



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

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In the Matter of

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

DECISION

MDD/154237

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**PRELIMINARY RECITALS**

Pursuant to a petition filed August 19, 2013, under Wis. Stat. § 49.45(5), and Wis. Admin. Code § HA 3.03(1), to review a decision by the St. Croix County Department of Human Services in regard to Medical Assistance, a hearing was held on January 23, 2014, at New Richmond, Wisconsin.

The issue for determination is whether the petitioner is disabled.

There appeared at that time and place the following persons:

**PARTIES IN INTEREST:**

Petitioner:

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

Respondent:

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

By: No Appearance

**ADMINISTRATIVE LAW JUDGE:**

Michael D. O'Brien  
Division of Hearings and Appeals

**FINDINGS OF FACT**

1. The petitioner is a resident of St. Croix County.
2. The petitioner is 49 years old.
3. The petitioner attended high school until the 9<sup>th</sup> grade. She was enrolled in a modified curriculum. She has obtained a GED. She has been employed and understands directions given while working.
4. The petitioner has not been employed for about 10 years.

5. The petitioner is 5'6" tall and weighs 244 pounds. She complains of pain, particularly in her neck, daily.
6. The petitioner can lift 10 pounds frequently and 20 pounds occasionally. She can reach overhead only occasionally and cannot climb ladders, ropes or scaffolds or work at heights because she has frequent seizures.
7. The petitioner has panic attacks about once a month. She hyperventilates, cannot breathe, sweats, and becomes tense. She also has crying spells, reduced concentration, irritability, reduced sleep, and general fatigue.
8. The petitioner's neck is stiff and sore. Her forward flexion is 25 degrees, her lateral flexion is 60 degrees to the right and 40 degrees to the left. She has reproducible tenderness throughout her neck and upper back. She has no significant physiological deficits.

### DISCUSSION

The petitioner seeks medical assistance based upon a disability. To qualify as disabled, she must meet the disability standard set by Supplemental Security Income (SSI) regulations. Wis. Stat. § 49.47(4)(a)4. 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. She is disabled if she cannot engage in any substantial gainful activity because of a medically determinable physical or mental condition that will or has lasted at least twelve months. The Disability Determination Bureau determines if an applicant meets this definition by evaluating in sequence her 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. 20 C.F.R. § 416.905 and § 416.920.

The SSI regulations require a five-step process. First, if the person is working at a job that is considered to be substantial gainful employment, she will be found to be not disabled without further review. If she is not working, the Bureau must determine if she 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 Bureau found that she is not engaged in gainful employment and that she has a severe impairment.

The third 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 that are considered disabling without additional review. 20 C.F.R. § 416.925(a). The petitioner has frequent seizures, but these can be controlled by medication. I am aware that she cannot afford this medication, but to meet the listing she must demonstrate that the seizures persist despite three months of prescribed treatment. 20 CFR Pt. 404, Subpt. P, App. 1, § 11.03. Because following prescribed treatment would control her seizures, I must find that they are not disabling.

The petitioner also contends she has an anxiety disorder characterized by panic attacks. I find her testimony credible because it is confirmed by a psychologist who witnessed an attack during his examination of her. Moreover, I found both her and her husband's testimony believable in general. Under 20 CFR, Appendix 1, Subpart P, Part 404, § 12.06A, an anxiety disorder based upon panic attacks requires that she first show "[r]ecurrent severe panic attacks manifested by a sudden unpredictable onset of intense apprehension, fear, terror and sense of impending doom occurring on the average of at least once a week." Although she has established that she has fairly frequent panic attacks, the evidence established that these occur about once a month. Therefore, these do not meet the listing.

The fourth and fifth steps occur if the impairment does not meet the listings. The Bureau must determine whether she can perform past jobs. If not, then it must determine if she can do any other types of work in the society that would be considered substantial gainful activity. 20 C.F.R. § 416.960. The petitioner has not worked in about 10 years and there is no evidence that she can perform any of her past jobs. When a claimant proves that she cannot perform previous work, the burden of proof shifts to the Department to

show that she is able to perform other substantial gainful activity. *Flowers v. Harris*, 616 F. 2d 776 (5th Cir. 1980). See also *DHA Decision No. MDD-49/54605*. She is 49 years old, which is still considered to be a younger individual. Generally, a younger person who can do sedentary work is not disabled. 20 C.F.R. Pt. 404, Subpt. P. App. 2, Rule 201.23. Sedentary work lifting no more than 10 pounds at a time and occasionally walking or standing. 20 C.F.R. § 404.1567(a). When she turns 50 in October she will be considered to be approaching advanced age. 20 CFR §416.963(d). A person approaching advanced age who can speak English is not considered disabled if she can do light work. See 20 CFR Pt. 404, Subpt. P, App. 2, Rule 202.10. Light work is work that requires her to lift at least 20 pounds occasionally and 10 pounds frequently. 20 C.F.R. § 404.1567(b). The administrative code does not address what to do in borderline age situations, but the Appeals Council has. The *Hearings, Appeals, and Litigation Law Manual*, § 2.5.3.2., states that if a person is within a few days or months of her next higher age category and if she would be disabled at that age, the agency should use a sliding age scale that considers “additional vocational adversity” such as poor language skills in English and a work history involving unskilled labor in an isolated industry. Although the petitioner will turn 50 this year, she is more than a few months from that date. Therefore, she must be evaluated as a younger person, and the issue is still whether she can do sedentary work.

The Disability Determination Bureau contends that she can lift 10 pounds frequently and 20 pounds occasionally, which if true means she can do light work. Her medical records indicate that she can lift and carry 10 pounds without indicating whether she could do it once, occasionally, or frequently. It appears that she has no significant strength deficits, which would indicate that she could lift at least 20 pounds occasionally. Her medical records also indicate that she could only stand or sit 30 minutes at a time and that her squatting and bending are moderately impaired. This appears to be based upon her own statements concerning pain. She contends that the primary source of her pain is in her neck, which is also stiff and upper back. The examination performed by the Department’s doctor confirms reproducible pain throughout her neck. However, he found no evidence that she had any serious physiological deficits. From this, I find that pain does limit her, but not so much that she cannot lift 10 pounds occasionally. She reports that she can walk about 100 yards before getting too tired to continue. This indicates that she can walk occasionally. She can also sit at least occasionally. From this, I find that she could do sedentary work and thus is not disabled.

### **CONCLUSIONS OF LAW**

The petitioner is not disabled because she a younger person who can do sedentary work.

**THEREFORE, it is**

**ORDERED**

The petitioner's appeal is 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, 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 11th day of February, 2014

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\sMichael D. O'Brien  
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](mailto:DHAmail@wisconsin.gov)  
Internet: <http://dha.state.wi.us>

The preceding decision was sent to the following parties on February 11, 2014.

St. Croix County Department of Human Services  
Disability Determination Bureau