9. Claimant does not have jurisdiction under 42 CFR 435.541(c)(4)(ii), or 42 CFR 435.541(c)(4)(iii). The only jurisdiction claimant could enter under is 42 CFR 435.541(c)(4)(i). Claimant testified under oath at the administrative hearing that she was alleging the same impairments.

10. Claimant testified at the administrative hearing that she does not smoke. Contrary medical evidence indicates claimant has a substantial smoking history contributing to shortness of breath: '…She is a long-term tobacco user currently smoking roughly one half pack of cigarettes per day…' Exhibit 7. 'Chronic and persistent tobacco use.' Exhibit 9.

11. Claimant's exercise test of March 19, 2010 concludes METS 8.00 interesting hear rate of 88 rising to a maximal heart rate of 171. Claimant's stress test represents 100 percent of the maximal age predicted heart rate.

12. Other evidence indicates claimant achieved 100 percent of maximum predicted heart rate.

13. A New York Heart Classification indicates that claimant's functional capacity is classed I and Therapeutic Class is Class A. Claimant has cardiac disease but without resulting in limitation of physical activity. Claimant's ordinary physical activity does not cause undo fatigue, palpitation, dyspnea or anginal pain. Claimant's ordinary physical activity need not be restricted. See Exhibit 18.

14. In response at the administrative hearing as to whether claimant could do a desk job, claimant's response was: "It all depends."

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 400.10, *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).

ISSUE 1

Jurisdiction is paramount. The original hearing decision in this matter dismissed claimant's case for lack of jurisdiction. The specific law was thoroughly cited in that decision. Applicable federal regulations are found at 42 CFR 435.

Claimant's AHR's hearing request does not identify any federal regulations or specifically identify the specify rule and/or the specific federal regulation he is attempting to incorporate into his request to establish jurisdiction. As noted in the Findings of Fact, claimant cannot prevail with regards to jurisdiction under 42 CFR 435.541(c)(4)(ii), or 42 CFR 435.541(c)(4)(iii). Thus, jurisdiction can only be conferred pursuant to 42 CFR 435.541(c)(4)(i). This section requires an alleging of a new or different condition. This is in fact what claimant's "rehearing/reconsideration" alleges. However, this was not claimant's testimony under oath at the administrative hearing. Under the Michigan Administrative Procedures Act, Michigan Administrative Code Rules, BEM 600, and General Evidentiary Rules, an Administrative Law Judge is required to issue a decision based upon evidence of record. The evidence of record in this case was that claimant testified that she received an adverse decision for an SSI application by SSA in October 2009. Claimant further alleged that she was alleging the same impairments. Thus, there is no jurisdiction under 42 CFR 435.

Claimant's AHR's contention that there was a misapplication of law or policy does not apply. Oddly, claimant's AHR does not allege newly discovered evidence that was not available at the administrative hearing. In order to do so, the AHR would have to allege that it was not available; as the application took place before the hearing, this contention could not be made.

This Administrative Law Judge does not find any error in the decision and thus, the original decision stands.

ISSUE 2

In the alternative, this Administrative Law Judge will simple apply the sequential analysis herein.

In order to receive MA benefits based upon disability or blindness, claimant must be disabled or blind as defined in Title XVI of the Social Security Act (20 CFR 416.901). DHS, being authorized to make such disability determinations, utilizes the SSI definition

of disability when making medical decisions on MA applications. MA-P (disability), also is known as Medicaid, which is a program designated to help public assistance claimants pay their medical expenses. Michigan administers the federal Medicaid program. In assessing eligibility, Michigan utilizes the federal regulations.

Relevant federal guidelines provide in pertinent part:

> "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.

The federal regulations require that several considerations be analyzed in sequential order:

> ...We follow a set order to determine whether you are disabled. We review any current work activity, the severity of your impairment(s), your residual functional capacity, your past work, and your age, education and work experience. If we can find that you are disabled or not disabled at any point in the review, we do not review your claim further.... 20 CFR 416.920.

