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STATE OF MICHIGAN
DEPARTMENT OF LICENSING AND REGULATORY AFFAIRS
LANSING

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DIRECTOR

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Date Mailed: February 1, 2018
MAHS Docket No.: 17-014450
Agency No.: 102259518
Petitioner: Charolette Delgado

ADMINISTRATIVE LAW JUDGE: Vicki Armstrong

HEARING DECISION

Following Petitioner's request for a hearing, this matter is before the undersigned Administrative Law Judge pursuant to MCL 400.9 and 400.37; 42 CFR 431.200 to 431.250. After due notice, an in-person hearing was held on January 4, 2018, from Saginaw, Michigan. Petitioner personally appeared and testified. Petitioner submitted exhibits 1-31 which were admitted into evidence.

The Department of Health and Human Services (Department) was represented by Eligibility Specialist, Veronica Bracey. Ms. Bracey testified on behalf of the Department. The Department submitted exhibits A, pages 1-305; and B, pages 1-81, which were admitted into evidence. The record was closed at the conclusion of the hearing.

ISSUE

Whether the Department properly determined that Petitioner was not disabled for purposes of the State Disability Assistance (SDA) benefit program?

FINDINGS OF FACT

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

1. On May 5, 2017, Petitioner applied for SDA. [Hearing Summary].
2. On October 17, 2017, the Medical Review Team (MRT) denied Petitioner's SDA application. [Dept. Exh. A, pp 299-305].
3. On October 24, 2017, the Department sent Petitioner notice that her SDA application was denied. [Hearing Summary].

4. On November 1, 2017, Petitioner filed a hearing request to contest the Department's negative action. [Dept. Exh. A, p 1].
5. Petitioner has been diagnosed with avascular necrosis Stage III, compression fracture of the spine, lumbar stenosis, facet arthropathy at L5-S1, degenerative disc disease with posterior disc protrusion, grade 1 anterolisthesis of L5 upon S1 with moderate to marked foraminal narrowing present bilaterally, pulmonary hypertension, pulmonary embolisms, deep vein thrombosis (DVT), chronic obstructive pulmonary disease (COPD), pneumonia, sexually transmitted disease, depression, blood clots, ongoing ovarian cysts, and in need of a right hip replacement.
6. On April 3, 2017, Petitioner presented to the emergency department complaint of right hip pain since she was in a motor vehicle crash four months ago. Petitioner reported that since the accident, she has needed to use a cane for ambulation. She stated she had 12 weeks of physical therapy which seemed to improve her pain. She explained she had an x-ray of her hip about three months ago and it was negative. Petitioner stated that her hip pain was constant and aching in nature, but with movement, she has a sharp pain in her hip. She described the pain as radiating slightly down her thigh, but stated the pain was mainly in her hips. She stated that she fell two weeks ago when her right leg "gave out." She reported weakness in her right leg with tingling in her left foot, but denied numbness. X-rays of the right hip were normal. She was diagnosed with acute right hip pain and discharged in stable condition. [Dept. Exh. A, pp 113-117].
7. On April 14, 2017, Petitioner underwent an MRI of her right hip. She was diagnosed with a small effusion versus synovitis right hip joint and Stage II avascular necrosis bilateral hips. The necrotic lesions were seen involving two thirds of the circumference of the bilateral femoral heads. The lesion in the right femoral head was surrounded by marrow edema, suggestive of recent onset. A complex cystic lesion was seen in the left adnexa measuring 5.5 x 2.4 cm in size. [Dept. Exh. A, pp 10, 118-119].
8. On May 9, 2017, Petitioner's Nurse Practitioner (NP) placed Petitioner off work for medical reasons until August 9, 2017. The NP explained that due to Petitioner being treated for a condition of her hip which made prolonged sitting, standing, or walking very painful, she was unable to perform her job duties. [Dept. Exh. A, p 9].
9. On July 4, 2017, Petitioner presented to the emergency department complaining of hip pain. Petitioner explained that she was diagnosed with avascular necrosis of her right hip and was following with an orthopedic surgeon in Ann Arbor. An x-ray revealed very subtle areas of sclerosis throughout the femoral heads, slightly more noticeable on the right and minimal irregularity along the superior aspect of the femoral head, keeping with Petitioner's history of avascular necrosis. Petitioner was given Toradol and Dilaudid IM for the pain. She was also provided with a walker to help with ambulation. Petitioner was diagnosed with pain of right hip joint

and chronic right-sided low back pain with sciatica. She was discharged in stable condition. [Dept. Exh. A, pp 136-140].

