STATE OF MICHIGAN
MICHIGAN ADMINISTRATIVE HEARING SYSTEM
ADMINISTRATIVE HEARINGS FOR THE
DEPARTMENT OF HUMAN SERVICES

IN THE MATTER OF:

[redacted]

Reg. No: 2011-41696
Issue No: 2009
Case No: [redacted]
Hearing Date:
October 25, 2011
Kalamazoo County DHS

ADMINISTRATIVE LAW JUDGE: Vicki L. Armstrong

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 25, 2011. Claimant and Claimant's representative personally appeared and testified.

ISSUE

Whether the Department of Human Services (the department) properly denied Claimant's application for Medical Assistance (MA-P) and Retro-MA?

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 February 17, 2011, Claimant filed an application for MA and Retro-MA benefits alleging disability.

(2) On April 18, 2011, the Medical Review Team (MRT) denied Claimant's application for MA-P, and Retro-MA stating Claimant's non-severe impairment lacks duration of 12 months, pursuant to 20 CFR 416.909.

(3) On April 19, 2011, the department caseworker sent Claimant notice that his application was denied.

(4) On June 13, 2009, Claimant's representative filed a request for a hearing to contest the department's negative action.

(5) Claimant has a history of degenerative disc disease, right knee problems, diabetes, cellulitis, high cholesterol, hyperglycemia, chronic septic arthritis, secondary myonecrosis and back pain.

(6) On February 2, 2011, Claimant was seen in the emergency room complaining of right knee pain. Claimant suffers from depression and high cholesterol. X-rays were taken and compared with x-rays from 11/16/09. There is an approximately 2.5 x 2.6 cm well-defined lucency within the distal femoral metaphysic with a sclertoci border that does not appear significantly changed. There is a narrow zone of transition. No osseous destruction is seen. There is a joint effusion seen. Well-defined sclerotically bordered lucency within the distal femoral metaphysis could represent a fibroxanthoma (nonossifying fibroma). Differential considerations include bone cyst, fibrous dysplasia, or chondromyxoid fibroma. The lack of change compared to radiograph 11/16/09 is likely indicative of a nonaggressive etiology. Diagnosed with right knee cellulitis and hyperglycemia. Arthrocentesis performed, bloody aspirate. Sent for culture/gram stain. Site prepped with betadine and anesthesized with lidocaine. IV of Vancoycin, Dilaudid and Ativan started. Acetaminophen 650 mg given for fever. He had developed a complex right thigh abscess involving the anterior compartment of his thigh with extensive skin necrosis of the lateral thigh. (Department Exhibits 48-49, 53-54, 71-72, 86-87).

(7) On February 3, 2011, Claimant was admitted for right knee pain and swelling. He presented with cellulitis with possible abscess on the lateral side of the knee. Diagnosed as a right distal femur abscess. Claimant had a knee aspiration done with a few milliliters of bloody fluid obtained. Two x-rays of the right knee were obtained which showed generalized subcutaneous swelling along with joint space narrowing. Large joint effusion which communicates with several extra-articular fluid collections in the posterior fossa and lateral subcutaneous tissues. The fluid collections extend superior to the level of this film. There also appears to be a 2 x 1 cm lucent lesion in the distal femur in the metaphysic. Due to the lucent lesion finding in the x-rays, there may also be an osteomyelitis that needs to be ruled out. Repeat aspiration of the knee was performed for both diagnostic and therapeutic relief. Claimant was initially started on IV antibiotics in the emergency room including vancomycin and rocephin. Claimant was admitted by medicine services for antibiotics for the cellulitis. An MRI showed the presence of distal femoral osteomyelitis, lateral tibia plateau osteomyelitis, myositis, fascitis and cellulitis as well as possible septic arthritis or soft tissue abscess. An emergent irrigation and debridement of the right distal femur was done. Cultures done at the time of the abscess were positive for methicillin susceptible staph aureus. Impression: Complicated by knee infection with MSSA. History suggests chronic erythema with three weeks of redness and pus; November of 2009

effusion. Possibly with the operative findings of distal femoral lateral tibial plateau osteomyelitis, myositis and necrotic tissue in the lateral compartment status post debridement. There is chronic septic arthritis with extension to the bones under pressure and secondary myonecrosis. New diagnosis of diabetes may be a contributor. (Department Exhibits 31, 41-43, 46-47, 72-73, 91-92).

