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

IN THE MATTER OF:

Reg. No.:	14-019518
Issue No.:	2009
Case No.:	
Hearing Date:	March 25, 2015
County:	Wayne (76)

ADMINISTRATIVE LAW JUDGE: Christian Gardocki

HEARING DECISION

Following Claimant's request for a hearing, this matter is before the undersigned Administrative Law Judge pursuant to MCL 400.9 and 400.37; 7 CFR 273.15 to 273.18; 42 CFR 431.200 to 431.250; 45 CFR 99.1 to 99.33; and 45 CFR 205.10. After due notice, an in-person hearing was held on March 25, 2015, from Detroit, Michigan. Participants included the above-named Claimant. , Claimant's husband, testified on behalf of Claimant. and appeared as Claimant's authorized hearing representative (AHR). Participants on behalf of the Department of Human Services (DHS) included , medical contact worker.

ISSUE

The issue is whether DHS properly denied Claimant's Medical Assistance (MA) eligibility for the reason that Claimant is not a disabled individual.

FINDINGS OF FACT

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

1. On , Claimant applied for MA benefits, including retroactive MA benefits from 1/2014.

2. Claimant's only basis for MA benefits was as a disabled individual.

3. On , the Medical Review Team (MRT) determined that Claimant was not a disabled individual (see Exhibits 2-13 – 2-14).

4. On , DHS denied Claimant's application for MA benefits and mailed a Medical Program Eligibility Notice (Exhibits 2-11 -2-12) informing Claimant's AHR of the denial.

5. On ██████, Claimant's AHR requested a hearing (see Exhibits 2-5 – 2-8) disputing the denial of MA benefits.

6. As of the date of the administrative hearing, Claimant was a 43 year old female.

7. Claimant has not earned substantial gainful activity since before the first month of benefits sought.

8. Claimant alleged disability based on restrictions related to diagnoses of bursitis, chronic obstructive pulmonary disease (COPD) with recurring shortness of breath (SOB), asthma, and spinal pain.

CONCLUSIONS OF LAW

The Medical Assistance (MA) program is established by the Title XIX of the Social Security Act, 42 USC 1396-1396w-5, and is implemented by 42 CFR 400.200 to 1008.59. The Department of Human Services (formerly known as the Family Independence Agency) administers the MA program pursuant to MCL 400.10 and MCL 400.105. Department policies are contained in the Department of Human Services Bridges Administrative Manual (BAM) and Department of Human Services Bridges Eligibility Manual (BEM) and Department of Human Services Reference Tables Manual (RFT).

The Medicaid program is comprised of several sub-programs which fall under one of two categories; one category is FIP-related and the second category is SSI-related. BEM 105 (10/2010), p. 1. To receive MA under an SSI-related category, the person must be aged (65 or older), blind, disabled, entitled to Medicare or formerly blind or disabled. *Id*. Families with dependent children, caretaker relatives of dependent children, persons under age 21 and pregnant, or recently pregnant, women receive MA under FIP-related categories. *Id*. It was not disputed that Claimant's only potential category for Medicaid eligibility would be as a disabled individual.

Disability for purposes of MA benefits is established if one of the following circumstances applies:

- by death (for the month of death);
- the applicant receives Supplemental Security Income (SSI) benefits;
- SSI benefits were recently terminated due to financial factors;
- the applicant receives Retirement Survivors and Disability Insurance (RSDI) on the basis of being disabled; or
- RSDI eligibility is established following denial of the MA benefit application (under certain circumstances).
  BEM 260 (7/2012) pp. 1-2

There was no evidence that any of the above circumstances apply to Claimant. Accordingly, Claimant may not be considered for Medicaid eligibility without undergoing a medical review process which determines whether Claimant is a disabled individual. *Id*., p. 2.

Generally, state agencies such as DHS must use the same definition of SSI disability as found in the federal regulations. 42 CFR 435.540(a). Disability is federally defined as the inability to do any substantial gainful activity (SGA) 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. A functionally identical definition of disability is found under DHS regulations. BEM 260 (7/2012), p. 8.

