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

In the Matter of

██████████ ██████████
c/o ██████████ & ██████████ ██████████
██
██

DECISION

MKB/152852

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, a rescheduled telephonic hearing was held on December 04, 2013, at Antigo, Wisconsin with the petitioner's mother, ██████████ ██████████ and his grandmother. The petitioner's representative signed a Medicaid Disability Reconsideration/Hearing Waiver.

During that hearing, petitioner's mother requested that the record be held open for medical, school, clinical letters and records to be submitted to this office to support petitioner's Medicaid Disability application; and then for a reconsideration by the Disability Determination Bureau (DDB). DDB sent an August 5, 2013 notice to the petitioner denying his MA application as not disabled for MA eligibility purposes based upon medical reports received through September 18, 2013. However, new evidence has been received into the hearing record during and after that hearing.

This Administrative Law Judge (ALJ) sent a February 14, 2014 cover letter to Ms. Davis at the Disability Determination Bureau with a copy of the following documents: a) a January 3, 2013 submission of 9 pages of legal and factual arguments as to why ██████████ should be found disabled; b) a November 24, 2013 letter by Dr. ██████████ G. ██████████, MD; c) a December 3, 2013 letter by ██████████ A. ██████████, DO, FCP (allergy and immunology); d) petitioner's clinical, laboratory and pharmacy records; and copies of pictures of petitioner. In that same letter, this ALJ requested that DDB review the enclosed records, and submit to the Division of Hearings and Appeals (DHA) an updated "Case Development Worksheet" by March 3, 2014. Mrs. ██████████ was granted until March 17, 2014 to submit to DHA any response to DDB's reconsideration summary (updated case development worksheet and childhood disability evaluation form), if she wished.

DDB timely submitted to DHA an updated Case Development Worksheet which stated the following:

DDB has reviewed the newly submitted material per Judge Wolkstein's request. We find that there is no information in this material that was not considered at the reconsideration of the claim. We reviewed the unsigned 9 page letter and find that there are no medical sources listed that we did not have records from, and the letters written by Drs. ██████████ and ██████████ also do not contain any new information. The assessment of 10/7/13 is unchanged. Marked in domain 6 only. Does not meet, equal or functionally equal the listings.

This ALJ sent a March 11, 2014 letter to the petitioner's representative with a copy of DDB's update. That letter indicated that Ms. ██████████ was granted until March 25, 2014 to submit to DHA any response to

DDB’s reconsideration summary (updated case development worksheet), if she wished. Ms. [REDACTED] did not submit any response to DHA by March 25, 2014 or even by the date of this decision.

The issue for determination is whether the Department correctly denied the petitioner’s Katie Beckett (KB) application because he was found to not be “disabled” for KB eligibility purposes.

There appeared at that time and place the following persons:

PARTIES IN INTEREST:

Petitioner:

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

Representative:

[REDACTED] [REDACTED], mother
[REDACTED]
[REDACTED]

Respondent:

Department of Health Services
1 West Wilson Street, Room 651
Madison, Wisconsin 53703

By: No Appearance, written submissions
Disability Determination Bureau
722 Williamson St.
Madison, WI 53703

ADMINISTRATIVE LAW JUDGE:

Gary M. Wolkstein
Division of Hearings and Appeals

FINDINGS OF FACT

1. Petitioner is a 3 year old resident of Langlade County who resides with his family.
2. The petitioner’s representative applied on behalf of petitioner for the MA Katie Beckett Program on or about May 14, 2013.
3. The petitioner is diagnosed with gastroesophageal reflux, bronchiolitis, upper and lower respiratory infections, reactive airway disease, chronic sinusitis, Hypogammaglobulinemia and language delay.
4. In the petitioner’s August 2, 2013, Childhood Disability Evaluation (form SSA-538-F6), Dr. [REDACTED] [REDACTED], MD confirmed the evaluation that petitioner had “No limitation” ratings in the domains #1 - #5 and a “Marked” rating in domain #6 (Health and Physical Well-Being). The petitioner did not have any “Extreme” ratings in his evaluation.
5. Under domain #6, Dr. [REDACTED] indicated that [REDACTED] had a history of being on many antibiotics and undergone multiple ENT evaluations. Petitioner experienced recurrent nasal infections with one left medial lobe pneumonia in April, 2011. In April, 2013, his HISS panel revealed a total IgG of 347 with 9 of 14 pneumococcal serotypes being sub-therapeutic. Flow cytometry was obtained revealing normal T, B, NK counts. IVIG was subsequently started. In the follow-up of June 12, 2013, the clinical note indicates that [REDACTED] has been doing well since starting IVIG, has been off antibiotics, denies cough, wheeze, SOB, and denies recurrent otitis media, and sinus infections.

