



STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

[REDACTED]
c/o [REDACTED]
[REDACTED]
[REDACTED]

DECISION

MKB/152645

PRELIMINARY RECITALS

Pursuant to a petition filed September 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 November 14, 2013.

The issue for determination is whether petitioner is disabled for purpose of the MA Katie Beckett Program ["KBP"].

There appeared at that time via telephone the following persons:

PARTIES IN INTEREST:

Petitioner:

[REDACTED]
c/o [REDACTED]
[REDACTED]
[REDACTED]

Represented by:

[REDACTED] [REDACTED], petitioner's mother
[REDACTED]
[REDACTED]

Respondent:

Department of Health Services
1 West Wilson Street, Room 651
Madison, Wisconsin 53703
By: No Appearance
Disability Determination Bureau
722 Williamson St.
Madison, WI 53703

OTHER PERSONS PRESENT:

[REDACTED] [REDACTED], MSW, LCSW, Individual Therapist
[REDACTED] [REDACTED], Service Facility, Comprehensive Community Services
[REDACTED] [REDACTED], Parent Mentor

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

FINDINGS OF FACT

1. Petitioner (17 years old) is a resident of Sauk County, Wisconsin.
2. On or about May 10, 2013 petitioner filed an *Application For Katie Beckett Program Wisconsin Medicaid*; by a letter dated August 23, 2013 entitled *Medicaid -- Disability Decision Notice -- Katie Beckett Program DDB* found that petitioner was not eligible for KBP because his condition is not disabling.
3. On September 16, 2013 petitioner filed a *Medicaid -- Adult [sic] Reconsideration Request* with DDB but DDB again determined that petitioner's condition is not disabling.
4. Petitioner suffered sexual abuse as a child (between the ages of 1 and 5; petitioner denies any recollection of the abuse) and has diagnoses of Obsessive Compulsive Disorder ["OCD"], Oppositional Defiant Disorder ["ODD"], Attention Deficit Disorder ["ADD"], and Post Traumatic Stress Disorder ["PTSD"]; he takes several medications and is overweight.
5. Petitioner experiences fixations and rituals; he repeats tasks and becomes angry if another person tries to stop him; he is fixated on video games and technology and will often stay up for days on end, as a result his sleep is dysregulated; he has a daily ritual for putting on his eyeglasses which is to stand straight up with his legs apart and repeatedly put the arms of his eye glasses into his mouth; petitioner struggles with toileting and uses excessive amount of toilet paper (his mother states that it is so bad she has a hard time affording all of the toilet paper) causing the toilet to clog and overflow (he is not open to discussing this issue or trying to resolve it), this once required the services of a plumber to fix; petitioner can sometimes refuse to walk on the grass saying he will not step on the grass because there are animals that walk on the grass; petitioner is fearful of change, including changing his clothing (he prefers to wear the same clothes over and over); he counts and wants the numbers to end "on an even number"; petitioner showers for excessively long periods of time (1 hour), uses 4 towels for each shower, and then goes into the kitchen and washes his arms and hands repeatedly, he is often late for appointments and school because of his showering; he misses school regularly and has only attended 2 days this school year and a school district letter dated March 12, 2012 states that "he has virtually not been in school since January" (his mother has recently started to home school him instead of having him attend the local public school); petitioner's eating is maladaptive, he often eats for comfort at night (eating several bags of food such as cheese and chips); petitioner fears having his genitals touched (as during a medical examination; he refuses to allow it) and showering in public (as at school); petitioner has a pattern of responding negatively with aggression to persons of authority (or withdrawing and not responding at all; "mutism").
6. Petitioner's individual therapist, who has treated petitioner since June 2011 and is an MSW and an LCSW, states that petitioner's fixations and rituals have led to social isolation, that petitioner prefers social isolation and avoids any interpersonal activities, that petitioner has no friends at

school and no interest in connecting with peers socially, that petitioner will watch a peer from a distance but is hesitant to engage with the peer beyond parallel play, and that petitioner reported that he has 5 friends at school which is not truthful; petitioner's mother reports that he spends all his time in his room and will only come out to use the bathroom or eat and that he has no friends and no social interactions with anybody; petitioner and his mother report that petitioner has fewer social skills than his same age peers and petitioner's individual therapist concurs with this.