(8) On February 4, 2011, Claimant had irrigation and debridement open biopsy surgery, continued antibiotic therapy. Pre and post-operative diagnoses: pyomyositis abscess complex right distal femur and benign lytic lesion right distal femur. Findings: a lytic lesion right distal femur, benign, likely a chondroma or simple bone cyst. Extensive myonecrosis of right quadriceps musculature. Because he continued to spike fevers despite antibiotic administration, operative debridement was necessary. Pending culture results, he may need long term antibiotic therapy. He was placed on broad-spectrum antibiotics and when the cultures came back showing MSSA, the antibiotics were narrowed to Nafcillin. In the process of the lab workup it was found he had quite severe hyperglycemia. Hemoglobin Ala was elevated. He was placed on insulin. He was placed on an ACE inhibitor. He suffered in hospital with severe depression and was placed on Zoloft. He is also a tobacco abuser and nicotine patches were prescribed. (Department Exhibits 30, 32, 78-81).

(9) On February 7, 2011, Claimant had irrigation and debridement and manipulation under anesthesia with wound vacuum assisted closure surgery, and continued IV antibiotics. Claimant underwent a repeat irrigation and debridement where the vastus was split and the bone was exposed. Pre and post-operative diagnoses: complex right thigh abscess postoperative and diabetes type 2. (Department Exhibits 30, 43).

(10) On February 8, 2011, Claimant had a transfusion. Plan for return to surgery on February 10, 2011, for irrigation and debridement and wound vacuum assisted closure change. (Department Exhibit 29).

(11) On February 10, 2011, Claimant had surgery, irrigation and debridement and wound vacuum assisted closure change, continued on IV antibiotics. (Department Exhibit 29).

(12) On February 11, 2011, the wound vacuum assisted closure was changed and a repeat irrigation and debridement was done. Next wound vacuum assisted closure change will be on unit with sedation and plastic surgery consult. IV antibiotics were continued. At this time Claimant is on antibiotics day six. Infectious diseases have already evaluated Claimant and they recommend six weeks of antibiotics for concern of chronic osteomyelitis. Plan to do a wound vacuum assisted closure change on him in the operating room on February 14, 2011. At that time, will be able

to best visualize the wound and then be able to determine the best mechanism for which to achieve soft tissue closure over the wound. (Department Exhibits 29, 43-44).

(13) On February 14, 2011, Claimant had irrigation and debridement and wound vacuum assisted closure surgery. (Department Exhibit 29).

(14) On February 15, 2011, Claimant's doctor informed him the outpatient clinic had him scheduled to continue his antibiotic treatment on discharge. (Department Exhibit 29).

(15) On February 16, 2011, Claimant had his first vacuum assisted closure wound changed at bedside. (Department Exhibit 29).

(16) On February 18, 2011, the medical staff was trying to coordinate charity for the wound vacuum assisted closure. Will also need to finalize arrangements for daily infusion center and m-w-f wound vacuum assisted closure changes with the wound clinic. (Department Exhibit 28).

(17) On February 21, 2011, Claimant's wound vacuum dressing was changed. The wound was examined and it was found that the bone was completely covered with granulation tissue. It was decided it was safe to place a split thickness skin graft over the wound and to discontinue wound vacuum assisted closure. Skin grafting surgery scheduled for February 22, 2011. (Department Exhibit 28).

(18) On February 22, 2011, Claimant in surgery for debridement of distal right femur and skin grafting. The abscess was subsequently drained and debrided multiple times. Plastic surgery was consulted to discuss coverage options for his open wound. The surgeon elected to use a wound vacuum assisted closure and it was changed several times in the operating room before changing it at the bedside. (Department Exhibits 28, 32-33).

(19) On February 23, 2011, Claimant was discharged from Bronson Hospital with continued daily therapy at the infusion center. Claimant had extensive hospital stay with 4 procedures. By the end of the hospitalization, he was quite comfortable with pain management. Discharge Diagnosis: methicillin-sensitive staphylococcus aureus deep tissue infection; methicillin-sensitive staphylococcus aureus osteomyelitis; status post skin grafting; diabetes mellitus type 2, new diagnosis; tobacco addiction; depression, gastroesophageal reflux disease. Medications at discharge: Nafcillin through PICC line, stop date 3/24/11. Will have labs followed by Infectious Disease. Will have Infusion Clinic starting today. Insulin Novolin N 35 units every morning; Insulin human R patient will give sliding scale with meals; Lisinopril, Zoloft, Percocet, Famotidine, Nicotine

patch. Pertinent Diagnostics and Labs: Hemoglobin A1c drawn on admission was 12.9. Bacterial cultures growing methicillin-sensive Staphylococcus aureus. MRI on admission showed concern for septic arthritis and soft tissue abscesses. There is distal femoral osteomyelitis and probable lateral tibial plateau osteomyelitis, associated myositis fasciitis and cellulitis. Chest x-ray showed lungs were clear. Repeat CT showed successful distal osteomyelitis debridement. Left PICC had been positioned properly. (Department Exhibits 28, 31-32, 38).