The regulations require that if disability can be ruled out at any step, analysis of the next step is not required. These steps are:

1. If you are working and the work you are doing is substantial gainful activity, we will find that you are not disabled regardless of your medical condition or your age, education, and work experience. 20 CFR 416.920(b). If no, the analysis continues to Step 2.

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 416.909(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 that meets the duration requirement? 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. Sections 200.00-204.00(f)?

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? This step considers the residual functional capacity, age, education, and past work experience to see if the client can do other work. If yes, the analysis ends and the client is ineligible for MA. If no, MA is approved. 20 CFR 416.920(g).

At application claimant has the burden of proof pursuant to:

> ...You must provide medical evidence showing that you have an impairment(s) and how severe it is during the time you say that you are disabled. 20 CFR 416.912(c).

Federal regulations are very specific regarding the type of medical evidence required by claimant to establish statutory disability. The regulations essentially require laboratory or clinical medical reports that corroborate claimant's claims or claimant's physicians' statements regarding disability. These regulations state in part:

> ...Medical reports should include --
>
> (1) Medical history.
>
> (2) Clinical findings (such as the results of physical or mental status examinations);
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> (3) Laboratory findings (such as sure, X-rays);
>
> (4) Diagnosis (statement of disease or injury based on its signs and symptoms).... 20 CFR 416.913(b).
>
> ...Statements about your pain or other symptoms will not alone establish that you are disabled; there must be medical signs and laboratory findings which show that you have a medical impairment.... 20 CFR 416.929(a).
>
> ...The medical evidence...must be complete and detailed enough to allow us to make a determination about whether you are disabled or blind. 20 CFR 416.913(d).
>
> Medical findings consist of symptoms, signs, and laboratory findings:

(a) **Symptoms** are your own description of your physical or mental impairment. Your statements alone are not enough to establish that there is a physical or mental impairment.

(b) **Signs** are anatomical, physiological, or psychological abnormalities which can be observed, apart from your statements (symptoms). Signs must be shown by medically acceptable clinical diagnostic techniques. Psychiatric signs are medically demonstrable phenomena which indicate specific psychological abnormalities e.g., abnormalities of behavior, mood, thought, memory, orientation, development, or perception. They must also be shown by observable facts that can be medically described and evaluated.

(c) **Laboratory findings** are anatomical, physiological, or psychological phenomena which can be shown by the use of a medically acceptable laboratory diagnostic techniques. Some of these diagnostic techniques include chemical tests, electrophysiological studies (electrocardiogram, electroencephalogram, etc.), roentgenological studies (X-rays), and psychological tests. 20 CFR 416.928.

It must allow us to determine --

(1) The nature and limiting effects of your impairment(s) for any period in question;

(2) The probable duration of your impairment; and

(3) Your residual functional capacity to do work-related physical and mental activities. 20 CFR 416.913(d).

Information from other sources may also help us to understand how your impairment(s) affects your ability to work. 20 CFR 416.913(e).

...You can only be found disabled if you are unable 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. See 20 CFR 416.905. Your impairment must result from anatomical, physiological, or psychological abnormalities

> which are demonstrable by medically acceptable clinical and laboratory diagnostic techniques.... 20 CFR 416.927(a)(1).

It is noted that Congress removed obesity from the Listing of Impairments shortly after the removal of drug addition and alcoholism. This removal reflects the view that there is a strong behavioral component to obesity. Thus, obesity in-and-of itself is not sufficient to show statutory disability.

Applying the sequential analysis herein, claimant is not ineligible at the first step as claimant is not currently working. 20 CFR 416.920(b). The analysis continues.

The second step of the analysis looks at a two-fold assessment of duration and severity. 20 CFR 416.920(c). This second step is a *de minimus* standard. Ruling any ambiguities in claimant's favor, this Administrative Law Judge (ALJ) finds that claimant meets both. The analysis continues.

The third step of the analysis looks at whether an individual meets or equals one of the Listings of Impairments. 20 CFR 416.920(d). Claimant does not. The analysis continues.

The fourth step of the analysis looks at the ability of the applicant to return to past relevant work. This step examines the physical and mental demands of the work done by claimant in the past. 20 CFR 416.920(f).

