



**STATE OF WISCONSIN
Division of Hearings and Appeals**

In the Matter of

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

DECISION

MDD/150606

PRELIMINARY RECITALS

Pursuant to a petition filed June 07, 2013, 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 (MA), a telephonic hearing was held on August 15, 2013, at Milwaukee, Wisconsin.

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

There appeared at that time and place the following persons:

PARTIES IN INTEREST:

Petitioner:

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

Respondent:

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

ADMINISTRATIVE LAW JUDGE:

Kelly Cochrane
Division of Hearings and Appeals

FINDINGS OF FACT

1. Petitioner is a resident of Milwaukee County.
2. Petitioner is 28 years old. She has a history of Grand Mal seizures and has a cognitive disorder.
3. On or about November 27, 2012 petitioner applied for disability through the state MA program. She did not apply for federal disability through the Social Security Administration.

4. On April 26, 2013 the Disability Determination Bureau (DDB) concluded petitioner was not disabled, as it did not appear her impairments were severe enough to be considered disabling.
5. Petitioner filed a MA-Reconsideration Request and on or about June 7, 2013 her reconsideration request was again denied by the DDB.

DISCUSSION

In order to be eligible for MA 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). Wis. Stat. §49.47(4)(a)4. 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 that can be expected to either result in death or last for a continuous period of not less than 12 months. 20 C.F.R. §404.1505. Therefore, this examiner is required to review the petitioner's current MA appeal utilizing the same tests for disability as those used by the Social Security Administration in determining disability for Supplemental Security Income (Title XVI benefits).

Although the determination of disability depends upon medical evidence, it is not a medical conclusion; it is a legal conclusion. Thus, while the observations, diagnoses, and test results reported by a physician are relevant evidence, the opinions of the doctors as to whether an individual is disabled are not conclusive as to that determination.

In addition, the definitions of disability in the regulations governing MA, Supplemental Security Income (SSI), and Social Security Disability Income Insurance (SSDI) programs 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 is severe, that it affects an individual's basic work activities, and that it will last 12 months or longer as a severe impairment.

THE FIVE-STEP DISABILITY DETERMINATION PROCESS

The above requirements are delineated in 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 be found to be not disabled regardless of medical findings. However, if an individual is not working, or is working but earning less than \$1040 per month, proceed to Test #2. 20 C.F.R. § 416.920(b)
2. An individual who does not have a "severe impairment" which significantly limits his or her ability to work will be found not disabled. However, if an individual is found to have a severe impairment, proceed to Test #3. 20 C.F.R. § 416.920(c)
3. If the individual's severe impairment meets or equals a listing in 20 C.F.R. § 404, subpart P, Appendix 1, that individual will be determined disabled. However, if the individual's severe impairment does not meet or equal a listing, proceed to Test #4. 20 C.F.R. § 416.920(d)
4. If the individual is capable (has the Residual Functional Capacity) to perform past work, the individual will be determined not disabled. However, if the individual does not have the capacity to perform past work, proceed to Test #5. 20 C.F.R. § 416.920(e)

(Note, if the individual has marginal education (less than 7th grade) and work experience of 35 or more years of unskilled arduous physical labor and can no longer perform past work at a

customary exertional level, he or she will be determined disabled under 20 C.F.R. § 416.962) 20 C.F.R. § 416.920(f)(2)

5. If the individual is capable of performing any substantial gainful activity in the national economy, that individual will be determined not disabled. However, if the individual cannot perform any substantial gainful activity in the national economy, that individual will be determined disabled. 20 C.F.R. § 416.920(f)(1)

If it is determined that an applicant for MA is not disabled at the second step in the review, it is not necessary to review the case under any later test or tests. 20 C.F.R. §404.1521.

In addition, where an individual has an impairment or combination of impairments resulting in *both* (1) physical limitations and (2) mental (emotional and psychological) limitations, both of those separate types of impairments must be evaluated. As explained by the Code of Federal Regulations:

When we assess your *physical* abilities, we first assess the nature and extent of your physical limitations and then determine your residual functional capacity for work activity on a regular and continuing basis . . . When we assess your *mental* abilities, we first assess the nature and extent of your mental limitations and restrictions and then determine your residual functional capacity for work activity on a regular and continuing basis.

