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

**IN THE MATTER OF:**

[redacted]

Reg. No.: 201341508
Issue No.: 2009; 4031
Case No.: [redacted]
Hearing Date: October 3, 2013
County: Sanilac County DHS

**ADMINISTRATIVE LAW JUDGE**: Janice G. Spodarek

## 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, a conference telephone hearing was held. Claimant was represent by [redacted]. The DHS was represented in part by [redacted].

## ISSUE

Did the Department of Human Services (DHS) properly deny Claimant's Medical Assistance (MA) and State Disability Assistance (SDA) at review?

## FINDINGS OF FACT

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

1. Pursuant to a Decision and Order issued on by [redacted] on [redacted], Claimant was previous approved MA and SDA, Reg No 2009-22463. On 12-31-11 the DHS scheduled this case for review, at issue herein.

2. On 3-5-13 MRT denied continuing MA on the basis that Claimant received an unfavorable decision by the SSA Appeals Council. MRT denied SDA under the review legal standard.

3. Claimant appealed the SSA denial of the Appeals Council to the federal district court.

4. On 3-21-13, the DHS issued notice.

5. On 4-1-13, Claimant filed a timely hearing request. The DHS failed to reinstate the action pending the outcome of the administrative hearing.

6. On 6-20-13, the State Hearing Review Team (SHRT) denied Claimant continuing SDA at review under the review legal standard.

7. Claimant is a [redacted]-year-old [redacted] standing 5'6" tall and weighing 240 pounds. Claimant's BMI is 38.7 classifying Claimant as obese under the body mass index.

8. Claimant does not have an alcohol/drug abuse problem or history. Claimant smokes. Claimant has a nicotine addiction.

9. Claimant has a [redacted] and can drive an automobile.

10. Claimant has a [redacted].

11. Claimant is not currently working. Claimant last worked in [redacted] in [redacted] work when Claimant was [redacted] old. Claimant testified that she has not worked in part because "my [redacted] took care of me." Claimant's work history is medium exertional, semi-skilled employment.

12. Claimant alleges continuing disability on the basis secondary to obesity, nicotine addiction, dermatitis, diabetes, depression, bipolar, anxiety, and fibromyalgia.

13. The 6-20-13 SHRT findings and conclusions of its decision are adopted and incorporated by reference herein.

14. Medical evidence includes a 2-3-12 surgical pathology report indicating a negative finding, upper and lower gastrointestinal.

15. An [redacted] report indicates per office visit: 5/5 strength throughout; diminished perception to light touch distal bilateral lower extremities, normal gait, positive tender pointes, normal [redacted] per Exhibit 97 1-5-12.

16. An [redacted] with complaints of fibromyalgia, diabetes, cholesterol, hypertension, ADD, anxiety, depression, bipolar and neuropathy, mild difficulty on/off exam table; moderate difficulty heel/toe walk, squat. Unable to hop. Sensory loss L4-S1 left side.

17. A [redacted] review indicates Claimant doing extremely well with current treatment.

18. [redacted] indicates moderately obese, diagnosing Claimant with Bipolar II disorder, panic disorder, and anxiety disorder.

19. A [redacted] states in part: alert and oriented X3; grooming and hygiene good; motor activity and speech normal; affect appropriate; mood is euthymic; … thought processes are goal-directed and logical; thought content normal; memories grossly normal; operational judgment and insight good.

20. Claimant testified that she engages in activities of daily living, light housework, reads "true magazines," watches TV, walks a mile every day.

## 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).

The State Disability Assistance (SDA) program which provides financial assistance for disabled persons is established by 2004 PA 344. The Department of Human Services (DHS or department) administers the SDA program pursuant to MCL 400.10, *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).

Statutory authority for the SDA program states in part:

> (b) A person with a physical or mental impairment which meets federal SSI disability standards, except that the minimum duration of the disability shall be 90 days. Substance abuse alone is not defined as a basis for eligibility.

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.

Prior to any substantive review, jurisdiction is paramount. In this case, as noted in the Findings of Fact, MRT dismissed Claimant's MA review case on the basis that Claimant received a final determination from the SSA at the Appeals Council. Claimant's attorney

argues that Claimant's SSA denial was appealed to federal district court, and thus, the determination is not "final" as defined in federal law, regulations and state policy.

The applicable federal authority is found at 42 CFR Part 435. These regulations provide: "An SSA disability determination is binding on an agency until the determination is changed by the SSA." 42 CFR 435.541(a)(b)(i). These regulations further provide: "If the SSA determination is changed, the new determination is also binding on the agency." 42 CFR 435.541(a)(b)(ii).