6. Dr. [REDACTED] stated in the conclusion of her August 2, 2013 evaluation: "At the present time, this child's conditions are showing significant improvement with IVIG treatment which was started just prior to his PFD. This response suggests that other conditions that may have been allowable prior to IVIG therapy, would not meet the durational requirement. Child has established MDIs that are severe, but do not medically meet/equal or functionally equal the listings."
7. In the petitioner's October 10, 2013, second Childhood Disability Evaluation (form SSA-538-F6), Dr. [REDACTED], confirmed the earlier evaluation that petitioner had "No limitation" ratings in the domains #1 - #5 and a "Marked" rating in domain #6 (Health and Physical Well-Being). The petitioner did not have any "Extreme" rating in his evaluation.
8. Dr. [REDACTED] stated in pertinent part of her conclusion of the updated and second October 10, 2013 evaluation: ". . . F/U 6/12/13, notes child doing well since starting IVIG. Has been off antibiotics, denies cough, wheeze, SOB. Denies recurrent otitis media, sinus infections. In 7/13 he also received a second opinion and it was consistent with the treatment he is currently receiving. 8/14/13 infusion completed w/out complications. 9/11/13 infusion and went home stable and no signs of reactions. At the present time, this child's conditions are showing significant improvement with IVIG treatment which was started just prior to his PFD. This response suggests that other conditions that may have been allowable prior to IVIG therapy, would not meet the durational requirement. Child has established MDIs that are severe, but do not medically meet/= or functionally equal the listings."
9. The Department sent an August 5, 2013 notice to the petitioner stating that he does not qualify for MA Katie Beckett benefits because he was determined to not be "disabled" for KB eligibility purposes.
10. The record was held open for the submission of additional evidence by petitioner to DDB for a reconsideration. This ALJ sent this evidence to DDB for a re-evaluation (updated Case Development Worksheet) to DHA and to petitioner's representative. See above Preliminary Recitals.
11. DDB timely submitted to DHA an updated Case Development Worksheet which stated the following:

DDB has reviewed the newly submitted material per Judge Wolkstein's request. We find that there is no information in this material that was not considered at the reconsideration of the claim. We reviewed the unsigned 9 page letter and find that there are no medical sources listed that we did not have records from, and the letters written by Drs. [REDACTED] and [REDACTED] also do not contain any new information. The assessment of 10/7/13 is unchanged. Marked in domain 6 only. Does not meet, equal or functionally equal the listings.
12. Ms. [REDACTED] did not submit any response to DDB's Reconsideration to DHA by March 25, 2014 or even by the date of this decision.

DISCUSSION

The purpose of the "Katie Beckett" waiver is to encourage cost savings to the government by permitting children under age 18, who are totally and permanently disabled under Social Security criteria, to receive MA while living at home with their parents. Wis. Stat., §49.47(4)(c)1m. The Bureau of Developmental Disabilities Services is required to review "Katie Beckett" waiver applications in a five-step process. The first step is to determine whether the child is age 18 or younger and disabled. The disability determination is made for the Bureau by DDB. If the child clears this hurdle, the second step is to determine whether the child requires a level of care that is typically provided in a hospital, nursing home, or ICF-MR. The

remaining three steps are assessment of appropriateness of community-based care, costs limits of community-based care, and adherence to income and asset limits for the child.

“Disability” is defined as an impairment or combination of impairments that substantially reduces a child’s ability to function independently, appropriately, and effectively in an age-appropriate manner, for a continuous period of at least 12 months. Katie Beckett Program Policies and Procedures Manual, page 32. Current standards for childhood disability were enacted following the passage of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996. The current definition of a disabling impairment for children is as follows:

If you are a child, a disabling impairment is an impairment (or combination of impairments) that causes marked and severe functional limitations. This means that the impairment or combination of impairments:

- (1) Must meet or medically or functionally equal the requirements of a listing in the Listing of Impairments in appendix 1 of Subpart P of part 404 of this chapter, or
- (2) Would result in a finding that you are disabled under § 416.994a.

20 C.F.R. §416.911(b). §416.994a referenced in number (2) describes disability reviews for children found disabled under the prior law.

The process of determining whether an individual meets this definition is sequential. See 20 C.F.R. §416.924. First, if the claimant is doing "substantial gainful activity", he is not disabled and the evaluation stops. Petitioner is not working, so he passed this step.

Second, physical and mental impairments are considered to see if the claimant has an impairment or combination of impairments that is severe. If the impairment is a slight abnormality or a combination of slight abnormalities that causes no more than minimal functional limitations, it will not be found to be severe. 20 C.F.R. §416.924(c). Petitioner was determined to meet this step.

