



STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

[REDACTED]

DECISION

MDD/143450

PRELIMINARY RECITALS

Pursuant to a petition filed April 13, 2012, under Wis. Stat. § 49.45(5), and Wis. Admin. Code § HA 3.03(1), to review a decision by the Milwaukee Enrollment Services in regard to Medical Assistance, a hearing was held on December 06, 2012, at Milwaukee, Wisconsin.

The issue for determination is whether the Disability Determination Bureau (DDB) correctly denied Petitioner's request for disability-based Medicaid.

There appeared at that time and place the following persons:

PARTIES IN INTEREST:

Petitioner:

[REDACTED]

Respondent:

Department of Health Services
1 West Wilson Street
Madison, Wisconsin 53703
By: DDB file

ADMINISTRATIVE LAW JUDGE:

Mayumi M. Ishii
Division of Hearings and Appeals

FINDINGS OF FACT

1. Petitioner is a resident of Milwaukee County.
2. Petitioner filed an application for disability-based Medicaid on December 29, 2011, stating that she has been disabled by degenerative disk disease and rotoscoliosis. (DDB file)
3. Since 2003, Petitioner has undergone multiple spinal surgeries to address severe lumbar spinal stenosis, degenerative disk disease and rotoscoliosis. Her surgeries have included laminectomies of L2-5 and L5-7 with C6 corpectomy and C5-7 fusions. Petitioner also experienced a number of

post-surgical complications including leaking spinal fluid, a staph infection and a non-functioning spinal cord stimulator. (DDB file, Exhibit 3)

4. On March 1, 2012, the DDB sent Petitioner a notice indicating her application was denied. The DDB determined that Petitioner is able to perform light/sedentary work. (DDB file)
5. On April 13, 2012, Petitioner filed a request for reconsideration. (DDB file)
6. On August 22, 2012, the DDB again denied Petitioner's application for disability -based Medicaid and on August 27, 2012, the DDB forwarded Petitioner's file to the Division of Hearings and Appeals for review. (DDB file)
7. Petitioner has a pending claim filed with the Social Security Administration for SSI-Disability benefits. (Petitioner's testimony)

DISCUSSION

It is a well-established principle that a moving party generally has the burden of proof, especially in administrative proceedings. State v. Hanson, 295 N.W.2d 209, 98 Wis. 2d 80 (Wis. App. 1980). In a case involving an application for medical assistance, the applicant has the initial burden to establish he or she met the application requirements.

A person between ages 18 and 65, with no minor children, must be blind or disabled to be eligible for MA. In order to be eligible for Medicaid as a disabled person, an applicant must meet the same tests for disability as those used by the Social Security Administration to determine disability for Supplemental Security Income (Title XVI benefits). § 49.47(4)(a)4, *Wis. Stats.* Title XVI of the Social Security Act defines "disability" as the inability to engage in any substantial gainful activity due to physical or mental impairments which can be expected to either result in death or last for a continuous period of not less than 12 months.

Although the determination of disability depends upon medical evidence, it is not a medical conclusion; it is a legal conclusion. The definitions of disability in the regulations governing MA require more than mere medical opinions that a person is disabled in order to be eligible. There must be medical evidence that an impairment exists, that it affects basic work activities, that it is severe, and that it will last 12 months or longer as a severe impairment. Thus, while the observations, diagnoses, and test results reported by the Petitioner's physicians are relevant evidence in determining impairment, the doctors' opinions as to whether the petitioner is disabled for the purposes of receiving MA are not relevant.

The DDB found Petitioner to suffer from a severe impairment, but it also found that despite the impairment, Petitioner is still able to engage in substantial meaningful activity based upon the tests described below.