DHS policy is found in BEM 260-MA Disability/Blindness. The applicable section to the issue of finality states in part:

> **Final SSI Disability Determination**
>
> SSA's determination that disability or blindness does not exist for SSI is final for MA if:
>
> The determination was made after 1/1/90, and
> No further appeals may be made at SSA; see Exhibit II in this item, or…BEM 260, p3.

Exhibit II referenced defines "no further appeals" as:

> If the Appeals Council upholds the ALJ's decision, there are no further appeals at SSA. The client may contest SSA's decision at the appropriate federal district court. Exhibit II, BEM 260 p 12

Clearly the DHS policy specifically addresses the very issue disputed herein. It explicitly states that for the purposes of a "final" SSA decision, a decision is final at the Appeals Council. The policy further acknowledges that a client may go on to federal district court, but that once "…the Appeals Council upholds the ALJ's decision, there are no further appeals at SSA. The client may contest SSA's decision at the appropriate federal district court." BEM 260, p12. BEM 260 includes in this analysis both new applications and review cases.

In short, it does not matter that the case has been appealed to a federal district court. For the purposes herein, "final" is final once the SSA Appeals Council rules. Under the above cited federal authority, and DHS policy and procedure, this ALJ finds that the DHS correctly closed Claimant's MA.

It should be noted that this ALJ does not find Exhibit II as 'contrary to law' as envisioned by the DHS Delegation of Hearing Authority. While within the general body of American jurisprudence an argument could be made that an appeal is a continuance of a case, such is procedural and not substantive. Policy and procedure is the heart of administrative law, recognized by statute. BEM 260, Exhibit II deals with procedure, and

thus not 'contrary to law.' And, in fact, BEM 260 Exhibit II consistent with 42 CFR 435.541.

The remainder of this decision will continue with regard to Claimant's SDA at review. As already noted, for SDA, except for the duration requirement, the DHS applies the MA requirements.

At review, there are very specific regulations which apply. Specifically, federal regulations add 2 steps the review process:

> ...the medical evidence we will need for a continuing disability review will be that required to make a current determination or decision as to whether you are still disabled, as defined under the medical improvement review standard.... 20 CFR 416.993.
>
> ...You must provide us with reports from your physician, psychologist, or others who have treated or evaluated you, as well as any other evidence that will help us determine if you are still disabled.... You must have a good reason for not giving us this information or we may find that your disability has ended.... If we ask you, you must contact your medical sources to help us get the medical reports. We will make every reasonable effort to help you in getting medical reports when you give us permission to request them from your physician, psychologist, or other medical sources.... 20 CFR 416.993(b).
>
> ...In some instances, such as when a source is known to be unable to provide certain tests or procedures or is known to be nonproductive or uncooperative, we may order a consultative examination while awaiting receipt of medical source evidence. Before deciding that your disability has ended, we will develop a complete medical history covering at least the 12 months preceding the date you sign a report about your continuing disability status.... 20 CFR 416.993(b).
>
> ...If you are entitled to disability benefits as a disabled person age 18 or over (adult) there are a number of factors we consider in deciding whether your disability continues. We must determine if there has been any medical improvement in your impairment(s) and, if so, whether this medical improvement is related to your ability to work. If your impairment(s) has not so medically improved, we must consider whether one or more of the exceptions to medical

improvement applies. If medical improvement related to your ability to work has not occurred and no exception applies, your benefits will continue. Even where medical improvement related to your ability to work has occurred or an exception applies, in most cases, we must also show that you are currently able to engage in substantial gainful activity before we can find that you are no longer disabled. 20 CFR 416.994(b).

**Medical improvement**. Medical improvement is any decrease in the medical severity of your impairment(s) which was present at the time of the most recent favorable medical decision that you were disabled or continued to be disabled. A determination that there has been a decrease in medical severity must be based on changes (improvement) in the symptoms, signs and/or laboratory findings associated with your impairment(s).... 20 CFR 416.994(b)(1)(i).

**Medical improvement not related to ability to do work.** Medical improvement is not related to your ability to work if there has been a decrease in the severity of the impairment(s) as defined in paragraph (b)(1)(i) of this section, present at the time of the most recent favorable medical decision, but no increase in your functional capacity to do basic work activities as defined in paragraph (b)(1)(iv) of this section. If there has been any medical improvement in your impairment(s), but it is not related to your ability to do work and none of the exceptions applies, your benefits will be continued.... 20 CFR 416.994(b)(1)(ii).