10. On July 21, 2017, Petitioner's lumbar spine MRI revealed facet arthropathy at L5-S1. Degenerative disc disease with posterior disc protrusion. It also showed a grade 1 anterolisthesis of L5 upon S1 with moderate to marked foraminal narrowing present bilaterally. [Dept. Exh. A, pp 141-142].
11. On August 23, 2017, Petitioner's transthoracic echocardiogram revealed mild aortic valve sclerosis without stenosis and a left ventricular ejection fraction, by visual estimation of 55 to 60%. The physician concluded that there may be a very mild obstructive defect reflected in the increase in airways resistance and a slight improvement with bronchodilator. [Dept. Exh. A, pp 143-150].
12. On September 6, 2017, Petitioner underwent an independent psychological evaluation on behalf of the Department. Petitioner was psychiatrically hospitalized once in 1986, and had been in substance abuse treatment in the past. Petitioner used a walker to walk. She had a significant limp and moved slowly. Petitioner was diagnosed with Major Depressive Disorder, recurrent, mild; Alcohol Use Disorder in full sustained remission; Cannabis Use Disorder in full sustained remission and Cocaine Use Disorder in full sustained remission. The psychologist opined that Petitioner was able to understand and remember simple and one step as well as complex and multistep instructions and work procedures. She may have some problems concentrating and persisting through a typical 8-hour day. She should be able to maintain socially appropriate behavior. She should be able to adjust to changes in her routine and environment. Her prognosis was guarded. [Dept. Exh. A, pp 102-105].
13. On September 13, 2017, Petitioner saw her orthopedic surgeon for an initial evaluation of her right hip avascular necrosis. She described her pain as throbbing and stabbing. She complained of numbness and tingling. She presented to the office ambulating with the assistance of a rolling walker. Prior to the walker, she was using a cane. Petitioner was diagnosed with arthritis in her lumbar spine and Stage III avascular necrosis of her right femoral head. [Petitioner's Exh. pp 10-14].
14. On November 14, 2017, during a follow-up appointment with her orthopedic surgeon, Petitioner was informed that she would need surgical intervention of a right total hip replacement. [Petitioner's Exh. pp 2-3].
15. Petitioner is a 44-year-old woman, born on September 3, 1973. She is 4'11 and weighs 170 pounds. She is a high school graduate and last worked in May of 2017, as a telemarketer, when her physician took her off work.
16. Petitioner was appealing the denial of Social Security disability at the time of the hearing.

17. Petitioner's impairments have lasted, or are expected to last, continuously for a period of 90 days or longer.

CONCLUSIONS OF LAW

Department policies are contained in the Department of Health and Human Services Bridges Administrative Manual (BAM), Department of Health and Human Services Bridges Eligibility Manual (BEM), and Department of Health and Human Services Reference Tables Manual (RFT).

The Medical Assistance (MA) program is established by Title XIX of the Social Security Act, 42 USC 1396-1396w-5; 42 USC 1315; the Affordable Care Act of 2010, the collective term for the Patient Protection and Affordable Care Act, Pub. L. No. 111-148, as amended by the Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152; and 42 CFR 430.10-.25. The Department (formerly known as the Department of Human Services) administers the MA program pursuant to 42 CFR 435, MCL 400.10, and MCL 400.105-.112k.

The State Disability Assistance (SDA) program, which provides financial assistance for disabled persons, was established by 2004 PA 344. The Department administers the SDA program pursuant to 42 CFR 435, MCL 400.10 *et seq.* and Mich Admin Code, Rules 400.3151 – 400.3180. A person is considered disabled for SDA purposes if the person has a physical or mental impairment which meets federal Supplemental Security Income (SSI) disability standards for at least ninety days. Receipt of SSI benefits based on disability or blindness, or the receipt of MA benefits based on disability or blindness, automatically qualifies an individual as disabled for purposes of the SDA program.