7. Petitioner's most recent teacher reports that petitioner has average social skills and in a September 2013 *Teacher Questionnaire* reports that he does not have a "serious problem" interacting and relating with others except when it comes to respecting and obeying adults in authority (although he does have an "obvious problem" making and keeping friends); in the same September 2013 *Teacher Questionnaire* petitioner's most recent teacher also reports that petitioner has no observed problems with attending and completing tasks and that his functioning in this area appears age-appropriate.
8. On August 5, 2013 petitioner underwent a single 2½ hour Mental Health Status Evaluation (in which his mother took part) by a psychologist resulting in a *Disability Report* dated August 9, 2013; that report states: petitioner arrived promptly; he was relatively cooperative and pleasant and there were no instances of irritability, belligerence, malingering, or factitious behaviors; petitioner described his mood as "pretty happy", denied any mood swings, he noted that he was "calm" (his affect was consistent with this), and he did not display any significant signs of anxiety other than jiggling his feet; petitioner stated that he had a number of friends, that he associated with both family and friends, and that he had 5 to 6 friends whom he saw at school; petitioner related well with the psychologist, was pleasant, and had good eye contact; the psychologist noted no indications of any social withdrawal, isolation, temper tantrums, poor social judgment, impulsiveness, apathy, or paranoid thinking; petitioner was able to readily count backwards from 100 through 79 by 3's within 10 seconds without error, to spell the word "world" both forwards and backwards, and to alphabetize; he was able to follow a 3-step command and no difficulty was noted in following conversations with the psychologist; petitioner states that he enjoys reading and reads "for fairly long periods of time"; petitioner's achievement abilities, as measured by the *Wide Range Achievement Test -- IV* (which tests word reading; sentence comprehension; spelling; math computation; and reading composite) are well into the above-average to superior range (with the exception of spelling which fell within the average range); the report concludes that petitioner "did not endorse any signs or symptoms of a serious mental illness or suicide risk"; the report gives petitioner diagnoses of childhood PTSD, OCD, ADD, and ODD.
9. DDB has found that petitioner has marked impairment in the domain of caring for oneself.

DISCUSSION

A child is determined to be disabled by standards outlined in the Social Security Act. 42 U.S.C. § 1396a(e)(3)(A) (2000 Supplementary Pamphlet), See also, 42 U.S.C. § 1382c(a)(3)(C) (2000 Supplementary Pamphlet), 42 C.F.R. § 435.225 (2011), Wis. Stat. § 49.46(1)(d)4. (2011-12). 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, the child will not be considered *disabled* even if the child otherwise meets the definition of *disabled*. 20 C.F.R. § 416.906 (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. 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, or medically 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 C.F.R. See, 20 C.F.R. § 416.902 (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. Id.; See also, 20 C.F.R. §§ 416.926 & 416.926a (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).

First, it cannot conclude that petitioner's impairment equals the severity of a listing found in the Listing. The Listing that is most relevant to petitioner is found in 112.00 [“Mental Disorders”]. However, petitioner does not exhibit all the necessary symptoms to the necessary degree to meet those Listings. His impairments do not rise to the required level. See, 112.06 (*Anxiety Disorders*) & 112.02.B2.

Second, based on the evidence, petitioner's impairments do not medically equal the severity of a listing found in the Listing. Petitioner's impairments are not at least equal in severity and duration to the listed findings found in the Listing. See, 20 C.F.R. § 416.926 (2011).

Third, as noted above, a child has *marked and severe functional limitations* if the child’s severe impairment functionally equals the severity of a listing found in the Listing. 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*¹ limitations in any 2 of the following 6 *domains* (or an *extreme*² limitation in any 1 of the domains): (i) acquiring and using information; (ii) attending and completing tasks; (iii) interacting and relating with others; (iv) moving about and manipulating objects; (v) caring for oneself; and, (vi) health and physical well-being. 20 C.F.R. §§ 416.926a(b)(1) & (d) (2011); see also, 20 C.F.R. § 416.926a(e)(2)(i) & (3)(i) (2011).

