



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

In the Matter of



REHEARING DECISION

MAP/153792

The attached proposed decision of the hearing examiner dated April 2, 2014, is modified as follows and, as such, is hereby adopted as the final order of the Department.

PRELIMINARY RECITALS

Pursuant to a petition filed October 30, 2013, under Wis. Stat., §49.45(5), to review a decision by the Disability Determination Bureau (DDB) to deny disability for Medicaid Purchase Plan (MAPP) purposes, a hearing was held on February 26, 2014, by telephone. A hearing set for January 23, 2014 was rescheduled at the petitioner's request. A decision dismissing the appeal was issued on March 4, 2014. Petitioner requested a rehearing that was granted on March 21, 2014. No additional hearing was necessary as the basis for the rehearing was an error in the legal analysis.

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

PARTIES IN INTEREST:

Petitioner:



Petitioner's Representative:



Respondent:

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

ADMINISTRATIVE LAW JUDGE:

Brian C. Schneider
Division of Hearings and Appeals

FINDINGS OF FACT

1. Petitioner is a 31-year-old resident of Rock County.
2. Petitioner is not the caretaker of a minor child. She has a high school education.
3. Petitioner has a rare congenital blood disorder called thrombotic thrombocytopenic purpura (TTP). The disease, untreated, causes a number of impairments including bruising, fatigue, nausea, jaundice, fever, anemia, and eventually seizure, liver failure, and stroke.

4. The disease is treated with regular infusions of fresh, frozen plasma. With the regular plasma treatment a person is capable of normal activities, and that is the case with petitioner.
5. Petitioner applied for MA on March 22, 2013. By a letter dated August 1, 2013, the DDB determined that petitioner was not disabled. Rather than filing for reconsideration, petitioner appealed to the Division of Hearings and Appeals. In a decision dated October 10, 2013, the Division found that petitioner essentially requested reconsideration by appealing and sent the file back to the DDB for reconsideration. The DDB affirmed its disability denial on November 27, 2013 and sent the case back to the Division of Hearings and Appeals for a hearing on the merits.
6. At the time of the application petitioner was employed as a waitress, and she continues that employment.

DISCUSSION

An adult under 65 may receive MA if she is disabled. Wis. Stat. §§ 49.46(1) and 49.47(4). To qualify as disabled, the person must meet the definition of that term as it is used for Supplemental Security Income (SSI) purposes. Wis. Stat. §49.47(4)(a)4. Federal regulations automatically find that anyone engaging in substantial gainful activity is not disabled. However, Wisconsin has an exemption from the federal government that allows those who are disabled but wish to work to receive medical assistance through the MAPP program. Wis. Stat. §49.472; MA Handbook, Appendix, §5.12.1.

The applicable SSI disability standards are found in the Code of Federal Regulations, Title 20, Part 416, Subpart I, and by reference Appendices 1 and 2, Subpart P, Part 404. Specifically, to be disabled means to be unable to engage in any substantial gainful activity because of a medically determinable physical or mental condition which will, or has, lasted at least twelve months. To determine if this definition is met, the applicant's current employment status, the severity of her medical condition, and her ability to return to vocationally relevant past work or to adapt to new forms of employment are evaluated in that sequence. 20 C.F.R. s. 416.905 and s. 416.920.

The SSI regulations typically require a five-step process. First, if the person is working at a job that is considered to be substantial gainful employment, she is found to be not disabled without further review. However, the MAPP program eliminates that step.

Wis. Stat., §49.472(3)(c) provides as one criterion for MAPP eligibility that an individual "would be eligible for supplemental security income 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)." In other words, she can be considered to be disabled even if she is working at employment that is considered to be substantial gainful activity. The statute does not mention *ability to work* as suggested in petitioner's pre-hearing brief. It mentions actual work. Thus step one of the process, current employment status, is eliminated from the process for determining disability.