Current legislative amendments to the Act delineate eligibility criteria as implemented by department policy set forth in program manuals. 2004 PA 344, Sec. 604, establishes the State Disability Assistance program. It reads in part:

Sec. 604 (1). The department shall operate a state disability assistance program. Except as provided in subsection (3), persons eligible for this program shall include needy citizens of the United States or aliens exempt from the Supplemental Security Income citizenship requirement who are at least 18 years of age or emancipated minors meeting one or more of the following requirements:

(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.

Specifically, this Act provides minimal cash assistance to individuals with some type of severe, temporary disability which prevents him or her from engaging in substantial gainful work activity for at least ninety (90) days.

A person is disabled for SDA purposes if he or she:

- Receives other specified disability-related benefits or services, see Other Benefits or Services below, or
- Resides in a qualified Special Living Arrangement facility, or
- Is certified as unable to work due to mental or physical disability for at least 90 days from the onset of the disability.
- Is diagnosed as having Acquired Immunodeficiency Syndrome (AIDS), see Medical Certification of Disability. BEM 261, pp 1-2 (7/1/2014).

Disability is defined as 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 (90 days for SDA). 20 CFR 416.905(a). The person claiming a physical or mental disability has the burden to establish it 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 CFR 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). Similarly, conclusory statements by a physician or mental health professional that an individual is disabled or blind, absent supporting medical evidence, is insufficient to establish disability. 20 CFR 416.927.

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 limitation(s) in light of the objective medical evidence presented. 20 CFR 416.929(c)(2).

In order to determine whether or not an individual is disabled, federal regulations require a five-step sequential evaluation process be utilized. 20 CFR 416.920(a)(1). The five-step analysis requires the trier of fact to consider an individual's current work activity;

the severity of the impairment(s) both in duration and whether it meets or equals a listed impairment in Appendix 1; residual functional capacity to determine whether an individual can perform past relevant work; and residual functional capacity along with vocational factors (e.g., age, education, and work experience) to determine if an individual can adjust to other work. 20 CFR 416.920(a)(4); 20 CFR 416.945.

If an individual is found disabled, or not disabled, at any step, a determination or decision is made with no need to evaluate subsequent steps. 20 CFR 416.920(a)(4). If a determination cannot be made that an individual is disabled, or not disabled, at a particular step, the next step is required. 20 CFR 416.920(a)(4). If an impairment does not meet or equal a listed impairment, an individual's residual functional capacity is assessed before moving from Step 3 to Step 4. 20 CFR 416.920(a)(4); 20 CFR 416.945. Residual functional capacity is the most an individual can do despite the limitations based on all relevant evidence. 20 CFR 945(a)(1). An individual's residual functional capacity assessment is evaluated at both Steps 4 and 5. 20 CFR 416.920(a)(4). In determining disability, an individual's functional capacity to perform basic work activities is evaluated and if found that the individual has the ability to perform basic work activities without significant limitation, disability will not be found. 20 CFR 416.994(b)(1)(iv). In general, the individual has the responsibility to prove disability. 20 CFR 416.912(a). An impairment or combination of impairments is not severe if it does not significantly limit an individual's physical or mental ability to do basic work activities. 20 CFR 416.921(a). The individual has the responsibility to provide evidence of prior work experience; efforts to work; and any other factor showing how the impairment affects the ability to work. 20 CFR 416.912(c)(3)(5)(6).

The Administrative Law Judge is responsible for making the determination or decision about whether the statutory definition of disability is met. The Administrative Law Judge reviews all medical findings and other evidence that support a medical source's statement of disability. 20 CFR 416.927(e).

As outlined above, the first step looks at the individual's current work activity. In the record presented, Petitioner is not involved in substantial gainful activity and testified that she has not worked since May of 2017. Therefore, she is not disqualified from receiving disability benefits under Step 1.