In this case, this ALJ finds that claimant cannot return to past relevant work on the basis of the medical evidence. The analysis continues.

The fifth and final step of the analysis applies the biographical data of the applicant to the Medical Vocational Grids to determine the residual functional capacity of the applicant to do other work. 20 CFR 416.920(g). After a careful review of the credible and substantial evidence on the whole record, this Administrative Law Judge finds that claimant does not meet statutory disability on the basis of Medical Vocational Grid Rule 201.20 and in the alternative 201.21 as a guide.

In reaching this conclusion, it is noted that claimant's exercise stress test found that she obtained a maximum METS of 8.00 representing a 100 percent of the maximal, age predicted heart rate. Moreover, claimant's New York Heart Functional Capacity and Therapeutic Classification indicated that she may have cardiac disease but it is without resulting limitation of physical activity. This evaluation indicates that her ordinary physical activity does not cause undo fatigue, palpitation, dyspnea or anginal pain. Ordinary physical activity need not be restricted. See Exhibit 18.

Moreover, it is noted that claimant's prior shortness of breath was related to her nicotine addiction and smoking problems. Claimant testified that she was not smoking at the administrative hearing. Claimant's testimony was either not credible and/or she has ceased smoking, the shortness of breath obviously has resolved due to the stress test.

It is noted that claimant's smoking and/or obesity are the "individual responsibility" types of behaviors reflected in the *SIAS v Secretary of Health and Human Services*, 861 F2d 475 (6th cir 1988) decision. In *SIAS*, the claimant was an obese, heavy smoker who argued that he could not afford support hose prescribed by his doctor for acute thrombophlebitis. The doctor also advised claimant to reduce his body weight. The court said in part:

> …The claimant's style of life is not consistent with that of a person who suffers from intractable pain or who believes his condition could develop into a very quick life-threatening situation. The claimant admitted to the ALJ he was at least 40 pounds overweight; ignoring the instructions of his physician, he has not lost weight.
>
> …The Social Security Act did not repeal the principle of individual responsibility. Each of us faces myriads of choices in life, and the choices we make, whether we like it or not, have consequences. If the claimant in this case chooses to drive himself to an early grave, that is his privilege—but if he is not truly disabled, he has no right to require those who pay Social Security taxes to help underwrite the cost of his ride. *SIAS*, supra, p. 481.

In *SIAS*, the claimant was found not truly disabled because the secretary disregarded the consequences resulting from the claimant's unhealthy habits and lifestyles—including the failure to stop smoking. *AWAD v Secretary of Health and Human Services*, 734 F2d 288, 289-90 (6th cir 1984).

With regards to claimant's other alleged physical impairments, there is no indication that rise to statutory disability. As noted above, claimant has the burden of proof pursuant to 20 CFR 416.912(c). Federal and state law is quite specific with regards to the type of evidence sufficient to show statutory disability. 20 CFR 416.913. This authority requires sufficient medical evidence to substantiate and corroborate statutory disability as it is defined under federal and state law. 20 CFR 416.913(b), .913(d), and .913(e); BEM 260. These medical findings must be corroborated by medical tests, labs, and other corroborating medical evidence that substantiates disability. 20 CFR 416.927, .928. Moreover, complaints and symptoms of pain must be corroborated pursuant to 20 CFR 416.929(a), .929(c)(4), and .945(e). Claimant's medical evidence in this case, taken as a whole, simply does not rise to statutory disability by meeting these federal and state requirements. 20 CFR 416.920; BEM 260, 261.

DECISION AND ORDER

The Administrative Law Judge, based upon the above findings of fact and conclusions of law, decides:

ISSUE 1

There was no misapplication of law or policy in the original hearing decision and thus, that decision is hereby UPHELD.

ISSUE 2

In the alternative, applying the sequential analysis, statutory disability is not shown and the original denial of claimant's September 8, 2009 MA application is hereby UPHELD.

/s/_____
Janice G. Spodarek
Administrative Law Judge
for Maura D. Corrigan, Director
Department of Human Services

Date Signed: April 13, 2011

Date Mailed: April 14, 2011

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 mailing date of the rehearing decision.

JGS/db

cc: [redacted]