Next, the review must determine if the claimant has an impairment(s) that meets, medically equals or functionally equals in severity any impairment that is listed in appendix 1 of subpart P of Part 404 of the regulations. The DDB found that petitioner does not meet the listings.

The purpose of the Listing of Impairments is to describe impairments that are considered severe enough to result in "marked and severe" functional limitations. This is a term of art in the new disability rules for children, and "severe", when coupled with "marked" in this phrase, has a different meaning than "severe" as used in the second step above. In general, a child's impairment(s) is of "listing-level severity" if it results in marked limitations in two broad areas of functioning, or extreme limitations in one such area. 42 C.F.R. §416.925(b)(2).

"Marked" limitation and "extreme" limitation are defined in the regulations at 20 C.F.R. §§416.926a(e)(2), (3). Marked limitation means, when standardized tests are used as the measure of functional abilities, a valid score that is two standard deviations below the norm for the test (but less than three standard deviations). For children from ages three to age eighteen, it means "more than moderate" and "less than extreme". The regulation provides that a marked limitation “may arise when several activities or functions are limited or even when only one is limited as long as the degree of limitation is such as to interfere seriously with the child's functioning.” In comparison, "extreme" limitation means a score three standard deviations below the norm or, for children ages three to age eighteen, no meaningful function in a given area.

I have reviewed the information in the file and compared that information to the Listings. I must agree with the DDB determination that petitioner does not meet or medically equal any of the Listings.

During the hearing, petitioner's mother did not dispute that [REDACTED] has made some improvements. See Findings of Fact #5 - #8 above. However, she asserted accurately that he continues to have many medical problems. She explained that he continues to be a medically "fragile" child with many serious medical problems.

If a child does not meet or equal the Listings, the last step of the analysis is the assessment of functional limitations as described in sec. 416.926a of the regulations. This means looking at what the child cannot do because of the impairments in order to determine if the impairments are functionally equivalent in severity to any listed impairment. To be found disabled, the child must have "marked" limitations in two of the six domain areas, or an "extreme" limitation in one of the areas. 20 C.F.R. §416.926a(b)(2).

The DDB found that petitioner has "marked limitation" in "health and physical well-being (domain #6) and "no limitation" in domains #1-#5. Mrs. [REDACTED] was unable to refute the Department's case that he does not meet the disability criteria with his improvements for KB eligibility. I agree with those findings. The medical evidence as of 2013 does not support "extreme" ratings in any of the six domains. Overall, these ultimate findings must be affirmed as correct assessments of his skills and problems at this time. Thus, [REDACTED] presents with one "marked" rating and no "extreme" rating, and does not present with the requisite two "marked" ratings or one "extreme" rating to meet the disability test. Furthermore, the hearing record confirms that [REDACTED] has made substantial improvement since he applied for KB on May 14, 2013. Accordingly, based upon the above, I must concur with the Disability Determination Bureau's finding that he is "not disabled" and therefore correctly denied his May 14, 2013 Katie Beckett Program application.

CONCLUSIONS OF LAW

1. Petitioner is not "disabled" as that term is used for Katie Beckett MA eligibility purposes.
2. The Department correctly denied the petitioner's Katie Beckett (KB) May 14, 2013 application because he is not "disabled" for KB eligibility purposes.

THEREFORE, it is

ORDERED

The petition for review herein be and the same is hereby Dismissed.

REQUEST FOR A REHEARING

You may request a rehearing if you think this decision is based on a serious mistake in the facts or the law or if you have found new evidence that would change the decision. Your request must be **received within 20 days after the date of this decision**. Late requests cannot be granted.

Send your request for rehearing in writing to the Division of Hearings and Appeals, 5005 University Avenue, Suite 201, Madison, WI 53705-5400 **and** to those identified in this decision as "PARTIES IN INTEREST." Your rehearing request must explain what mistake the Administrative Law Judge made and why it is important or you must describe your new evidence and explain why you did not have it at your first hearing. If your request does not explain these things, it will be denied.

The process for requesting a rehearing may be found at Wis. Stat. § 227.49. A copy of the statutes may be found online or 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 filed with the Court **and** served either personally or by certified mail on the Secretary of the Department of Health Services, 1 West Wilson Street, Room 651, Madison, Wisconsin 53703, **and** on those identified in this decision as “PARTIES IN INTEREST” **no more than 30 days after the date of this decision** or 30 days after a denial of a timely rehearing (if you request one).

The process for Circuit Court Appeals may be found at Wis. Stat. §§ 227.52 and 227.53. A copy of the statutes may be found online or at your local library or courthouse.

Given under my hand at the City of Madison,
Wisconsin, this 9th day of April, 2014

\sGary M. Wolkstein
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 April 9, 2014.

Bureau of Long-Term Support
Division of Health Care Access and Accountability