



STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

██████████
██████████
██████████
██████████

DECISION

MDD/149752

PRELIMINARY RECITALS

Pursuant to a petition filed February 20, 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 July 17, 2013. At petitioner's request the record of the July 17th Hearing was held open until July 29, 2013.

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

There appeared at that time via telephone the following persons:

PARTIES IN INTEREST:

Petitioner:

██████████
██████████
██████████

Respondent:

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

OTHER PERSON PRESENT:

██████████, ██████████, ██████████, ██████████, petitioner's husband

ADMINISTRATIVE LAW JUDGE:

Sean P. Maloney
Division of Hearings and Appeals

FINDINGS OF FACT

1. Petitioner (43 years old) is a resident of Brown County.

2. Petitioner is overweight; in 2005 she had bariatric surgery (with post-operative complications) but regained weight; in 2006 she had a total left knee replacement; in 2007 she was diagnosed with arthritis in her thoracic and lumbar spine; in 2009 she was diagnosed with hypertension; both her feet have large bunions, her left foot has a severely medially deviated 2nd toe, and her right foot has a deviated 2nd toe to the lateral side (despite surgery and the placement of pins); she has chronic pain (back pain and other diffuse pain); she suffers from depression for which she takes medication; she has smoked ½ a pack of cigarettes per day for 28 years but does not drink alcohol; a *Disability Report* dated January 8, 2013, based on an examination of petitioner, concludes that petitioner can do Activities of daily Living [“ADLs”] and diagnoses her with dysthymia due to medical conditions, some personality difficulties (personality Disorder with mixed features), and pain; the *Disability Report* states that petitioner is able to manage her pain, is able to ambulate and walk about (she is clearly mobile and when she takes her medication she appears to be pain free and able to adequately move and ambulate about without difficulties or limitations), has adequate independent living skills, and that her work capacity is adequate (although there may be some jobs where she is not able to function because she is taking certain types of medications); a medical report dated November 27, 2012, also based on an examination of petitioner, concludes that petitioner is “impaired” for certain ADLs (sleep; transferring from bed to chair; climbing stairs; sitting; standing; bathing; writing; meal preparation; driving; public transportation; grocery shopping; recreational activities; past job functions), that she appears unable to carry out physical functions which would require use of the thoracic and lumbar spine, and that she has major limitations due to her feet and is limited from any employment where she had to rely on standing or walking for more than an hour.
3. Petitioner reports that on both her feet she has bad hammer toes, her toes cross over one another, her foot bones stick out, her left foot is so pushed over that it does not align with her ankle and she must walk on the side of that foot, and that she must wear slippers (cannot wear shoes); she reports that she can only be on her feet for 20 minutes because her ankles swell and she is in pain (can stand in one place for only about 10 minutes); that she can sit, stand, or walk for only ½ to 1 hour (loses her balance; for balance she uses a cane in public and the walls at home), has arthritis in her back, has lots of severe back pain and cannot lift anything heavier than a gallon of milk, is very overweight, has an artificial left knee and her right knee is “bone-on-bone” (although she has none of the signs or findings of this) and that she is supposed to have surgery; that she is being treated for fibromyalgia (although no diagnosis has been made) and is in constant pain and can barely bend her right knee; that she has restless leg syndrome; and, that she has a hard time writing because her hands go numb.
4. Petitioner completed the 10th grade but is not a high school graduate; she attended insurance agent school and had an insurance license but that license has expired; she is literate and can read and write in English; she testified that she is okay with lifting a gallon of milk and that she has a “really, really hard time” lifting her 23 pound granddaughter.
5. Petitioner is not currently working; she last worked in 2010 as a secretary at an insurance office doing clerical work and answering telephones; she has also worked as a bartender (she worked on-and-off as a bartender for about 18 years).
6. DDB determined that petitioner is not disabled because she is capable of doing work other than work she has done in the past (Reg-Basis Code N32).

DISCUSSION

To be eligible for MA as disabled, a person must meet the definition of *disabled* that is used for Supplemental Security Income [“SSI”] 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 any 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 she 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 & 416.972 (2011).

Petitioner is not currently working.

(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).

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 she is capable of doing work other than work she 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.

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, §§ 1.01 & 12.00. In particular, the limitations petitioner reports are not entirely consistent with the medical documentation in this matter. The medical documentation shows that she does have some limitations, but it does not show that she cannot ambulate effectively (at least over short distances).

(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, then the person must be found not disabled. See, 20 C.F.R. § 416.920(f) (2011).

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

(5) Work Other Than Past Relevant Work

The fifth 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, 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). As noted above, the limitations petitioner reports are not entirely consistent with the medical documentation in this matter.

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 but is not a high school graduate. She is literate in English. Thus, she is considered to have at least a *limited education*. See, 20 C.F.R. § 416.964(b)(3) (2011). Additionally, petitioner is 43 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*, and who is literate in English must be found to be not disabled. See, 20 C.F.R. Part 404, Subpart P, Appendix 2, Table No. 1, §§ 201.24 – 201.26 (2011). Therefore, I must find petitioner to be not disabled.

CONCLUSIONS OF LAW

For the reasons discussed above, petitioner is not disabled for MA purposes.

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 28th day of August, 2013

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



State of Wisconsin\DIVISION OF HEARINGS AND APPEALS

Wayne J. Wiedenhoef, Acting Administrator
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 August 28, 2013.

Brown County Human Services
Disability Determination Bureau
ssamsa@hrserase.com