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STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

DECISION

MDD/146866

PRELIMINARY RECITALS

Pursuant to a petition filed January 16, 2013, under Wis. Stat. § 49.45(5), and Wis. Admin. Code § HA 3.03(1), to review a decision by the Disability Determination Bureau ["DDB"] in regard to Medical Assistance ["MA"], a Hearing was held via telephone on February 20, 2013.

The issue for determination is whether petitioner is disabled for purpose of MA.

There appeared at that time via telephone the following persons:

PARTIES IN INTEREST:

Petitioner:

(not present at February 20, 2013 Hearing)

Represented by:

, petitioner's mother

Respondent:

Department of Health Services
1 West Wilson Street
Madison, Wisconsin 53703
By: No Appearance

OTHER PERSONS PRESENT:

, petitioner's grandmother[1]
, Ph.D., Clinical Psychologist, Wisconsin Early Autism Project ["WEAP"]
, OTR, Occupational Therapist ["OT"], S.P.O.T.S. Pediatric Therapy
, petitioner's 2nd grade teacher

[1] Petitioner's grandmother is an attorney. However, she does not represent petitioner in this matter.

ADMINISTRATIVE LAW JUDGE:
Sean P. Maloney
Division of Hearings and Appeals

FINDINGS OF FACT

1. Petitioner [male; age 7 (almost 8) years old] is a child and is resident of Wisconsin.

2. On July 30, 2012 petitioner filed a *Medicaid -- Disability Application*; by a letter dated January 2, 2013 DDB found that petitioner was not disabled because "his condition does not cause marked and severe functional limitations." Exhibits C-1 & C-2.

3. On January 16, 2013 petitioner filed a *Medicaid -- Child Reconsideration Request* with DDB but DDB again determined that petitioner's condition is not disabling. Exhibits C-1 & C-2.

4. Petitioner has been diagnosed with an Autism Spectrum Disorder, receptive and expressive language delay, disruptive behavior disorder Not Otherwise Specified ["NOS"], articulation disorder, and sensory processing disorder. Exhibits A-1, B, A-2a, A-2b, A-2c & A-3.

5. Petitioner takes no medication except for a multivitamin and melatonin on occasion to assist with sleep (he often experiences disruption with sleeping). Exhibits A-1 & B.

6. On the *Autism Diagnostic Observation Schedule* ["ADOS"-2] petitioner had heightened scores in the Social Affect ["SA"] domain which is composed of communication and reciprocal social interaction; on the *Childhood Autism Rating Scale, Second edition Standard Version* ["CARS2-ST"] he achieved a total raw score of 37.5 which falls into the Severe Symptoms category of Autism Spectrum Disorder (fear and nervousness were in the severely abnormal classification; emotional response, adaption to change, taste, smell, and touch response, nonverbal communication, and general impressions were in the moderately abnormal classification; relating to people and body use falls between the moderately and mildly abnormal classifications; imitation, object use, visual response, listening response, verbal communication, and activity level falls into the mildly abnormal classification; intellectual response falls between normal and mildly abnormal based on recent testing); on the *Wechsler Intelligence Scale for Children* he scored 71 (showing a substantial functional impairment); he shows symptoms that are consistent with a moderate degree of autism. Exhibit A-1, B & A-3.

7. Petitioner has struggled with gross motor skill but has met developmental milestones in relation to gross motor skills (although he still exhibits low muscle tone and demonstrates clumsiness, difficulties with coordination, and is currently not able to ride a bike); his range of Motion ["ROM"] is within normal limits; he has delays in grasp strength and control (his grasp, both right and left, is at 5 pounds whereas the norm is greater than 30 pounds; he is right-handed); he can independently don his socks (using oversized socks) and shoes (at school he uses tennis shoes that do not require tying) and can don all basic clothing but requires some assistance with dressing because he is unsuccessful with closures (tying shoes; zipping pants; buttoning; however , he independent in engaging the zipper on his coat and requires minimal assistance for ½ inch or smaller buttons) and refuses to try to manage fasteners and tie his shoes; he lacks dexterity with his use of a