**Medical improvement that is related to ability to do work.** Medical improvement is related to your ability to work if there has been a decrease in the severity, as defined in paragraph (b)(1)(i) of this section, of the impairment(s) present at the time of the most recent favorable medical decision **and** an increase in your functional capacity to do basic work activities as discussed in paragraph (b)(1)(iv) of this section. A determination that medical improvement related to your ability to do work has occurred does not, necessarily, mean that your disability will be found to have ended unless it is also shown that you are currently able to engage in substantial gainful activity as discussed in paragraph (b)(1)(v) of this section.... 20 CFR 416.994(b)(1)(iii).

As noted, the DHS must show that there has been improvement, and, that the improvement is related to the individual's ability to engage in work and work like settings.

In this case, Claimant was previous approved on the basis of fibromyalgia, migraines, diabetes, depression, anxiety, panic attacks and sleep apnea. As to Claimant's mental status, the 2010 evaluations indicate a severe mental impairment(s). More recent documentation, specifically a 2012 evaluation, indicates that Claimant has improved . See Findings of Fact 18 and 19.

As to Claimant's other impairments, more recent medical documentation does continue to diagnose claimant with these conditions. However, the most recent 11-8-12 independent assessment that Claimant can do her activities of daily living—to which Claimant testified to, and is able to drive, enjoys crosswords, playing with her grandkids. Claimant indicated that she walks a mile a day. As anticipated by 20 CFR 416.988, the DHS has met its burden to show that Claimant's condition has improved. Thus the first 2 prongs are met. The remaining decision is essentially the remaining 5 steps of the analysis.

These 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).
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> 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);

(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 concurs with the SHRT decision in finding Claimant not eligible for continuing SDA on the basis of medical vocational grid 201.24 as a guide.

In reaching this conclusion, it is noted The 6th Circuit has held that subjective complaints are inadequate to establish disability when the objective evidence fails to establish the existence of severity of the alleged pain. *McCormick v Secretary of Health and Human Services*, 861 F2d 998, 1003 (6th cir 1988).

It is also noted that Claimant's obesity and nicotine addiction are of the type as discussed in the following case law. 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).

Statutory disability does not recognize many behaviors as statutorily disabling where behavioral driven treatment will remove or reduce the severity or complaint. Among others, this includes complaints such as drug and alcohol addiction, obesity, and smoking. Issues related to these problems often result from life style choices. In addition, many heart problems, type 2 diabetes, neuropathy, and high cholesterol have been significantly correlated with many life style behaviors. In such instances, the symptoms and problem are treatable--obesity is treatable with weight loss, diet and exercise; alcoholism and drug addiction with abstinence; lung/breathing related medical issues are treatable with cessation from smoking. As with the congressional mandate denying statutory disability for alcohol and drug addiction, individual behaviors that drive medically related complaints and symptoms are not considered under the federal social security law as "truly disabling" see SIAS. In most instances, standard medical protocol is to instruct the individual to stop consuming alcohol, stop the drug addiction, stop smoking, and to lose weight. In fact, 20 CFR 416.930 requires a finding of not disabled where an individual fails to follow the recommended or prescribed treatment program.

Moreover, Claimant's continued failure to stop smoking and lose weight raises issues and considerations found at 20 CFR 416.930.

For these reasons and for the reasons state above, statutory disability for continuing SDA is not shown.

## DECISION AND ORDER

The Administrative Law Judge, based upon the above findings of fact and conclusions of law, decides that the department's actions were correct.

Accordingly, the department's determination in this matter is **UPHELD**.

/s/

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

Date Signed: 10/28/13

Date Mailed: 10/29/13

**NOTICE:** Michigan Administrative Hearing System (MAHS) 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. MAHS 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. (60 days for FAP cases)

The Claimant may appeal the Decision and Order to Circuit Court within 30 days of the receipt 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.

Claimant may request a rehearing or reconsideration for the following reasons:

- A rehearing **MAY** be granted if there is newly discovered evidence that could affect the outcome of the original hearing decision.
- A reconsideration **MAY** be granted for any of the following reasons:
  - misapplication of manual policy or law in the hearing decision,
  - typographical errors, mathematical error, or other obvious errors in the hearing decision that affect the substantial rights of the claimant,
  - failure of the ALJ to address other relevant issues in the hearing decision.

Request must be submitted through the local DHS office or directly to MAHS by mail at

Michigan Administrative Hearings
Reconsideration/Rehearing Request
P. O. Box 30639
Lansing, Michigan 48909-07322

JGS/hj

cc: [redacted]