(20) On March 24, 2010, the State of Michigan performed a Disability Determination based only on information provided by Claimant. Claimant was cooperative but seemed depressed. He appeared anxious throughout the interview and walked with a significant limp and held tightly to the handrails while climbing the steps. He appeared to be in contact with reality, but his self-esteem appears low. He was polite and cooperative but seems highly dependent upon his girlfriend. He appears to have limited motivation and very limited insight into his situation. Claimant maintained a spontaneous stream of mental activity throughout his interview. His pressure of speech was within normal limits and his responses were generally organized but somewhat tangential. He seemed to ruminate about problems and difficulties that he is currently having and those he has had earlier in life. He has recently lost 60 pounds since November 2009. Claimant maintained a blunted affect throughout his interview. Claimant has medical issues mostly involving knee and back pain. Claimant stopped drinking in July 2009. Claimant was diagnosed on Axis I: 300.4, Dysthymic Disorder, 303.90 Alcohol Dependence; Axis III: Chronic right knee pain, lumbar pain in lower back; Axis IV: Stressors: Unemployed, Inadequate finances, no health insurance, limited social skills, educational problems, special education classes. Axis V: Current GAF: 50. Claimant's prognosis is fair with psychological and medical treatment, guarded without treatment. Medical Source Statement: Claimant's symptoms of depressed mood, anger outbursts, pessimistic attitude and irritability and low energy would likely disrupt his ability to effectively work with others. He appears to have some difficulties with learning as well. He is poorly motivated but has adequate concentration abilities. He appears to be sensitive to stress and does not appear to handle stress well. He would likely not manage stress well in a job setting. He appears able to perform simple tasks but would have difficulty with more complex tasks. (Department Exhibits 4-9).

(21) On March 30, 2011, Claimant was seen for a follow up regarding his recent knee surgery related to septic arthritis and a subsequent skin graft, hypertension, depression and diabetes. His sugars have been in the 100-150 range and he is controlled with Novolin insulin. Claimant's prescriptions of Zoloft, Lisinopril, Pepcid, Xanax and Percocet were renewed. (Department Exhibit 10).

(22) Claimant is a 41 year old man whose birthday is [redacted]. Claimant is 5'10" tall and weighs 215 lbs. Claimant completed the eighth grade and does not have a GED and was enrolled in Special Education. He last worked in January 2008 as a forklift operator.

(23) Claimant was denied Social Security disability benefits and is appealing that determination.

CONCLUSIONS OF LAW

The Medical Assistance (MA) program is established by the 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 (formerly known as the Family Independence Agency) administers the MA program pursuant to MCL 400.10, *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 Manual (RFT).

Under the Medicaid (MA) program:

> "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.

When determining disability, the federal regulations require several factors to be considered, including: (1) the location/duration/frequency/intensity of an applicant's pain; (2) the type/dosage/effectiveness/side effects of any medication the applicant takes to relieve pain; (3) any treatment other than pain medication that the applicant has received to relieve pain; and (4) the effect of the applicant's pain on his or her ability to do basic work activities. 20 CFR 416.929(c)(3). The applicant's pain must be assessed to determine the extent of his or her functional limitations in light of the objective medical evidence presented. 20 CFR 416.929(c)(94).

> In determining whether you are disabled, we will consider all of your symptoms, including pain, and the extent to which your symptoms can reasonably be accepted as consistent with objective medical evidence, and other evidence. 20 CFR 416.929(a).
>
> Pain or other symptoms may cause a limitation of function beyond that which can be determined on the basis of the anatomical, physiological or psychological abnormalities considered alone. 20 CFR 416.945(e).

> In evaluating the intensity and persistence of your symptoms, including pain, we will consider all of the available evidence, including your medical history, the medical signs and laboratory findings and statements about how your symptoms affect you. We will then determine the extent to which your alleged functional limitations or restrictions due to pain or other symptoms can reasonably be accepted as consistent with the medical signs and laboratory findings and other evidence to decide how your symptoms affect your ability to work. 20 CFR 416.929(a).
>
> Since symptoms sometimes suggest a greater severity of impairment than can be shown by objective medical evidence alone, we will carefully consider any other information you may submit about your symptoms. 20 CFR 416.929(c)(3).
>
> Because symptoms such as pain, are subjective and difficult to quantify, any symptom-related functional limitations and restrictions which you, your treating or examining physician or psychologist, or other persons report, which can reasonably be accepted as consistent with the objective medical evidence and other evidence, will be taken into account in reaching a conclusion as to whether you are disabled. 20 CFR 416.929(c)(3).
>
> We will consider all of the evidence presented, including information about your prior work record, your statements about your symptoms, evidence submitted by your treating, examining or consulting physician or psychologist, and observations by our employees and other persons. 20 CFR 416.929(c)(3).
>
> Your symptoms, including pain, will be determined to diminish your capacity for basic work activities to the extent that your alleged functional limitations and restrictions due to symptoms, such as pain, can reasonably be accepted as consistent with the objective medical evidence and other evidence. 20 CFR 416.929(c)(4).