20 C.F.R. 416.945(b) and (c).

PROCESSING OF PETITIONER'S DISABILITY APPLICATION

For Test #1, petitioner is currently not working and therefore passes Test #1.

For Test #2, in determining whether a disability is "severe" under 20 C.F.R. §416.920(c), the Bureau applies the following test:

If you do not have any impairment or combination of impairments which significantly limits your physical or mental ability to do basic work activities, we will find that you do not have a severe impairment and are, therefore, not disabled. We will not consider your age, education and work experience.

In this particular case, the Bureau initially determined the petitioner did not have a severe impairment. Therefore, petitioner failed at Step 2, and her application was initially denied. On reconsideration, the Bureau still assessed her physical abilities as not severe, but that for her mental abilities it assessed the nature and extent of her mental limitations and restrictions and then determined her residual functional capacity (RFC) for work activity on a regular and continuing basis.

The Bureau found that petitioner's conditions do not meet or equal any listed impairment and that she retained the abilities to perform "unskilled work." Generally, this determination is made by application of a guideline tool known as the Social Security RFC "grids", by a vocational consultant, and an additional tool known as the "Mental Residual Physical Functional Capacity Assessment" performed by the Bureau's Disability Examiner and reviewed and approved by a psychiatric Medical Consultant. The Bureau concluded in part that even with her cognitive disorder she has the ability to carry out very short and simple instructions and that she would be best suited to a job situation with a fixed routine with few, if any, changes. While she has limitations in understanding, concentration, and completing tasks she was not markedly limited in her ability to concentrate and perform at a consistent pace.

I have reviewed the assessment tool, and I find it persuasive and in line with petitioner's and her mother's testimony at hearing. The regulations provide that:

Unskilled work is work which needs little or no judgment to do simple duties that can be learned on the job in a short period of time. The job may or may not require considerable strength. For example, we consider jobs unskilled if the primary work duties are handling, feeding and offbearing (that is, placing or removing materials from machines which are automatic or operated by others), or machine tending, and a person can usually learn to do the job in 30 days, and little specific vocational preparation and judgment are needed. A person does not gain work skills by doing unskilled jobs.

20 CFR §404.1568(a).

The DDB reviewer concluded that because her physical limitations were not severe due to her seizures being well controlled by medication and that her mental limitations were not markedly limited in her ability to concentrate and perform at a consistent pace, that the petitioner could handle the demands of unskilled work.

I must concur with the DDB determination that she retained at the time of the denial the residual functional capacity to perform unskilled work. While the petitioner does have limitations - and this is not to diminish the challenges she faces - I do not believe that these conditions prevent her from engaging in substantial gainful employment at an unskilled work level. The clinical impression was that petitioner has a mild cognitive disability with deficits in adaptive areas, written and oral communication, self-direction, functional academics, work and health. She showed weak math and reading levels and had difficulty with complex instructions and in 'information processing' in verbal and non-verbal information. She is otherwise noted to be a hard worker, friendly, outgoing, and emotionally stable. She described at hearing her past work which she enjoyed and performed well at, and that she is constantly seeking new employment. She was assessed as not being vulnerable to exploitation by strangers, able to be independent in transportation needs, care for herself in terms of hygiene, meal preparation, using the computer, household chores (even if her mother may need to remind her), typing, yard work, shopping, handling finances and writing songs. Her sociability was evident at hearing and is duly noted in her records. The Bureau's determination that she is not disabled is affirmed. If the petitioner believes at any point in the future that her conditions have worsened, she is free to file a new application and/or update her medical record with the Disability Determination Bureau. In addition, she may re-apply at any time in the future.

I add, assuming petitioner finds this decision unfair, that it is the long-standing position of the Division of Hearings & Appeals that the Division's hearing examiners lack the authority to render a decision on equitable arguments. See, Wisconsin Socialist Workers 1976 Campaign Committee v. McCann, 433 F.Supp. 540, 545 (E.D. Wis.1977). This office must limit its review to the law as set forth in statutes, federal regulations, and administrative code provisions.

CONCLUSIONS OF LAW

Petitioner is not disabled as required for MA eligibility.

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 Milwaukee,
Wisconsin, this 23rd day of August, 2013

\sKelly Cochrane
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 August 23, 2013.

Milwaukee Enrollment Services
Disability Determination Bureau