Under the regulations established to interpret Title XVI, a claimant's disability must meet the 12-month durational requirement before being found disabling. In addition, the disability must pass five sequential tests established in the Social Security Administration regulations. Those tests are as follows:

1. An individual who is working and engaging in substantial gainful activity will not be found to be disabled regardless of medical findings. *20 CFR 404.1520 (b)*.
2. An individual who does not have a "severe impairment" will not be found to be disabled. A condition is not severe if it does not significantly limit physical or mental ability to do basic work. *20 CFR 416.921(c)*.
3. If an individual is not working and is suffering from a severe impairment which meets the duration requirement and meets or equals a listed

impairment in Appendix I of the federal regulations, a finding of disabled will be made without consideration of vocational factors (age, education, and work experience.) *20 CFR 404.1520(d)*.

4. If an individual is capable of performing work he or she has done in the past, a finding of not disabled must be made. *20 CFR 404.1520(f)*.
5. If an individual's impairment is so severe as to preclude the performance of past work, other factors, including age, education, past work experience and residual function capacity must be considered to determine if other types of work the individual has not performed in the past can be performed. *20 CFR 404.1520(g)*.

These tests are sequential. If it is determined that an applicant for MA is employed or does not suffer from a severe impairment it is not necessary to proceed to analyze the next test in the above sequence.

TEST 1

The first test asks whether an individual is working and engaging in substantial gainful activity.

“Substantial activity” is defined as, “work activity that involves doing significant physical or mental activities. Your work may be substantial, even if it is done part time basis.....” *20 CFR 404.1572(a)*

“Gainful work activity” is defined as, “work activity that you do for pay or profit. Work activity is gainful if it is the kind of work usually done for pay or profit, whether or not a profit is realized.” *20 CFR 404.1572(b)*

Earnings can be used to determine whether a person is engaging in substantial gainful activity. *20 CFR 404.1574(a) and (b)*. The 2012 substantial gainful activity (SGA) income limit was \$1010 per month. (Please see www.ssa.gov)

Petitioner is not currently working. As such, she passes test 1.

TEST 2

Petitioner passes test 2 because the DDB found that she does have a severe impairment.

TEST 3

The question presented here is whether petitioner’s impairment meets the criteria listed in Appendix 1 to Subpart P of Part 404 of the Code of Federal Regulation (CFR). If Petitioner meets the aforementioned criteria, tests 4 and 5 do not need to be done; she qualifies as disabled. If Petitioner does not meet the criteria, then she must pass tests 4 and 5 to be considered disabled.

Appendix 1, subsection 1.04 deals with disorders of the spine, including spinal stenosis and degenerative disc disease. It states that in order to qualify for MA, a person with a disorder of the spine must also have:

- A. Evidence of nerve root compression characterized by neuro-anatomic distribution of pain, limitation of motion of the spine, motor loss (atrophy with associated muscle weakness or muscle weakness) accompanied by sensory or reflex loss and, if there is involvement of the lower back, positive straight-leg raising test (sitting or supine); OR
- B. Spina arachnoiditis, confirmed by an operative note or pathology report of tissue biopsy, or by appropriate medically acceptable imaging, manifested by severe burning or painful dysesthesia, resulting in the need for changes in position or posture more than one every two hours; OR

- C. Lumbar spinal stenosis resulting in pseudoclaudication, established by findings on appropriate medically acceptable imaging, manifested by chronic nonradicular pain and weakness, and resulting in inability to ambulate effectively, as defined in 100B2b.

CFR, Appendix 1 to Subpart P of Part 404 (1.04)

Although Petitioner is in constant and considerable pain, there is no clear indication in the record that Petitioner has been diagnosed with nerve root compression, spina arachnoiditis or lumbar stenosis, which manifests symptoms as described above.

TEST 4

The fourth test asks whether Petitioner is capable of work she performed in the past. Per *40 CFR 404.1560 (b)(1)*, the question more specifically, is did Petitioner engage in substantial gainful activity (significant physical or mental activities for which she could have been paid) within the past 15 years, and if so, can Petitioner continue to perform that work?

I could not locate within the DDB file any specific finding by the DDB with regard to Petitioner's ability to perform past work. However, based upon Petitioner's credible testimony, it does not appear that she would be able to return to her former employment.