SGA means a person does the following: performs significant duties, does them for a reasonable length of time, and does a job normally done for pay or profit. *Id*., p. 9. Significant duties are duties used to do a job or run a business. *Id*. They must also have a degree of economic value. *Id*. The ability to run a household or take care of oneself does not, on its own, constitute SGA. *Id*.

The person claiming a physical or mental disability has the burden to establish a disability through the use of competent medical evidence from qualified medical sources such as his or her medical history, clinical/laboratory findings, diagnosis/prescribed treatment, prognosis for recovery and/or medical assessment of ability to do work-related activities or ability to reason and make appropriate mental adjustments, if a mental disability is alleged. 20 CRF 413.913. An individual's subjective pain complaints are not, in and of themselves, sufficient to establish disability. 20 CFR 416.908; 20 CFR 416.929(a).

Federal regulations describe a sequential five step process that is to be followed in determining whether a person is disabled. 20 CFR 416.920. If there is no finding of disability or lack of disability at each step, the process moves to the next step. 20 CFR 416.920 (a)(4).

The first step in the process considers a person's current work activity. 20 CFR 416.920 (a)(4)(i). A person who is earning more than a certain monthly amount is ordinarily considered to be engaging in SGA. The monthly amount depends on whether a person is statutorily blind or not. "Current" work activity is interpreted to include all time since the date of application. The 2014 monthly income limit considered SGA for non-blind individuals is $1,070.

Claimant credibly denied performing any employment since the date of the MA application; no evidence was submitted to contradict Claimant's testimony. Based on the presented evidence, it is found that Claimant is not performing SGA and has not performed SGA since the date of MA application. Accordingly, the disability analysis may proceed to step two.

The second step in the disability evaluation is to determine whether a severe medically determinable physical or mental impairment exists to meet the 12 month duration requirement. 20 CFR 416.920 (a)(4)(ii). The impairments may be combined to meet the severity requirement. If a severe impairment is not found, then a person is deemed not disabled. *Id.*

The impairments must significantly limit a person's basic work activities. 20 CFR 416.920 (a)(5)(c). "Basic work activities" refers to the abilities and aptitudes necessary to do most jobs. *Id.* Examples of basic work activities include:

- physical functions (e.g. walking, standing, sitting, lifting, pushing, pulling, reaching, carrying, or handling)
- capacities for seeing, hearing, and speaking, understanding; carrying out, and remembering simple instructions
- use of judgment
- responding appropriately to supervision, co-workers and usual work situations; and/or
- dealing with changes in a routine work setting.

Generally, federal courts have imposed a de minimus standard upon claimants to establish the existence of a severe impairment. *Grogan v. Barnhart*, 399 F.3d 1257, 1263 (10th Cir. 2005); *Hinkle v. Apfel*, 132 F.3d 1349, 1352 (10th Cir. 1997). *Higgs v Bowen,* 880 F2d 860, 862 (6th Cir. 1988). Similarly, Social Security Ruling 85-28 has been interpreted so that a claim may be denied at step two for lack of a severe impairment only when the medical evidence establishes a slight abnormality or combination of slight abnormalities that would have no more than a minimal effect on an individual's ability to work even if the individual's age, education, or work experience were specifically considered. *Barrientos v. Secretary of Health and Human Servs.*, 820 F.2d 1, 2 (1st Cir. 1987). Social Security Ruling 85-28 has been clarified so that the step two severity requirement is intended "to do no more than screen out groundless claims." *McDonald v. Secretary of Health and Human Servs.*, 795 F.2d 1118, 1124 (1st Cir. 1986).

SSA specifically notes that age, education, and work experience are not considered at the second step of the disability analysis. 20 CFR 416.920 (5)(c). In determining whether Claimant's impairments amount to a severe impairment, all other relevant evidence may be considered. The analysis will begin with a summary of presented evidence.

Claimant testified that she hurt her neck while performing her job duties as a certified nursing assistant. Claimant testified that on 10/31/08, she was asked to push a patient's leg back and forth, in lieu of a machine that the patient was supposed to use to perform such motions. Claimant testified that the patient had cement in her knee so it was very difficult to bend the patient's knee. Claimant testified that after about 20 knee bends with the patient, Claimant felt a sharp pain in her neck that persists to the present day.