The severity of the individual's alleged impairment(s) is considered under Step 2. The individual bears the burden to present sufficient objective medical evidence to substantiate the alleged disabling impairments. In order to be considered disabled for MA purposes, the impairment must be severe. 20 CFR 916.920(a)(4)(ii); 20 CFR 916.920(b). An impairment, or combination of impairments, is severe if it significantly limits an individual's physical or mental ability to do basic work activities regardless of age, education and work experience. 20 CFR 916.920(a)(4)(ii); 20 CFR 916.920(c). Basic work activities means the abilities and aptitudes necessary to do most jobs. 20 CFR 916.921(b). Examples include:

1. Physical functions such as walking, standing, sitting, lifting, pushing, pulling, reaching, carrying, or handling;
2. Capacities for seeing, hearing, and speaking;
3. Understanding, carrying out, and remembering simple instructions;
4. Use of judgment;
5. Responding appropriately to supervision, co-workers and usual work situations; and
6. Dealing with changes in a routine work setting. *Id.*

The second step allows for dismissal of a disability claim obviously lacking in medical merit. *Higgs v Bowen*, 880 F2d 860, 862 (CA 6, 1988). The severity requirement may still be employed as an administrative convenience to screen out claims that are totally groundless solely from a medical standpoint. *Id.* at 863 *citing Farris v Sec of Health and Human Services*, 773 F2d 85, 90 n.1 (CA 6, 1985). An impairment qualifies as non-severe only if, regardless of a petitioner's age, education, or work experience, the impairment would not affect the petitioner's ability to work. *Salmi v Sec of Health and Human Services*, 774 F2d 685, 692 (CA 6, 1985).

In the present case, Petitioner is diagnosed with avascular necrosis Stage III, compression fracture of the spine, lumbar stenosis, facet arthropathy at L5-S1, degenerative disc disease with posterior disc protrusion, grade 1 anterolisthesis of L5 upon S1 with moderate to marked foraminal narrowing present bilaterally, pulmonary hypertension, pulmonary embolisms, DVT, COPD, pneumonia, sexually transmitted disease, depression, blood clots, ongoing ovarian cysts, and in need of a hip replacement.

As previously noted, Petitioner bears the burden to present sufficient objective medical evidence to substantiate the alleged disabling impairment(s). As summarized above, Petitioner has presented medical evidence establishing that she has physical limitations on her ability to perform basic work activities, based on Stage II avascular necrosis and lumbar and cervical diagnoses. The medical evidence has established that Petitioner has an impairment, or combination thereof, that has more than a *de minimis* effect on Petitioner's basic work activities. Further, the impairments have lasted continuously for twelve months; therefore, Petitioner is not disqualified from receipt of MA-P benefits under Step 2.

In the third step of the sequential analysis of a disability claim, the trier of fact must determine if the individual's impairment, or combination of impairments, is listed in Appendix 1 of Subpart P of 20 CFR, Part 404. Petitioner has alleged avascular

necrosis, Stage III; pulmonary hypertension, pulmonary embolisms, COPD and cysts on her ovaries.

Petitioner has the burden of establishing her disability. The record evidence was insufficient to meet a listing. While there was evidence of Stage III avascular necrosis and degenerative lumbar disease, there was no evidence that Petitioner's hip and back problems were severe enough to meet a listing. Therefore, the analysis continues to Step 4.

Before considering step four of the sequential evaluation process, the Administrative Law Judge must first determine the petitioner's residual functional capacity. (20 CFR 404.1520(e) and 416.920(e)). An individual's residual functional capacity is his/her ability to do physical and mental work activities on a sustained basis despite limitations from his/her impairments. In making this finding, all the petitioner's impairments, including impairments that are not severe, must be considered. (20 CFR 404.1520(e), 404.1545, 416.920(e), and 416.945; SSR 96-8p).

Based on the record evidence, Petitioner does not have the residual functional capacity to perform sedentary work as defined in 20 CFR 404.1567(a). In making this finding, the Administrative Law Judge considered all Petitioner's symptoms and the extent to which these symptoms can reasonably be accepted as consistent with the objective medical evidence and other evidence.

After considering the evidence of record, the Administrative Law Judge finds that Petitioner's medically determinable impairments could reasonably be expected to produce the alleged symptoms, and that the Petitioner's statements concerning the intensity, persistence, and limiting effects of these symptoms are credible.

Next, the Administrative Law Judge must determine at step four whether the petitioner has the residual functional capacity to perform the requirements of her past relevant work. (20 CFR 404.1520(f) and 416.920(f)). The term past relevant work means work performed (either as the petitioner actually performed it or as it is generally performed in the national economy) within the last 15 years or 15 years prior to the date that disability must be established. In addition, the work must have lasted long enough for the petitioner to learn to do the job and have been substantial gainful activity (SGA). (20 CFR 404.1560(b), 404.1565, 416.960(b), and 416.965). If the Petitioner has the residual functional capacity to do her past relevant work, the petitioner is not disabled. If the petitioner is unable to do any past relevant work or does not have any past relevant work, the analysis proceeds to the fifth and last step.