spoon and does not use a fork and knife; he exhibits various sensory issues (he is bothered by noises and will often cover his ears in response; certain smells are averse to him); he is very selective about what he will eat and has a sensory aversion to new foods (he generally only includes hard, crunchy, salty food items in his menu although he will feed himself yogurt and plain vanilla ice cream using a spoon); his feeding problems include auditory, oral, tactile, and olfactory hypersensitivities, limited food variety, and intolerance to oral hygiene tasks; his handwriting skills are not well developed; he does have toileting skills but must be assisted with wiping; he needs assistance to put toothpaste on the tooth brush and does not brush thoroughly; he enjoys bathing but needs reminders to use soap, wash face, etc., and must be assisted with hair washing; his treating Psychologist testified that petitioner has a marked limitation in the domain of "Caring for Yourself" (domain #5)[2]. Exhibit A-1, B, A-2a, A-2b, A-2c, A-3, & A-4.

8. Petitioner shows deficits in communication; he shows deficits in receptive and expressive language skills; he has difficulties with pronunciation and is often resistive to repeating and explaining his expressive language; his school considers him to be at grade level with regard to comprehension skills; he does not elaborate or share information; he does not participate in reciprocal conversation (although he does spontaneously participate); he lacks insight and flexibility when engaging in conversation; petitioner can follow a routine 1-step request but is challenged by novel and multi-step requests although his treating Occupational Therapist ["OT"] states that his ability to follow directions is "Good" and he is able to verbalize and complete the first 3 steps of shoe tying on a dressing board. Exhibits A-1, B, A-2a, A-2b & A-2c.

9. The *Clinical Evaluation of Language Fundamentals* assessment shows that he has less than a 30% delay in receptive language (not showing a substantial functional impairment); his *Peabody Picture Vocabulary Test* score was a 90 (average range); his *Expressive Vocabulary test* score was a 91 (average range); his *CELF - Core Language* score was 81 (below average); his *Comprehensive Assessment of Spoken Language* score was a 92 (average) for receptive language composite and an 81 (slightly below average) for expressive language composite. Exhibit A-3.

10. Petitioner has developed a relationship with a peer but has not generalized this to others; he continues to demonstrate deficits related to initiation of social interactions/skills and appears to lack an understanding of friendship; he struggles with understanding the sentiments of a group and can disregard nonverbal communication; he engages in repetitive behaviors (chewing on his shirt at school; taking off/putting on his shoes; lining-up toy cars; flicking his fingers); he shows deficits in the area of imaginative play; changes in schedule and deviations from routine are problematic form petitioner; transitions in the home environment are very difficult even when he desires the new activity (he will persist in the old activity); in the home environment he has tantrums (refusing, screaming, kicking, hitting, biting, and hitting his head against the wall) at least once per day which can last as long as 30 minutes whenever there is a transition that is not his idea; in response to frustration he might display some self-injury (pulling his hair, slapping himself; hitting his head against the wall, but the behavior of hitting his head

[2] In his post-Hearing Brief petitioner states that his psychologist testified that petitioner's "limitations were marked in the area of communication, specifically receptive limitations (acquiring and using information, attending and completing tasks, interacting and relating with others and caring for himself)." This is not correct. The only area where petitioner's psychologist testified that petitioner had a marked limitation was in the domain of "Caring for Yourself" (domain #5).

against the wall has subsided); in school his 2nd grade teacher reports that he has begun to "flap his arms around" but describes him as being sweet, kind, sensitive, and well-behaved (one of the better behaved kids) and wanting to please; he receives accommodations at school for his needs including re-teaching of lessons, more 1-on-1 instruction, 1-on-1 or small group testing, and repeating of instructions; his 2nd grade teacher testified that he is doing well in school because of his accommodations; his awareness of dangerous situations is not well developed and he requires close supervision (awareness of traffic is poor; climbs in a reckless fashion; does not understand that strangers might pose a threat); he has not developed an awareness of the danger of traffic and heights (he will run and climb without caution; he does have an excessive fear of elevators); he displays variability with mood state (shifts from disinterest, to persistence, to aggression); his treating Psychologist states that petitioner "shows marked impairment in use of multiple nonverbal behaviors to regulate social interaction." Exhibits #A-1, B, A-2a, A-2b, A-2c, A-3 & A-4.