Hospital documents (Exhibits 1-48) from an admission dated [redacted] were presented. It was noted that Claimant presented with complaints of dyspnea, chest pain, and sputum production. It was noted that Claimant reported performing "a large amount of walking in the cold." It was noted that Claimant displayed pain medication seeking behavior. Physical examination findings were normal other than noted wheezing. An impression of no acute process was noted following chest radiology. Claimant's dyspnea was noted to be triggered by cold air. It was noted that Claimant reported that she quit smoking in 3/2013. It was noted that outside of recurrent COPD exacerbation, Claimant can do "all that she wants to without any difficulties." Heart testing noted a trace of mitral regurgitation and an ejection fraction of 65%. On [redacted] Claimant was unable to walk and talk without running out of breath. Unspecified "poor compliance" was noted. Sinus tachycardia was noted as a problem that was resolved during admission. Noted discharge diagnoses included shortness of breath, asthma exacerbation, and acute asthmatic bronchitis. A discharge date of [redacted] was noted. Discharge medications included diazepam, famotidine, and fluticasone.

Hospital documents (Exhibits 48-108) from an admission dated [redacted]4 were presented. It was noted that Claimant presented with complaints of dyspnea and chest pain, ongoing for 1 hour. Other active problems noted illicit drug use, drug seeking behavior, and anxiety. Physical examination findings noted that Claimant was inconsistent and "obviously embellishing her complaints." Normal echocardiogram results were noted. Possible noncompliance with treatment was noted. It was noted that Claimant had no health insurance. An impression of no acute process was noted following chest radiology. It was noted that Claimant received IV steroids. It was noted that Claimant was given a list of free clinics for "much needed outpatient follow up for her severe baseline emphysema." It was noted that Claimant received various respiratory medications and valium for anxiety. A discharge diagnosis of COPD exacerbation was noted. A discharge date of [redacted] was noted.

Hospital documents (Exhibits 109-184) from an admission dated [redacted] were presented. It was noted that Claimant presented with complaints of cough, ongoing for 3 days, and dyspnea, ongoing for a few hours. A complaint of back and leg pain was noted. A chest x-ray was noted to be negative. It was noted that Claimant was an active smoker. Spirometry testing (Exhibits 161-164) dated [redacted] noted that Claimant's highest FVC was 2.22 (68% of predicted) and a best FEV1 of 1.30 (51% of predicted). An impression of moderate shortness of breath was noted. Neurontin was provided for back pain. Noted discharge diagnoses included COPD exacerbation, leukocytosis (possibly related to steroids), anxiety, chronic back pain, and acute bronchitis. A discharge date of [redacted] was noted.

Hospital documents (Exhibits A1-A7) from an admission dated [redacted] were presented. It was noted that Claimant presented with complaints of dyspnea. It was noted that Claimant received steroid treatment, respiratory treatment, and antibiotics. Claimant's symptoms were noted as improved after a couple of days. Claimant's back pain was noted as controlled with oral pain medication. A discharge diagnosis of acute asthma

exacerbation was noted. Other diagnoses included chronic back pain, uncontrolled accelerated HTN, tachycardia, anxiety, hyperglycemia, and GERD. Various discharge medications included the following: hydrocodone-acetaminophen, azithromycin, predisone, alprazolam, diazepam, zolpidem, famotidine, gabapentin, albuterol, and others. A discharge date of [redacted] was noted.

Hospital documents (Exhibits A8-A10) from an admission dated [redacted] were presented. It was noted that Claimant presented with complaints of coughing, SOB, and wheezing. It was noted that Claimant received various medications during hospitalization and at discharge. Claimant's leg pain at discharge was noted as better controlled. Noted discharge diagnoses included acute COPD exacerbation, chest pain (noted to probably be musculoskeletal), anxiety, and leg pain secondary to previous back injury. A discharge date of [redacted] was noted.

Hospital documents (Exhibits A11-A14) from an admission dated [redacted] were presented. It was noted that Claimant presented with complaints of SOB after inhaling burning sausage smoke. A complaint of back pain was noted. It was noted that Claimant received physical therapy. A lidoderm patch for back pain was noted as provided. It was noted that Claimant symptoms improved over her hospital stay. It was noted that Claimant's SOB improved significantly. Noted discharge diagnoses included acute COPD exacerbation, chronic back pain, anxiety, and leukocytosis. A discharge date of [redacted] was noted.