DDB has already found that petitioner has marked impairment in the domain of caring for oneself. Thus, petitioner's condition will functionally equal the severity of a listing found if he has a marked impairment in at least one other the domain.

This matter must be decided based on a preponderance of the credible evidence. Wis. Admin. Code § HA 3.09(4) (February 2013). The information in the record of this matter is mixed with regard to the domain of interacting and relating with others. See, *Findings of Fact* #6, #7 & #8, above. However, the preponderance of the credible evidence in this matter is that petitioner has marked impairment in the domain of interacting and relating with others. It follows that petitioner's condition functionally equals the severity of a listing found in the Listing. Therefore, petitioner is disabled for purposes of KBP.

Testimony at the November 14, 2013 Hearing by both petitioner's mother and his Individual Therapist (who is both an MSW and LCSW) is that petitioner's fixations and rituals have led to social isolation, that he prefers social isolation and avoids any interpersonal activities, that he has no friends at school and no interest in connecting with peers socially, that he will watch a peer from a distance but is hesitant to engage with the peer beyond parallel play, that he spends all his time in his room and will only come out to use the bathroom or eat, that he has no friends and no social interactions with anybody, and that petitioner's report that he had 5 friends at school was not truthful. Their testimony was credible and supported and supplemented by written documentation submitted by them.

The record of this matter contains written reports from petitioner's most recent teacher and also from a psychologist. Those reports state that petitioner does not have a "serious problem" interacting and relating with others except when it comes to respecting and obeying adults in authority (although he does have an "obvious problem" making and keeping friends), that petitioner stated that he had a number of friends, that

¹ 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).

² 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).

he associated with both family and friends, and that he had 5 to 6 friends whom he saw at school, that petitioner related well with the psychologist, was pleasant, and had good eye contact, and that the psychologist noted no indications of any social withdrawal or isolation. However, the weight given to those reports must be substantially less than the weight given to the testimony of petitioner's mother and Individual Therapist and their supporting documents. First, neither the teacher nor the psychologist testified at the Hearing. Second, neither the teacher nor the psychologist has the extensive experience with petitioner that petitioner's mother and Individual Therapist do. Petitioner misses school regularly and has only attended 2 days this school year and a school district letter dated March 12, 2012 states that "he has virtually not been in school since January." The psychologist report was based on a single 2 & ½ hour evaluation.

Additionally, the reports of the teacher and the psychologist are hearsay insofar as they address, with regard to petitioner, the domain of interacting and relating with others. See, Wis. Stat. § 908.01(3) (2011-12). In circumstances where the reliability and probative force of hearsay evidence is suspect and that hearsay evidence is to form the sole basis for a finding of fact, the Wisconsin Supreme Court has held that uncorroborated hearsay does not constitute substantial evidence upon which to base a finding of fact. *Gehin v. Wisconsin Group Ins. Bd.*, 2005 WI 16, ¶¶ 53-56 & 58, 278 Wis. 2d 111, 692 N.W.2d 572; See also, *Williams v. Housing Auth. of City of Milwaukee*, 2010 WI App 14, ¶¶ 14 & 19, 323 Wis. 2d 179, 187 & 189, 779 N.W.2d 185 ["Uncorroborated hearsay evidence, even if admissible, does not by itself constitute substantial evidence."]. In these circumstances the Wisconsin Supreme Court has held that hearsay must be corroborated by nonhearsay evidence. *Gehin*, ¶¶ 82 & 92. There is little, if any, nonhearsay evidence in the record of this matter that corroborates the hearsay evidence offered by DDB relating to the domain of interacting and relating with others.

CONCLUSIONS OF LAW

For the reasons discussed above, petitioner is disabled for purpose of KBP.

NOW, THEREFORE, it is

ORDERED

That this matter be REMANDED to the DDB and to the Wisconsin Department of Health Services ["DHS"] and that, within 10 days of the date of this Decision, DDB and DHS proceed with a finding that petitioner is disabled and issue any benefits for which he is otherwise eligible.

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, Room 651, 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 19th day of December, 2013

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



State of Wisconsin \DIVISION OF HEARINGS AND APPEALS

Brian Hayes, 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 December 19, 2013.

Sauk County Department of Human Services
Bureau of Long-Term Support
Division of Health Care Access and Accountability