The DDB thus moved directly to step 2, whether the applicant has a "severe impairment." A severe impairment is one that limits a person's ability to do basic work activities. 20 C.F.R. §416.921. The DDB found that petitioner has a severe impairment. The next step is to determine if the impairment meets or equals a listed impairment found at Appendix 1, Subpart P, Part 404. The listings are impairments which are disabling without additional review. 20 C.F.R. 416.925(a). The DDB found that petitioner meets or equals no listing, and petitioner did not argue that she meets a specific listing. The listing concerning TTP, no. 7.06, requires platelet counts repeatedly below 40,000/cubic millimeter with at least one spontaneous hemorrhage within five months prior to adjudication or intracranial bleeding within twelve months prior to adjudication. Petitioner has not had those occurrences. I note that listings

must be met even with treatment because SSI rules require the person to follow treatment to be eligible. 20 C.F.R. § 416.930.

The fourth and fifth steps occur if the impairments do not meet the listings. The DDB must determine whether the person is able to perform past jobs. If not, then the agency must determine if the person can do any other types of work in the society that would be considered substantial gainful activity. 20 C.F.R. §416.960. The DDB did not address past work. Instead it essentially found that petitioner is not limited sufficiently to prevent her from working. In fact, if petitioner were limited to the lowest functional capacity, sedentary, she would be found to be not disabled. See Rule 201.25, which is found at Appendix 2 at 20 C.F.R., Part 404, Subpart P. When petitioner is getting her transfusions, she is capable of working, most likely at a functional capacity higher than sedentary, and thus she cannot be found to be disabled.

The question then is whether anyone who already is employed, but never found to be disabled, can be eligible for MAPP because clearly if the person already is working, she is likely to be found capable of working at step 4 or 5. The answer is yes. If that person meets a listing at step 3, the person can be eligible for MAPP even if she is already at substantial gainful employment.

The reason that I granted the rehearing is due to the interpretation of the legal standard discussed in the Department's Final Fair Hearing decision no. MAP-71/53891, dated December 23, 2002. The error I now find in that decision is the limitation of the discussion regarding steps 2 and 3. The difference between those steps directly impacts on the question of MAPP disability.

Step 2 determines if there is a "severe impairment," defined as a medical condition that significantly limits a person's ability to do basic work activities. 20 C.F.R. §416.920(c). A finding that the applicant has a severe impairment does not result in a finding that the person is disabled. It simply moves the process to the next step. 20 C.F.R. §416.920(a)(4)(ii). Because there must be a finding of *disability* a MAPP applicant cannot be found eligible at this stage. The United States Supreme Court decision in *Bowen v. Yuckert*, 482 U.S. 137 (1987) bears this out, explaining that the severe impairment step was to screen out unfounded claims, but the standard was *de minimis*. "The [step two] severity regulation increases the efficiency and reliability of the evaluation process by identifying at an early stage those claimants whose medical impairments are so slight that it is unlikely they would found to be disabled even if their age, education, and experience were taken into account." 482 U.S. at 153. Thus the range of severe impairments is wide, from an ankle impairment that causes a limp to late stage cancer. This is why the process must move on to step 3.

Step 3 is the "listings." If a person meets or equals any listing in step 3, she is found to be disabled and the sequential process stops. However, if the person fails to meet or equal a listing, the process moves to step 4. 20 C.F.R. §416.920(d) and (e). It is at this step 3 that a working MAPP applicant can obtain the necessary finding of disability. A simple example is a person unable to walk due to an old fracture that did not heal properly who works in an office and has never been found to be disabled. That person would be found not disabled at step 1 of an SSI application. In a MAPP application, step 1 would be skipped, but she would have a severe impairment that meets listing 1.06. She would be disabled for MAPP.

The point is that it is beyond comprehension that the originators of the MAPP program intended that anyone with a medical impairment who already is working, who applies for MAPP, be eligible for the program on the basis of the medical impairment alone, even if the impairment is not disabling.

Despite petitioner's severe medical impairment, she is capable of normal activities when she receives the prescribed treatment for the condition. With treatment she does not have a disabling medical condition as defined for SSI purposes, even if we ignore the fact of her substantial gainful employment. A person must meet SSI eligibility criteria but for her work; having a severe but not disabling condition would not qualify a person for SSI.

The MAPP decision at MAP-71/53891 is superseded by this decision.

CONCLUSIONS OF LAW

Petitioner is not disabled as required for MAPP eligibility.

THEREFORE, it is ORDERED

That 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, WI, 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 request (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 10 day
of July, 2014.