Hospital documents (Exhibits A15-A16) from an admission dated [redacted] were presented. It was noted that Claimant presented with complaints of dyspnea and back pain. It was noted that Claimant received steroid antibiotic treatment which improved Claimant's breathing. It was noted that Claimant asked about IV narcotics. Noted discharge diagnoses included acute COPD exacerbation, chronic back pain, and suspicion of drug seeking behavior. A discharge date of [redacted] was noted.

Hospital documents (Exhibits A17-A20) from an admission dated [redacted] were presented. It was noted that Claimant presented with complaints of SOB after inhaling bug spray being used by her neighbors. It was noted that Claimant received steroid breathing treatments and that Claimant's symptoms improved significantly. Noted discharge diagnoses included COPD exacerbation, chronic back pain, accelerated HTN, nicotine addiction, and tachycardia (multifactorial). A discharge date of [redacted] was noted.

Hospital documents (Exhibits A21-A24) from an admission dated [redacted] were presented. It was noted that Claimant presented with complaints of SOB, ongoing for 3 days. It was noted that Claimant received various medications during hospitalization and at discharge. A discharge diagnosis of asthma exacerbation was noted. A discharge date of [redacted] was noted.

Hospital documents (Exhibits A25-A29) from an admission dated [redacted] were presented. It was noted that Claimant presented with complaints of SOB and hip pain. Claimant was given steroid treatments for breathing problems. It was noted that an MRI demonstrated bursitis. It was noted that Claimant received physical therapy and pain medications which improved symptoms significantly. Noted discharge diagnoses included COPD exacerbation, left hip bursitis, and anxiety. A discharge date of [redacted] was noted.

Hospital documents (Exhibits A30-A34) from an admission dated [redacted] were presented. It was noted that Claimant presented with complaints of severe back pain and worsening SOB, ongoing for 2 days. Claimant reported that Norco did not relieve symptoms. It was noted that Claimant received IV steroids and antibiotics. It was noted that Claimant was insistent on receiving IV Dilaudid for back pain; instead, Claimant received oral medications and was advised to follow-up with a pain specialist. It was noted that Claimant's breathing returned to baseline. Noted discharge diagnoses included acute respiratory failure with hypoxia, chronic back pain, anxiety, and drug seeking behavior. A discharge date of [redacted] was noted.

Hospital documents (Exhibits A35-A39) from an admission dated [redacted] were presented. It was noted that Claimant presented with complaints of SOB, wheezing, and productive cough. It was noted that Claimant received IV steroids and breathing treatments. At discharge, Claimant was noted to not be labored while ambulating. A diagnosis of acute asthma exacerbation was noted. A discharge date of [redacted] was noted.

Claimant testified that she has sitting, walking, and standing restrictions related to COPD and back pain. Claimant's testimony was consistent with presented documents which verified numerous COPD exacerbation hospital admissions and a diagnosis of hip bursitis.

It is found that Claimant established significant impairment to basic work activities for a period longer than 12 months. Accordingly, it is found that Claimant established having a severe impairment and the disability analysis may proceed to Step 3.

The third step of the sequential analysis requires a determination whether the Claimant's impairment, or combination of impairments, is listed in Appendix 1 of Subpart P of 20 CFR, Part 404. 20 CFR 416.920 (a)(4)(iii). If Claimant's impairments are listed and deemed to meet the 12 month requirement, then the claimant is deemed disabled. If the impairment is unlisted, then the analysis proceeds to the next step.

Claimant's most prominent impairment appears to be breathing difficulties related to COPD. Listing 3.02 covers disabilities for chronic pulmonary insufficiency and reads:

3.03 ***Asthma***. With:

A. Chronic asthmatic bronchitis. Evaluate under the criteria for chronic obstructive pulmonary disease in 3.02A;
or
B. Attacks (as defined in 3.00C), in spite of prescribed treatment and requiring physician intervention, occurring at least once every 2 months or at least six times a year. Each in-patient hospitalization for longer than 24 hours for control of asthma counts as two attacks, and an evaluation period of at least 12 consecutive months must be used to determine the frequency of attacks.