DISCUSSION

For purpose of MA a child is determined to be disabled by standards outlined in the Social Security Act. Wis. Stat. § 49.47(4)(a)4. (2011-12); Wis. Admin. Code §§ DHS 103.03(1)(c)2. & (d)3. (December 2008); See also, 42 C.F.R. § 435.540(a) (2011); Wis. Stat. § 49.46(1)(d)4 (2011-12); *Medicaid Eligibility Handbook* 5.2, 5.3 & 5.4. The applicable Social Security Act disability standards are found in the Code of Federal Regulations ["CFR"], Title 20, Part 416, Subpart I (§§ 416.901 et. seq.), and, by reference, Appendices 1 and 2, Subpart P, Part 404.

Under the Social Security Act, for a child to be *disabled* the child must have a medically determinable physical or mental impairment or combination of impairments that causes marked and severe functional limitations. 20 C.F.R. § 416.906 (2011). Unless the impairment is expected to result in death, it must have lasted or must be expected to last for a continuous period of at least 12 months. This is called the *duration requirement*. Id. & 20 C.F.R. § 416.909 (2011). If a child files a new application and the child is engaged in *Substantial Gainful Activity* ["SGA"], the child will not be considered *disabled* even if the child otherwise meets the definition of *disabled*. 20 C.F.R. §§ 416.906 & 416.924(b) (2011). An SGA means work that: (a) involves doing significant and productive physical or mental duties; and, (b) is done (or intended) for pay or profit. 20 C.F.R. §§ 416.910 & 416.972 (2011).

DDB determined that petitioner is not disabled because it found that although petitioner has one or more severe physical or mental impairments his condition does not cause marked and severe functional limitations. The phrase *marked and severe functional limitations* is a level of severity that meets, medically equals, or functionally equals the severity of a listing in the *Listing of Impairments* found in Appendix 1 of Subpart P of Part 404 of Title 20 of the CFR. See, 20 C.F.R. §§ 416.902 & 416.924(d) (2011). This *Listing of Impairments* is known simply as the *Listing*. A

child's impairment may be a *severe impairment* and yet not meet or medically or functionally equal the severity of a listing in the Listing. This is because not all *severe impairments* cause *marked and severe functional limitations*. See, 20 C.F.R. §§ 416.902 & 416.924(c) & (d) (2011).

A child has *marked and severe functional limitations* in any one of the following 3 circumstances: (1) the child's severe impairment meets the severity of a listing found in the Listing; (2) the child's severe impairment medically equals the severity of a listing found in the Listing; or, (3) the child's severe impairment functionally equals the severity of a listing found in the Listing. 20 C.F.R. §§ 416.902 & 416.924(d) (2011). Therefore, if a child's severe impairment meets at least 1 of these 3 tests and also meets the duration requirement, he or she will be found to be *disabled*. 20 C.F.R. § 416.924(d)(1) (2011). On the other hand, if a child's severe impairment does not meet any of these 3 tests, or does not meet the duration requirement, he or she will be found to be not *disabled*. 20 C.F.R. § 416.924(d)(2) (2011).

As with any eligibility denial, the burden is on petitioner to show that he is eligible for the requested services. *Lavine v. Milne*, 424 U.S. 577, 583-584 (1976). Petitioner argues that he is *disabled* because he functionally equals the severity of a listing found in the Listing. Specifically, petitioner argues that he has a marked limitation in domains 1, 2, 4, and 5.

In order for a severe impairment to functionally equal the severity of a listing found in the Listing it must be of *listing level severity*. A severe impairment is of *listing-level severity* if there are *marked*[3] limitations in any 2 of the following 6 *domains* (or an *extreme*[4] limitation in any 1 of the domains): (1) acquiring and using information; (2) attending and completing tasks; (3) interacting and relating with others; (4) moving about and manipulating objects; (5) caring for oneself; and, (6) health and physical well-being. 20 C.F.R. §§ 416.926a(a), (b)(1) & (d) (2011); See also, 20 C.F.R. §§ 416.926a(e)(2)(i) & (3)(i) (2011).

As to domain 1 -- acquiring and using information: although petitioner has an impairment in this domain the severity of the impairment does not rise to the level of *marked*. His overall test scores

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[3] A *marked* limitation will be found when the child's impairment interferes seriously with the child's ability to independently initiate, sustain, or complete activities. The child's day-to-day functioning may be seriously limited when the child's impairments limit only 1 activity or when the interactive and cumulative effects of the impairment limit several activities. *Marked* limitation also means a limitation that is *more than moderate* but *less than extreme*. It is the equivalent of the functioning one would expect to find on standardized testing with scores that are at least 2, but less than 3, standard deviations below the mean. 20 C.F.R. § 416.926a(e)(2)(i) (2011).

[4] An *extreme* limitation will be found when the child's impairment interferes very seriously with the child's ability to independently initiate, sustain, or complete activities. The child's day-to-day functioning may be very seriously limited when the child's impairments limit only 1 activity or when the interactive and cumulative effects of the impairment limit several activities. *Extreme* limitation also means a limitation that is *more than marked*. It is the rating given to the worst limitations. However, it does not necessarily mean a total lack or loss of ability to function. It is the equivalent of the functioning one would expect to find on standardized testing with scores that are at least 3 standard deviations below the mean. 20 C.F.R. § 416.926a(e)(3)(i) (2011).

do not support a finding of *marked*, his school considers him to be at grade level with regard to comprehension skills, and he is at grade level in school (with accommodations). See, 20 C.F.R. § 416.926a(g) (2011).

As to domain 2 -- attending and completing tasks: Transitions are very difficult for petitioner as reflected in the above *Findings of Fact*. However, the evidence is that this is limited to the home environment. In school his 2nd grade teacher describes him as being sweet, kind, sensitive, and well-behaved (one of the better behaved kids) and wanting to please. Further, the evidence is mixed as to his ability to follow directions. The evidence shows that he can follow a routine 1-step request but is challenged by novel and multi-step requests yet his treating OT states that his ability to follow directions is "Good. He is able to verbalize and complete the first 3 steps of shoe tying on a dressing board. Finally, his treating Psychologist testified at the February 20, 2013 Hearing. He stated that he was familiar with the MA childhood disability standards, the use of the domains, and use of the terms *marked* and *extreme* as they used in reference to the domains. When asked what limitation petitioner showed with regard to domain 2 (attending and completing tasks) he did <u>not</u> testify that petitioner showed a marked limitation. See, 20 C.F.R. § 416.926a(h) (2011).

As to domain 4 -- moving about and manipulating objects: Petitioner's fine motor skills in his hands show delay in grasp strength and control. As a result, he is unsuccessful with closures (tying shoes; zipping pants; buttoning), lacks dexterity with his use of a spoon, does not use a fork and knife, and his handwriting skills are not well developed. However, he is independent in engaging the zipper on his coat and requires minimal assistance for ½ inch or smaller buttons. Further, he can independently don his socks (using oversized socks) and shoes and can don all basic clothing. Although petitioner does have some limitations in the fine motor skills of his hands these limitations, by themselves, do not raise to the level of *marked*. See, 20 C.F.R. § 416.926a(j) (2011).

Finally, as to domain 5 -- caring for oneself: petitioner's treating Psychologist testified at the February 20th Hearing that petitioner had a *marked* limitation in this domain. Given the evidence in the record of this matter, as reflected in the above *Findings of Fact*, it must be concluded that petitioner's treating Psychologist is correct. Petitioner has a *marked* limitation in the domain 5. See, 20 C.F.R. § 416.926a(k) (2011).

Petitioner does not claim that he has a *marked* limitation in domain 3 or in domain 6. He also does not claim that he has an *extreme* limitation in any domain. Therefore, since petitioner has a *marked* limitation in only 1 domain, it must be concluded that he is <u>not</u> *disabled*.

CONCLUSIONS OF LAW

For the reasons discussed above, petitioner is not *disabled*.

NOW, THEREFORE, it is **ORDERED**

That the petition for review herein be and the same is hereby DISMISSED.

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
Madison, Wisconsin, this 27th day of
February, 2013

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\sSean P. Maloney
Administrative Law Judge
Division of Hearings and Appeals

State of Wisconsin\DIVISION OF HEARINGS AND APPEALS

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The preceding decision was sent to the following parties on February 27, 2013.

Clark County Department of Social Services
Disability Determination Bureau