Petitioner was last employed in 2003 as a medical secretary. Prior to that Petitioner worked as an office manager in a different medical office. However, Petitioner was not even able to get through the fair hearing, which lasted no more than an hour, without changing positions between sitting and standing because of the pain in her back and legs.

Petitioner passes the fourth test.

TEST 5

This test asks whether Petitioner can perform any other work, despite her limitations. The DDB file stated that based upon the criteria found in *Part 404, Subpart P, Appendix 2, part 202.21*, that Petitioner was not disabled because she is considered an individual approaching advanced age (age 50-54) and has education consisting of a high school diploma or greater. Looking at the physical residual functional capacity evaluation it appears the DDB concluded that Petitioner has the ability to perform light, sedentary work with certain restrictions.

Part 404, Subpart P, Appendix 2, §200, states:

Where the findings of fact made with respect to a particular individual's vocation factors and residual functional capacity coincide with all the criteria of a particular rule, the rule directs a conclusion as to whether the individual is or is not disabled. However, each of these findings of fact is subject to rebuttal...Where any one of the findings of fact does not coincide with the corresponding criterion of a rule, the rule does not apply in that particular case and, accordingly, does not direct a conclusion of disabled or not disabled. In any instance where a rule does not apply, full consideration must be given to all of the relevant facts of the case in accordance with the definitions and discussions of each factor in the appropriate sections of the regulations.

....

If an individual's specific profile is not listed within this appendix 2, a conclusion of disabled or not disabled is not directed...an individual's ability to engage in substantial

gainful activity ...is decided on the basis of the principle and definitions in the regulations, giving consideration to the rules of specific case situations in this appendix 2. These rules...provide an overall structure for evaluation of those cases in which the judgments as to each factor do not coincide with those of any specific rule....

Emphasis added

Thus, the ultimate question posed by Test 5, regardless of Petitioner's age, work history and level of ability to communicate in English, is whether Petitioner can engage in any type of substantial gainful activity at all.

The definition of light work is found at 20 C.F.R. § 404.1567 and provides as follows:

(b) Light work. Light work involves lifting no more than 20 pounds at a time with frequent lifting or carrying of objects weighing up to 10 pounds. Even though the weight lifted may be very little, a job is in this category when it requires a good deal of walking or standing, or when it involves sitting most of the time with some pushing and pulling of arm or leg controls. To be considered capable of performing a full or wide range of light work, you must have the ability to do substantially all of these activities. If someone can do light work, we determine that he or she can also do sedentary work, unless there are additional limiting factors such as loss of fine dexterity or inability to sit for long periods of time.

Although the DDB found that Petitioner can perform light work, its conclusion is not supported by the record. Petitioner testified credibly that she cannot lift or carry a full laundry basket. It is unlikely Petitioner would be able to engage in lifting objects up to 20 pounds or frequent lifting of objects weighing up to 10 pounds.

The definition of sedentary work is found at 20 C.F.R. § 404.1567 and provides as follows:

(a) Sedentary work. Sedentary work involves lifting no more than 10 pounds at a time and occasionally lifting or carrying articles like docket files, ledgers, and small tools. Although a sedentary job is defined as one which involves sitting, a certain amount of walking and standing is often necessary in carrying out job duties. Jobs are sedentary if walking and standing are required occasionally and other sedentary criteria are met.

As discussed earlier, Petitioner could not get through the hearing without changing positions between sitting and standing. Petitioner did not appear to be malingering or otherwise exaggerating her pain and discomfort. On the contrary, she seemed a bit embarrassed by having to ask if she could stand up during the hearing. I would note that the hearing lasted no more than one hour. This observation corroborates Petitioner's testimony that she is unable to sit or stand for more than thirty minutes.

The DDB file notes that Petitioner's gait is normal, but that her gait is slow. This is confirmed by my observations of Petitioner entering and exiting the hearing room. She did, in fact, move extremely slowly.

I would note that Petitioner's healthcare provider submitted a letter indicating that Petitioner's condition has worsened since her initial application for medical assistance, because she has had to substitute less expensive, less effective medications in her prescription regimen.