In Claimant's case, the ongoing pain, recurring and chronic infection and other non-exertional symptoms he describes are consistent with the objective medical evidence presented. Consequently, great weight and credibility must be given to his testimony in this regard.

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 <u>not</u> 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).

Claimant has not been employed since January 2008; consequently, the analysis must move to Step 2.

In this case, Claimant has presented the required medical data and evidence necessary to support a finding that claimant has significant physical limitations upon Claimant's ability to perform basic work activities.

Medical evidence has clearly established that Claimant has an impairment (or combination of impairments) that has more than a minimal effect on Claimant's work activities. See Social Security Rulings 85-28, 88-13, and 82-63.

In the third step of the sequential consideration of a disability claim, the trier of fact must determine if the claimant's impairment (or combination of impairments) is listed in Appendix 1 of Subpart P of 20 CFR, Part 404. This Administrative Law Judge finds that the claimant's medical record will not support a finding that claimant's impairment(s) is a "listed impairment" or equal to a listed impairment. See Appendix 1 of Subpart P of 20 CFR, Part 404, Part A. Accordingly, Claimant cannot be found to be disabled based upon medical evidence alone. 20 CFR 416.920(d).

In the fourth step of the sequential consideration of a disability claim, the trier of fact must determine if the claimant's impairment(s) prevents claimant from doing past relevant work. 20 CFR 416.920(e). It is the finding of this Administrative Law Judge, based upon the medical evidence and objective physical findings, that Claimant cannot

return to his past relevant work because the rigors of working as a fork lift operator are completely outside the scope of his physical abilities given the medical evidence presented.

In the fifth step of the sequential consideration of a disability claim, the trier of fact must determine if the claimant's impairment(s) prevents claimant from doing other work. 20 CFR 416.920(f). This determination is based upon the claimant's:

(1) residual functional capacity defined simply as "what can you still do despite you limitations?" 20 CFR 416.945;

(2) age, education, and work experience, 20 CFR 416.963-.965; and

(3) the kinds of work which exist in significant numbers in the national economy which the claimant could perform despite his/her limitations. 20 CFR 416.966.

See *Felton v DSS* 161 Mich. App 690, 696 (1987). Once claimant reaches Step 5 in the sequential review process, claimant has already established a *prima facie* case of disability. *Richardson v Secretary of Health and Human Services,* 735 F2d 962 (6th Cir, 1984). At that point, the burden of proof is on the state to prove by substantial evidence that the claimant has the residual functional capacity for substantial gainful activity.

After careful review of Claimant's extensive medical record and the Administrative Law Judge's personal interaction with Claimant at the hearing, this Administrative Law Judge finds that Claimant's exertional and non-exertional impairments render Claimant unable to engage in a full range of even sedentary work activities on a regular and continuing basis. 20 CFR 404, Subpart P. Appendix 11, Section 201.00(h). See Social Security Ruling 83-10; *Wilson v Heckler*, 743 F2d 216 (1986). The department has failed to provide vocational evidence which establishes that Claimant has the residual functional capacity for substantial gainful activity and that, given Claimant's age, education, and work experience, there are significant numbers of jobs in the national economy which the Claimant could perform despite claimant's limitations. Accordingly, this Administrative Law Judge concludes that Claimant is disabled for purposes of the MA program. Consequently, the department's denial of his February 17, 2011 MA/retro-MA application cannot be upheld.

DECISION AND ORDER

The Administrative Law Judge, based upon the above findings of fact and conclusions of law, decides the department erred in determining Claimant is not currently disabled for MA/retro-MA eligibility purposes.

Accordingly, the department's decision is REVERSED, and it is Ordered that:

1. The department shall process Claimant's February 17, 2011 MA/retro-MA application, and shall award him all the benefits he may be entitled to receive, as long as he meets the remaining financial and non-financial eligibility factors.

2. The department shall review Claimant's medical condition for improvement in November 2013, unless his Social Security Administration disability status is approved by that time.

3. The department shall obtain updated medical evidence from Claimant's treating physicians, physical therapists, pain clinic notes, etc. regarding his continued treatment, progress and prognosis at review.

/s/
Vicki L. Armstrong
Administrative Law Judge
for Maura D. Corrigan, Director
Department of Human Services

Date Signed: 11/7/11

Date Mailed: 11/7/11

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.

VLA/ds