Petitioner's past relevant employment was as a telemarketer. The demands of Petitioner's past relevant work exceed the residual functional capacity. As a result, 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). See *Felton v DSS* 161 Mich. App 690, 696 (1987). Once Petitioner reaches Step 5 in the sequential review process, Petitioner 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 Petitioner has the residual functional capacity for substantial gainful activity.

The medical information indicates that Petitioner suffers from avascular necrosis Stage III, compression fracture of the spine, lumbar stenosis, facet arthropathy at L5-S1, degenerative disc disease with posterior disc protrusion, grade 1 anterolisthesis of L5 upon S1 with moderate to marked foraminal narrowing present bilaterally, pulmonary hypertension, pulmonary embolisms, DVT, COPD, pneumonia, sexually transmitted disease, depression, blood clots, ongoing ovarian cysts, and in need of a hip replacement.

Petitioner credibly testified that she cannot drive, cook, grocery shop, and uses a walker to ambulate. She testified she has a hard time using the bathroom and has a bath chair but is unable to shower without assistance. She reported constant pain all day, every day. She has a severely limited tolerance for physical activities and is unable to walk, sit, or stand for any long periods of time.

Petitioner's treating nurse practitioner opined on May 9, 2017, that Petitioner is being treated for a condition of her hip which makes prolonged sitting, standing, or walking very painful, and she was unable to perform her job duties. Further, Petitioner requires assistance with bathing, cooking and housework. Because Petitioner's treating nurse practitioner's opinion is well supported by medically acceptable clinical and laboratory diagnostic techniques, it has controlling weight. 20 CFR 404.1527(d)(2).

Petitioner is 44 years old, and has a high school education. Petitioner's medical records are consistent with her testimony in that she is unable to engage in even a full range of sedentary work 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).

Petitioner's complaints and allegations concerning her impairments and limitations, when considered in light of all objective medical evidence, as well as the record as a whole, reflect an individual who is so impaired as to be incapable of engaging in any substantial gainful activity on a regular and continuing basis.

A person is considered disabled for purposes of SDA if the person has a physical or mental impairment which meets federal SSI disability standards for at least 90 days. Receipt of SSI or RSDI benefits based upon disability or blindness or the receipt of MA benefits based upon disability or blindness automatically qualifies an individual as disabled for purposes of the SDA program. Other specific financial and non-financial eligibility criteria are found in BEM 261. Inasmuch as Petitioner has been found

“disabled” for purposes of MA, she must also be found “disabled” for purposes of SDA benefits.

DECISION AND ORDER

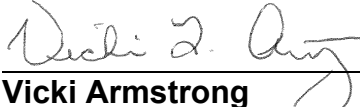
The Administrative Law Judge, based upon the above findings of fact and conclusions of law, decides the Department erred in determining Petitioner is not currently disabled for SDA eligibility purposes.

Accordingly, the Department’s decision is REVERSED, and it is Ordered that:

1. The Department shall process Petitioner’s May 5, 2017, SDA application, and shall award her all benefits she may be entitled to receive, as long as she meets the remaining financial and non-financial eligibility factors.
2. The Department shall review Petitioner’s medical condition for improvement in February of 2019, unless her Social Security Administration disability status is approved by that time.
3. The Department shall obtain updated medical evidence from Petitioner’s treating physicians, physical therapists, pain clinic notes, etc. regarding her continued treatment, progress and prognosis at review.

It is SO ORDERED.

VLA/bb



Vicki Armstrong
Administrative Law Judge
for Nick Lyon, Director
Department of Health and Human Services

NOTICE OF APPEAL: A party may appeal this Order in circuit court within 30 days of the receipt date. A copy of the circuit court appeal must be filed with the Michigan Administrative Hearing System (MAHS).

A party may request a rehearing or reconsideration of this Order if the request is received by MAHS within 30 days of the date the Order was issued. The party requesting a rehearing or reconsideration must provide the specific reasons for the request. MAHS will not review any response to a request for rehearing/reconsideration.

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

DHHS

Kathleen Verdoni
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Saginaw County, DHHS

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