Presented documents verified that Claimant was hospitalized 12 times. More precisely, two hospitalizations were due to asthma exacerbation, 10 were due to COPD exacerbation. Technically, an asthma attack is different from COPD exacerbation; thus, it could be reasonably argued that Listing 3.03 is inapplicable to Claimant. Due to the comparable symptoms, mixed discharge diagnoses, and high frequency of hospital admissions, application of Listing 3.03 is appropriate.

There was evidence suggesting that Claimant's non-compliance contributed to at ;east some of her hospitalizations. Non-compliance was noted in both of Claimant's 1/2014 hospitalizations though medication noncompliance appears reasonable when factoring that Claimant did not receive health insurance until 4/2014. It is notable that documents for the 9 hospitalizations subsequent to 1/2014 did not note noncompliance.

Claimant testified that she quit smoking two years ago. Claimant's testimony appears to be exaggerated as hospital documents from 7/2014 noted nicotine addiction as an active problem. Claimant's tobacco smoking could be considered a failure by Claimant to follow prescribed treatment and disqualify her from listing consideration.

It is also problematic for Claimant that she consistently exhibited drug-seeking behavior and was called-out by at least one physician for embellishing symptoms. It is notable that hip bursitis was not diagnosed until 10/2014 which suggests that Claimant may have been justified in seeking pain medication. This consideration would be more persuasive in excusing Claimant's behavior if pain-seeking behavior was not noted in hospital admission documents form 1/2015, a time after Claimant was diagnosed with bursitis.

Despite evidence of Claimant exaggerating symptoms, Claimant was hospitalized more than a sufficient amount of times to meet asthma listing requirements. It is found that Claimant meets the listing for 3.03 and is a disabled individual. Accordingly, it is found that DHS erred in denying Claimant's MA application.

DECISION AND ORDER

The Administrative Law Judge, based upon the above findings of fact and conclusions of law finds that DHS improperly denied Claimant's application for MA benefits. It is ordered that DHS:

(1) reinstate Claimant's MA benefit application dated [redacted], including retroactive MA benefits from 1/2014;
(2) evaluate Claimant's eligibility for benefits subject to the finding that Claimant is a disabled individual;
(3) initiate a supplement for any benefits not issued as a result of the improper application denial; and
(4) schedule a review of benefits in one year from the date of this administrative decision, if Claimant is found eligible for future benefits.

The actions taken by DHS are **REVERSED**.

Christian Gardocki
Administrative Law Judge
for Nick Lyon, Interim Director
Department of Human Services

Date Signed: **4/3/2015**

Date Mailed: **4/3/2015**

CG / hw

NOTICE OF APPEAL: A party may appeal this Hearing Decision in the circuit court in the county in which he/she resides, or the circuit court in Ingham County, within 30 days of the receipt date.

A party may request a rehearing or reconsideration of this Hearing Decision from the Michigan Administrative Hearing System (MAHS) within 30 days of the mailing date of this Hearing Decision, or MAHS may order a rehearing or reconsideration on its own motion.

MAHS may grant a party's Request for Rehearing or Reconsideration when one of the following exists:

- Newly discovered evidence that existed at the time of the original hearing that could affect the outcome of the original hearing decision;
- Misapplication of manual policy or law in the hearing decision which led to a wrong conclusion;
- Typographical, mathematical or other obvious error in the hearing decision that affects the rights of the client;
- Failure of the ALJ to address in the hearing decision relevant issues raised in the hearing request.

The party requesting a rehearing or reconsideration must specify all reasons for the request. MAHS will not review any response to a request for rehearing/reconsideration. A request must be *received* in MAHS within 30 days of the date this Hearing Decision is mailed.

A written request may be faxed or mailed to MAHS. If submitted by fax, the written request must be faxed to (517) 335-6088 and be labeled as follows:

Attention: MAHS Rehearing/Reconsideration Request

If submitted by mail, the written request must be addressed as follows:

Michigan Administrative Hearings
Reconsideration/Rehearing Request
P.O. Box 30639
Lansing, Michigan 48909-8139

cc: