FH

STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

[redacted]

DECISION

MAP/147369

PRELIMINARY RECITALS

Pursuant to a petition filed December 21, 2012, under Wis. Stat. § 49.45(5), and Wis. Admin. Code § HA 3.03, to review a decision by the Disability Determination Bureau ["DDB"] in regard to Medical Assistance ["MA"], a Hearing was held via telephone on March 25, 2013. With petitioner's agreement the Decision due date in this matter was extended to June 17, 2013.

The issues for determination are:

(I) whether petitioner is disabled for purposes of MA; and,
(II) whether petitioner is disabled for purposes of the MA Purchase Plan ["MAPP"].

There appeared at that time via telephone the following persons:

PARTIES IN INTEREST:
Petitioner:

[redacted]

Respondent:

Department of Health Services
1 West Wilson Street
Madison, Wisconsin 53703
By: No Appearance
Disability Determination Bureau
722 Williamson St.
Madison, WI 53703

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

FINDINGS OF FACT

1. Petitioner (age 42 years) is a resident of Brown County.

2. On or about June 22, 2012 petitioner applied for MA and for MAPP. By letters dated November 9, 2012 DDB found that petitioner is not disabled, not eligible for MA, and not eligible for MAPP. On December 21, 2012 petitioner filed a *Medicaid – Adult Reconsideration Request*, but the DDB affirmed its determination that petitioner is not disabled, not eligible for MA, and not eligible for MAPP.

3. Petitioner is currently employed as a Sandwich Artist at *Subway*; he works 32 hours per week and makes at least $8.25 per hour; his weekly gross pay is at least $264.00 (32 x $8.25); his gross monthly pay is at least $1,056.00 ($264.00/week x at least 4 weeks/month); petitioner is not blind.

4. Petitioner has a severe impairment based on the fact that DDB found petitioner not disabled because it determined that he was capable of doing work other than work he had done in the past (Reg-Basis Code N32).

5. Petitioner has been diagnosed with acute trochantic bursitits in left hip and arthritis of the left hip; he has significant back pain including pain shooting down to the left leg and heel area (sciatica); he limps; he exhibits mild depression; he complains of pain in his left hip, numbness and tingling in his hands, and that legs go numb when he stands; he states that he cannot walk more than ½ block, that it is hard for him to get up and down, that he cannot get out of the bathtub, and that he cannot bend over to put on his socks and shoes; he uses a bathroom chair; he takes medication for his pain but reports that the medication does not help (although he states that his doctor has recently increased his medication); he has a history of carpal tunnel syndrome in his hands.

6. In the past petitioner has worked as a gas station attendant at a gas station, an assistant cook at a supper club, and packaging at rehab center; he has used equipment such as machines and tools and has completed reports and done similar duties; he has not had supervisory responsibilities and has not used technical knowledge or skills.

7. Petitioner completed the 10th grade; he is not a high school graduate; he has not attended college or technical school; he is literature in English; he states that he can lift 5 to 10 pounds [although for his job at *Subway* he at times lifts 50 pounds: "bag of onions (once a month)"].

DISCUSSION

Petitioner may qualify for MA either if he is MA Disabled or if he is MAPP Disabled. *Medicaid Eligibility Handbook* ["MEH"] 5.2, 5.10.1, 26.1 & 26.3.2. DDB determined that petitioner was not disabled for either MA or MAPP.

(I) MA DISABILITY

To be eligible for MA as disabled, a person must meet the definition of *disabled* that is used for Supplemental Security Income ["SSI"; a.k.a. "Title 16"] purposes. See, Wis. Stat. § 49.47(4)(a)4. (2011-12). The applicable SSI disability standards are found in the Code of Federal Regulations, Title 20, Part 416, Subpart I (§ 416.901 et. seq.), and, by reference, Appendices 1 and 2, Subpart P, Part 404.

To be *disabled*, for an adult, means the inability to do <u>any</u> substantial gainful activity (i.e., the inability to work) 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 twelve

months. See, 20 C.F.R. § 416.905(a) (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*. See, 20 C.F.R. § 416.909 (2011).

To determine if a person is disabled, a 5-Step prescribed sequential evaluation procedure is used. See, 20 CFR § 416.920 (2011). If a person can be found to be disabled or not disabled at any point in the prescribed sequential evaluation procedure the prescribed sequential evaluation procedure is terminated and no further evaluation is made. See, 20 C.F.R. § 416.920(a)(4) (2011).

DDB found petitioner to be not disabled at Step 5 of the prescribed sequential evaluation procedure because it determined that petitioner is capable of doing work other than work he has done in the past (Reg-Basis Code N32).

The 5-Step prescribed sequential evaluation procedure is as follows.

(1) Current Work

The first step in the prescribed sequential evaluation procedure is to determine whether the person is currently working and, if so, if the work the person is doing is substantial gainful activity. For an adult to be disabled they must be unable to do any substantial gainful activity which exists in the national economy. See, 20 C.F.R. § 416.905(a) (2011). If a person is working and the work he or she is doing is *Substantial Gainful Activity*, that person will be found not disabled regardless of his or her medical condition or his or her age, education, and work experience. see, 20 C.F.R. § 416.920(b) (2011).

A *Substantial Gainful Activity* ["SGA"] means work that: (a) involves doing significant and productive physical or mental duties; and, (b) is done (or intended) for pay or profit. See, 20 C.F.R. §§ 416.910 & 20 C.F.R. § 416.972 (2011).

It is generally considered that the earnings from a person's work as an employee will show that the person has engaged in *Substantial Gainful Activity* if the earnings average more than $1,040 a month in calendar year 2013. Social Security Administration ["SSA"] *Program Operations Manual System* ["POMS"] DI 10501.015.B & DI 24001.025.B.2.; See also, 20 C.F.R. § 416.974(b)(2)(ii) (2011). When calculating earnings the value of any subsidized earnings and the value of any impairment-related work expenses (such as attendant care services, medical devices, prosthetic devices, special work-related equipment, drugs, etc.) are subtracted from gross income. 20 C.F.R. §§ 416.974(b)(1) & 416.976 (2011). The evidence is that petitioner has no subsidized earnings or impairment-related work expenses (although petitioner does take medication he reports that it does not help). Petitioner earns, on average, more than $1,056 a month from his employment. Therefore, petitioner is not disabled for purposes of MA.

It is not necessary to consider the remaining 4 steps in the 5 Step prescribed sequential evaluation procedure for purposes of the MA Disability determination in this matter. See, 20 C.F.R. § 416.920(a)(4) (2011). However, the remaining 4 steps will be outlined below because they are relevant to the MAPP Disability determination in this matter.

(2) *Severe Impairment*

The second step in the prescribed sequential evaluation procedure is to determine whether the person has a severe impairment 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. A *severe impairment* is one which significantly limits the person's physical or mental ability to do basic work activities. See, 20 C.F.R. §§ 416.920(c) & 416.921(a) (2011). *Basic work activities* are the abilities and aptitudes necessary to do most jobs. See, 20 C.F.R. § 416.921(b) (2011). Examples of *basic work activities* include:

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

see, 20 C.F.R. § 416.921(b) (2011).

It is noted that DDB has conceded that petitioner has a severe impairment by its use of Reg-Basis Code N32 and its finding at Step 5 that petitioner is not disabled because he is capable of doing work other than work he has done in the past. See, 20 C.F.R. § 416.920(a)(4) (2011).

(3) The *Listing of Impairments*

The third step in the prescribed sequential evaluation procedure is to determine whether the person's medical condition meets or equals the impairment listings of Appendix 1. See, 20 C.F.R. § 416.920(d) (2011); 20 C.F.R. Appendix 1 to Subpart P (immediately after § 404.1599), *Listing of Impairments* ["Listing"]. The Listing describes, for each of the major body systems, impairments which are considered severe enough to prevent a person from doing any gainful activity. See, 20 C.F.R. § 416.925(a) (2011). If a person has an impairment(s) which meets the duration requirement and which is listed in the Listing, or is equal to a listed impairment(s), the person will be found disabled without considering the person's age, education, and work experience. See, 20 C.F.R. § 416.920(d) (2011); See also, 20 C.F.R. §§ 416.925 et. seq. (2011).

An impairment will not be considered to be one listed in the Listing solely based on a diagnosis. It must also satisfy all the criteria of the Listing. see, 20 C.F.R. § 416.925(d) (2011).

It is important to note that an impairment being listed in the Listing is only a sufficient condition to be found disabled -- it is not a necessary condition. In other words, a person can be found disabled without their impairment being listed in the Listing.

(4) Past Relevant Work

The fourth step in the prescribed sequential evaluation procedure is to determine whether the person's impairments prevent the person from performing past relevant work. If the person can still do past relevant work, and that work is an SGA, than the person must be found not disabled. See, 20 C.F.R. § 416.920(f) (2011).

(5) Work Other Than Past Relevant Work

The fifth, and final, step in the prescribed sequential evaluation procedure is to determine whether the person can perform work other than past relevant work and whether that work is SGA. If the person cannot do work other than past relevant work, he or she will be found MA Disabled. see, 20 C.F.R. § 416.920(g) (2011). To make this determination, the person's *Residual Functional Capacity* ["RFC"] must be assessed. 20 CFR §§ 416.920(e) & 416.945 et. seq. (2011).

(II) MAPP DISABLED

The Medicaid Purchase Plan ["MAPP"] is the Medical Assistance ["MA"] program that is allowed under section 49.472 of the Wisconsin Statutes. Wis. Admin. Code § DHS 101.03(94m) (December 2008). The goals of MAPP are to: (a) encourage people with disabilities to earn more income without risking loss of health and long term care coverage; (b) allow people with disabilities to save more towards retirement or home ownership, or other financial independence opportunities; and, (c) increase the ability of people with disabilities to purchase services that enhance independence. *BWSP Operations Memo* No. 00-15, File 2791, Date 03/13/2000, p. 2. There are several eligibility requirements that must be satisfied before a person is eligible for MAPP. See, Wis. Stat § 49.472(3) (2011-12) & Wis. Admin. Code Chapter DHS 103 (December 2008).

One of the eligibility requirements for MAPP that must be satisfied is being MAPP Disabled. MAPP Disabled is defined as follows:

"The individual would be eligible for supplemental security income ["SSI"] for purposes of receiving medical assistance but for evidence of work, attainment of the substantial gainful activity level, earned income and unearned income in excess of the limit established under 42 USC 1396d (q) (2) (B) and (D)."

Wis. Stat. § 49.472(3)(c) (2011-12); See also, Wis. Admin. Code § DHS 103.03(1)(g)2. (December 2008); *Medicaid Eligibility Handbook* ["MEH"], 5.10, 26.1, 26.3.1.3 & 26.3.2.

In order to be eligible for SSI for purposes of receiving MA a person must be disabled as outlined above under the heading "(I) MA DISABILITY". See, 42 C.F.R. § 435.120 (2011); 20 C.F.R. § 416.202(a)(3) (2011); Wis. Stat. §§ 49.46(1)(a)4. & 49.47(4)(a)4. (2011-12); Wis. Admin. Code § DHS 103.03(1)(c)2. (December 2008); MEH 4.1 & 5.2.

Thus, the MAPP Disabled requirement demands that the person satisfy the MA Disability requirements "but for evidence of work, attainment of the substantial gainful activity level, earned income and unearned income in excess of the limit established under 42 USC 1396d (q) (2) (B) and (D)." Therefore,

a person need not have an MA Disability in order to be eligible for MAPP since, for purposes of MAPP, the disability requirement is specially defined to exclude the following from the MA Disability definition: "evidence of work, attainment of the substantial gainful activity level".

The Secretary of the Wisconsin Department of Health and Family Services ["DHFS"][1] has concluded that the determination of MAPP Disability is made by applying Steps 2, 3, 4 and 5 of the above described MA Disability procedure (Step 1 is not to be applied) with the following modifications: at Step 4 and Step 5 work the person is now doing to make himself or herself eligible for MAPP cannot be considered. DHA Case No. MAP-19/62964 (Wis. Div. Hearings & Appeals Final Decision November 17, 2004; Proposed Decision July 14, 2004) (DHFS).

Therefore, Steps 2, 3, 4 and 5 of the above described MA Disability procedure must be considered in determining whether or not petitioner is MAPP Disabled. However, at Steps 4 and 5 the fact that petitioner is currently employed cannot be considered.

STEP (2): *Severe Impairment*

As noted above, DDB has conceded that petitioner satisfies Step 2 by its use of Reg-Basis Code N32 and its finding at Step 5 that petitioner is not disabled because he is capable of doing work other than work he has done in the past. See, 20 C.F.R. § 416.920(a)(4) (2011). Therefore, petitioner satisfies Step 2. This leaves Steps 3, 4, and 5.

STEP (3): The *Listing of Impairments*

Based on the evidence in the record of this matter, petitioner's impairments do not meet or equal a listing in the Listing of Impairments. See, 20 C.F.R. Part 404, Subpart P, Appendix 1. Specifically, although petitioner has back, hip, and leg pain his pain and loss of function is not of the severity required by the Listing. See, Listing, § 1.00 *Musculoskeletal System.* This leaves Steps 4 and 5.

STEP (4): Past Relevant Work

As explained above, the fourth step in the prescribed sequential evaluation procedure is to determine whether the person's impairments prevent the person from performing past relevant work. If the person can still do past relevant work, and that work is an SGA, than the person must be found not disabled. See, 20 C.F.R. § 416.920(f) (2011).

As noted above, DDB has conceded that petitioner satisfies Step 4 by its use of Reg-Basis Code N32 and its finding at Step 5 that petitioner is not disabled because he is capable of doing work other than work he has done in the past. See, 20 C.F.R. § 416.920(a)(4) (2011). Therefore, petitioner satisfies Step 4. This leaves Steps 5.

STEP (5): Work Other Than Past Relevant Work

The fifth, and final, step in the prescribed sequential evaluation procedure is to determine whether the person can perform work other than past relevant work. If the person cannot do work other than past relevant work,

[1] DHFS is now called the Wisconsin Department of Health Services ["DHS"].

he or she will be found disabled. See, 20 C.F.R. § 416.920(g) (2011). In order to decide if a person can do any work, other than previous work that the person has done, the person's *Residual Functional Capacity* ["RFC"] must be considered -- along with the person's age, education, and work experience. 20 C.F.R. §§ 416.920(e) & 416.945 et. seq. (2011).