Kevin E. Moore
Kevin E. Moore, Deputy Secretary
Department of Health Services



STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of



PROPOSED REHEARING DECISION

MAP/153792

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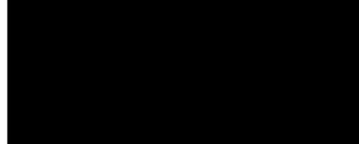
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The applicable SSI disability standards are found in the Code of Federal Regulations, Title 20, Part 416, Subpart I, and by reference Appendices 1 and 2, Subpart P, Part 404. Specifically, to be disabled means to be unable to engage in any substantial gainful activity because of a medically determinable physical or mental condition which will, or has, lasted at least twelve months. To determine if this definition is met, the applicant's current employment status, the severity of her medical condition, and her ability to return to vocationally relevant past work or to adapt to new forms of employment are evaluated in that sequence. 20 C.F.R. s. 416.905 and s. 416.920.

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must be met even with treatment because SSI rules require the person to follow treatment to be eligible. 20 C.F.R. §404.1530.

The fourth and fifth steps occur if the impairments do not meet the listings. The DDB must determine whether the person is able to perform past jobs. If not, then the agency must determine if the person can do any other types of work in the society that would be considered substantial gainful activity. 20 C.F.R. §416.960. The DDB did not address past work. Instead it essentially found that petitioner is not limited sufficiently to prevent her from working. In fact, if petitioner were limited to the lowest functional capacity, sedentary, she would be found to be not disabled. See Rule 201.25, which is found at Appendix 2 at 20 C.F.R., Part 404, Subpart P. When petitioner is getting her transfusions, she is capable of working, most likely at a functional capacity higher than sedentary, and thus she cannot be found to be disabled.

The reason that I granted the rehearing is due to the interpretation of the legal standard at this point. I cited the Department's Final Fair Hearing decision no. MAP-71/53891, dated December 23, 2002, for the proposition that steps 4 and 5 CAN be considered in the disability determination process as the DDB did in petitioner's case. The problem is that the Department's Deputy Secretary did not find the petitioner to be "not disabled" at step 5 in that case, but instead affirmed the proposed decision conclusion that the petitioner WAS disabled, stating:

In petitioner's case, her ability to work was confirmed by evidence that she is in fact working, albeit not at the level of substantial gainful activity. MAPP is designed to encourage more work by permitting earned income beyond the usual MA eligibility limits. The ALJ was correct in holding that petitioner is MAPP eligible. A contrary holding would run counter to the purpose of MAPP.

But that does not mean that steps 4 and 5 do not play a role in determining MAPP eligibility. If an applicant is determined capable of work under steps 4 or 5, the applicant is SSI (and therefore MAPP) ineligible. It is only in those instances where capacity to work is coupled with the performance of actual work that a MAPP applicant would be determined eligible. The ALJ was right in deciding that petitioner is MAPP eligible. He was wrong in eliminating steps 4 and 5 from the SSI Disability sequential evaluation process for the purpose of considering and determining MAPP eligibility.

I note here that the page numbers cited in the Deputy Secretary's decision do not match the page numbers in the copies now available; I will cite to page numbers on the current copies.

In reading both the proposed and final decisions in that case closely, I am troubled by obvious errors and omissions. The most obvious omission is in the proposed decision; it omits any mention of the petitioner's medical condition. It mentions only that she alleged that she was disabled. The obvious error by both the ALJ and the Deputy Secretary is putting equivalence in steps 2 and 3. The ALJ writes at the bottom of page 4: "If a person can be found to be SSI Disabled or not SSI Disabled at any point in the prescribed sequential evaluation procedure the prescribed sequential evaluation procedure is terminated and no further evaluation is made." That statement is misleading. For example, if a person is found to have a severe impairment at step 2, the procedure is not terminated but moves to step 3. Likewise, if a person is found to fail at step 3, the procedure is not terminated but moves to step 4.

The Deputy Secretary compounds the error by stating, in the second replacement paragraph on page 1: "If a MAPP applicant (or an SSI applicant who is not engaged in substantial gainful activity) is determined to have a severe impairment under steps 2 or 3, as was determined in petitioner's case, steps 4 and 5 are

considered.” The error is that there is a major difference between steps 2 and 3, and the petitioner in that case was not found to have a “severe impairment” at step 3. Just the opposite, she failed at step 3.