Based upon all of the foregoing, I find that Petitioner is not even capable of engaging in sedentary work.

I also note the following:

20 CFR §404.1560(c)(1) states, “If we find that your residual functional capacity is not enough to enable you to do any of your past relevant work...we will look at your ability to adjust to other work...Any other work (jobs) that you can adjust to must exist in significant numbers in the national economy (either in the region where you live or in several regions in the country.)”

20 CFR §404.1560(c)(2) further states that, “In order to support a finding that you are not disabled at this fifth step of the sequential evaluation process, we are responsible for providing evidence that demonstrates that other work exists in significant numbers in the national economy that you can do...”

The DDB provided no documentation or suggestion of what other work exists in significant numbers in the national economy that Petitioner can do given her age, education, work experience and limitations. A vague assertion that there is some job out there that Petitioner can do hardly satisfies the DDB’s responsibility stated above.

Petitioner passes test 5 and is therefore disabled for Medicaid/MA purposes. However, the record also indicates that Petitioner’s condition may improve with appropriate treatment. Thus, her case should be reviewed to determine whether she is still disabled in two years.

Petitioner should note that if the Social Security Administration denies her application for SSI-Disability Income, she can lose her non-financial eligibility for Medicaid/MA.

CONCLUSIONS OF LAW

The DDB incorrectly denied Petitioner’s application for disability -based Medicaid (MA).

THEREFORE, it is

ORDERED

That the county agency shall review Petitioner’s application for MA and issue any requests for verification it deems necessary within 10 days. The county agency shall, within 10 days of receipt of said verification, certify Petitioner as eligible for MA, if she is otherwise qualified for MA.

It is further ordered that the DDB set a reexamination date of December 1, 2014, to determine whether Petitioner is still disabled at that time.

REQUEST FOR A REHEARING

This is a final administrative decision. If you think this decision is based on a serious mistake in the facts or the law, you may request a rehearing. You may also ask for a rehearing if you have found new evidence which would change the decision. Your request must explain what mistake the Administrative Law Judge made and why it is important or you must describe your new evidence and tell why you did not have it at your first hearing. If you do not explain these things, your request will have to be denied.

To ask for a rehearing, send a written request to the Division of Hearings and Appeals, P.O. Box 7875, Madison, WI 53707-7875. Send a copy of your request to the other people named in this decision as "PARTIES IN INTEREST." Your request for a rehearing must be received no later than 20 days after the date of the decision. Late requests cannot be granted.

The process for asking for a rehearing is in Wis. Stat. § 227.49. A copy of the statutes can be found at your local library or courthouse.

APPEAL TO COURT

You may also appeal this decision to Circuit Court in the county where you live. Appeals must be served and filed with the appropriate court no more than 30 days after the date of this hearing decision (or 30 days after a denial of rehearing, if you ask for one).

For purposes of appeal to circuit court, the Respondent in this matter is the Department of Health Services. After filing the appeal with the appropriate court, it must be served on the Secretary of that Department, either personally or by certified mail. The address of the Department is: 1 West Wilson Street, Madison, Wisconsin 53703. A copy should also be sent to the Division of Hearings and Appeals, 5005 University Avenue, Suite 201, Madison, WI 53705-5400.

The appeal must also be served on the other "PARTIES IN INTEREST" named in this decision. The process for appeals to the Circuit Court is in Wis. Stat. §§ 227.52 and 227.53.

Given under my hand at the City of Milwaukee,
Wisconsin, this 26th day of December, 2012.

\sMayumi M. Ishii
Administrative Law Judge
Division of Hearings and Appeals



State of Wisconsin\DIVISION OF HEARINGS AND APPEALS

David H. Schwarz
Suite 201
5005 University Avenue
Madison, WI 53705-5400

Telephone: (608) 266-3096
FAX: (608) 264-9885
email: DHAmail@wisconsin.gov
Internet: <http://dha.state.wi.us>

The preceding decision was sent to the following parties on December 26, 2012.

Milwaukee Enrollment Services
Disability Determination Bureau