A person's RFC is the most a person can do despite the person's limitations. It is an assessment based upon all the relevant evidence in the case record. 20 C.F.R. § 416.945(a)(1) (2011).

A limited ability to perform certain physical demands of work activity such as sitting, standing, walking, lifting, carrying, pushing, pulling, or other physical functions (including manipulative or postural functions, such as reaching, handling, stooping, or crouching), may reduce the person's ability to do past and other work. 20 C.F.R. § 416.945(b) (2011). Pain and other symptoms may cause a limitation of function beyond that which can be determined on the basis of the anatomical, physiological or psychological abnormalities considered alone; e.g., someone with a low back disorder may be fully capable of the physical demands consistent with those of sustained medium work activity, but another person with the same disorder, because of pain, may not be capable of more than the physical demands consistent with those of light work activity on a sustained basis. In assessing the total limiting effects of a person's impairment(s) and any related symptoms, all of the medical and nonmedical evidence must be considered. 20 C.F.R. § 416.945(e) (2011).

In evaluating the intensity and persistence of a person's symptoms, all of the available evidence, including the person's medical history, the medical signs and laboratory findings, and statements from the person, the person's treating or nontreating sources, or other people about how the person's symptoms affect them must all be considered. 20 C.F.R. § 416.929(c)(1) (2011). Because symptoms, such as pain, are subjective and difficult to quantify, any symptom-related functional limitations and restrictions which the person, the person's treating or nontreating sources, or other people report, which can reasonably be accepted as consistent with the objective medical evidence and other evidence, will be taken into account as follows: the person's symptom's, including pain, will be determined to diminish the person's capacity for *basic work activities* to the extent that the person's alleged functional limitations and restrictions due to symptoms, such as pain, can reasonably be accepted as consistent with the objective medical evidence and other evidence. 20 C.F.R. §§ 416.929(c)(3) & (4) (2011); See also, 20 C.F.R. § 416.945(e) (2011).

In evaluating medical opinions more weight is generally given to treating sources, since these sources are likely to be the medical professionals most able to provide a detailed, longitudinal picture of the person's medical impairment(s) and may bring a unique perspective to the medical evidence that cannot be obtained from the objective medical findings alone or from reports of individual examinations, such as consultative examinations or brief hospitalizations. 20 C.F.R. § 416.927(d)(2) (2011); See also, 20 C.F.R. § 416.902*Treating source* (2011).

The physical exertion requirements of work in the national economy are classified as *sedentary*, *light*, *medium*, *heavy*, and *very heavy*. 20 C.F.R. § 416.967(intro.) (2011).

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 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. 20 C.F.R. § 416.967(a) (2011).

Light work, among other criteria, involves lifting no more than 20 pounds at a time with frequent lifting or carrying of objects weighing up to 10 pounds. 20 C.F.R. § 416.967(b) (2011).

Medium work involves lifting no more than 50 pounds at a time with frequent lifting or carrying of objects weighing up to 25 pounds. 20 C.F.R. § 416.967(c) (2011).

Heavy work involves lifting no more than 100 pounds at a time with frequent lifting or carrying of objects weighing up to 50 pounds. 20 C.F.R. § 416.967(d) (2011).

Very Heavy work involves lifting objects weighing more than 100 pounds at a time with frequent lifting or carrying of objects weighing up to 50 pounds or more. 20 C.F.R. § 416.967(e) (2011).

Based on the above law and on the evidence in the record of this matter petitioner meets at least the *Sedentary* requirement.

Petitioner completed the 10th grade and is not a high school graduate. He is literature in English. Thus, he is considered to have a *limited education*. See, 20 C.F.R. § 416.964(b)(3) (2011). His previous work experience appears to be of a *semi-skilled* nature. See, 20 C.F.R. § 416.968(b) (2011). Finally, petitioner is 42 years old and, as such, is considered a *younger person*. See, 20 C.F.R. § 416.963(c) (2011).

A younger person, with an RFC of *Sedentary*, who has a limited education, who is literate in English, and whose previous work experience consists of semi-skilled work must be found to be not disabled. See, 20 C.F.R. Part 404, Subpart P, Appendix 2, Table No. 1, §§ 201.25 & 26 (2011). Therefore, I must find petitioner to be not MAPP Disabled.

CONCLUSIONS OF LAW

For the reasons discussed above:

(I) petitioner is not disabled for purposes of MA; and,
(II) petitioner is not MAPP 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 23rd day of April, 2013

_____

\sSean P. Maloney
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 April 23, 2013.

Brown County Human Services
Division of Health Care Access and Accountability