A “severe impairment” is a medical condition that significantly limits a person’s ability to do basic work activities. 20 C.F.R. §416.920(c). A finding that the applicant has a severe impairment does not result in a finding that the person is disabled. It simply moves the process to the next step. 20 C.F.R. §416.920(a)(4)(ii).

Step 3 is the “listings.” If a person meets or equals any listing in step 3, she is found to be disabled and the sequential process stops. However, if the person fails to meet or equal a listing, the process moves to step 4. 20 C.F.R. §416.920(d) and (e).

The problem with Final Decision MAP-71/53891 is evident. The petitioner in that case was working. She was found to have a severe impairment. She was found not to meet a listing (or she would have been found to be disabled and the sequence terminated). The result of the decision was that steps 4 and 5 were not considered. Thus she was found to be disabled for MAPP purposes based solely upon having a severe impairment.

“Severe impairment” is not a reliable basis for finding a MAPP applicant to be disabled. The United States Supreme Court, in Bowen v. Yuckert, 482 U.S. 137; 107 S. Ct. 2287 (1987), explained that the severe impairment step was to screen out unfounded claims, but the standard was *de minimis*. “The [step two] severity regulation increases the efficiency and reliability of the evaluation process by identifying at an early stage those claimants whose medical impairments are so slight that it is unlikely they would found to be disabled even if their age, education, and experience were taken into account.” 482 U.S. at 153. Thus the range of severe impairments is wide, from an ankle impairment that causes a limp to late stage cancer.

The point is that it is beyond comprehension that the originators of the MAPP program intended that anyone with a medical impairment who already is working, who applies for MAPP, be eligible for the program on the basis of the medical impairment alone, even if the impairment is not disabling. That, in essence, is what happened in Final Decision MAP-71/53891. Because the proposed decision made no mention of the petitioner’s medical condition, there is no way of knowing whether the petitioner’s impairment was disabling even if it met the *de minimis* severe standard.

The question then is whether anyone who already is employed, but never found to be disabled, can be eligible for MAPP, because clearly if the person already is working, she is likely to be found capable of working at step 4 or 5. The answer is yes. If that person meets a listing at step 3, the person can be eligible for MAPP even if she is already at substantial gainful employment. A simple example is a person unable to walk due to an old fracture that did not heal properly who works in an office and has never been found to be disabled. That person would be found not disabled at step 1 of an SSI application. In a MAPP application, step 1 would be skipped, the person would have a severe impairment, and she would meet listing 1.06. She would be disabled for MAPP.

The problem for the petitioner in this case is that, despite her severe medical impairment, she is capable of normal activities when she receives the prescribed treatment for the condition. With treatment she does not have a disabling medical condition as defined for SSI purposes, even if we ignore the fact of her substantial gainful employment. A person must meet SSI eligibility criteria but for her work; having a severe but not disabling condition would not qualify a person for SSI. That is the way that the Disability Determination Bureau interprets the MAPP disability process, and it has to be assumed that the Department’s chosen agency is applying the law and policy in the manner approved by the Department.

I am sending this decision proposed because it appears to conflict with the 2002 MAP-71/53891 decision.

CONCLUSIONS OF LAW

Petitioner is not disabled as required for MAPP eligibility.

THEREFORE, it is ORDERED

That the petition for review herein be and the same is hereby dismissed.

This is a Proposed Decision of the Division of Hearings and Appeals. IT IS NOT A FINAL DECISION AND SHOULD NOT BE IMPLMENTED AS SUCH.

If you wish to comment or object to this Proposed Decision, you may do so in writing. It is requested that you briefly state the reasons and authorities for each objection together with any argument you would like to make. Send your comments and objections to the Division of Hearings and Appeals, P.O. Box 7875, Madison, WI 53707-7875. Send a copy to the other parties named in the original decision as "PARTIES IN INTEREST."

All comments and objections must be received no later than 15 days after the date of this decision. Following completion of the 15-day comment period, the entire hearing record together with the Proposed Decision and the parties' objections and argument will be referred to the Secretary of the Department of Health and Family Services for final decision-making.

The process relating to Proposed Decision is described in Wis. Stat. § 227.46(2).

Given under my hand at the City of Madison,
Wisconsin, this 2nd day of April, 2014



Brian C. Schneider
Administrative Law Judge
Division of Hearings and Appeals