FH

STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

[redacted]

AMENDED DECISION

MDD/154327

PRELIMINARY RECITALS

Pursuant to a petition filed November 07, 2013, under Wis. Stat. § 49.45(5), and Wis. Admin. Code § HA 3.03(1), to review a decision by the Racine County Department of Human Services in regard to Medical Assistance, a hearing was held on June 17, 2014, at Racine, Wisconsin. Post-hearing, the record was held open to allow the Petitioner's attorney to submit additional medical documentation and legal arguments. The Petitioner's attorney waived time limits relating to issuance of the decision. The record was closed on July 11, 2014. An initial decision was issued by DHA on September 3, 2014. The decision found the Petitioner was not disabled for the period of December, 2012 – May 5, 2014. The matter was remanded on September 3, 2014 to the agency to make a determination of disability for the period subsequent to May 5, 2014 based on additional information. On September 4, 2014, the Social Security Administration made a determination that the Petitioner is not disabled.

The issue for determination is whether the agency properly determined the Petitioner is not disabled.

There appeared at that time and place the following persons:

PARTIES IN INTEREST:

Petitioner:

[redacted]

Petitioner's Representative:

Attorney Brenda Manning
860 Northpoint Blvd
Waukegan, IL 60085

Respondent:

Department of Health Services
1 West Wilson Street, Room 651
Madison, Wisconsin 53703
By: No Appearance

ADMINISTRATIVE LAW JUDGE:
Debra Bursinger
Division of Hearings and Appeals

FINDINGS OF FACT

1. Petitioner is a resident of Racine County. He is 52 years old.
2. On or about December 27, 2012, the Petitioner filed a Medicaid Disability Application (MADA)with the agency. He reported the following impairments: degenerative lower and cervical spine, right shoulder degeneration, right hand degeneration, degenerative right knee, radiculopathy, syncope with collapse, status post pacemaker implantation, bipolar, anxiety with chronic insomnia, cerebral venous thrombosis, hypertension, chronic pain, deconditioning with weakness.
3. Petitioner had a lumbar spinal fusion in 2004. He complained of worsening symptomology since 2008. He had a left rotator cuff tear in 2010 after falling down stairs.
4. From December 26 – 31, 2012, Petitioner was hospitalized for back pain with progressively worsening lower extremity weakness, right knee meniscal tear with diffusion degeneration, difficult ambulation/pain, degenerative right shoulder with complete disruption and retraction of the subscapularis tendon with full thickness tear and moderate arthrosis, mastoid imflammation and Eustachian tube dysfunction with serous otitis, tube placed in left ear. Petitioner had a normal cardiac evaluation while hospitalized.
5. On January 11, 2013, the Petitioner filed a disability application with the Social Security Administration (SSA).
6. On February 23, 2013, the Petitioner suffered a syncopal episode. A CT scan of the abdomen done on February 27, 2013 showed persistent minimal fatty infiltration of the liver.
7. On April 9, 2013, the SSA denied the Petitioner's disability application on the grounds that he did not provide information that was requested.
8. From July 9 – 18, 2013, the Petitioner was admitted to a hospital for syncope, cardiac arrhythmia improved after pacer placement, chronic degenerative shoulder with increasing pain, degenerative disc disease causing radiculopathy in bilateral upper extremities and right leg. An MRI of C-spine showed disc/nerve impingement. It was noted that the Petitioner's shoulder has been treated with multiple injections in the past and is completely unstable with a labral and supraspinatus tears. He complained of persistent abdominal pain and diarrhea. A CT of the brain was unremarkable. It was noted that the Petitioner has mild degenerative change in the bilateral hips. No acute findings in either knee. A scan of both carotid systems showed no evidence of significant stenosis.
9. In August, 2013, Petitioner was hospitalized for left lower deep vein thrombosis and pulmonary embolism. In September, 2013, the Petitioner was admitted with altered mental status and determined to be suffering from an unintentional medication overdose.
10. In May, 2014, the Petitioner was hospitalized for 7 days with superior sagittal cerebral venous thrombosis, hypertension, anxiety, chronic pain, deconditioning and weakness, anxiety with chronic insomnia worsened, likely bipolar with flare during hospitalization. He was discharged home to receive physical, occupational and speech therapy as well as skilled nursing.
11. On September 24, 2013, the Disability Determination Bureau denied the Petitioner's MADA. On November 7, 2013, the Petitioner submitted a reconsideration request. On December 17, 2013, the DDB denied the Petitioner's reconsideration request.
12. Petitioner has a high school education. His previous work includes [redacted] of a [redacted]. He has not worked at his shop since 2010. Previous to his shop, he worked as an apprentice in a similar [redacted]. He has also previously worked in theatrical productions.
13. On September 4, 2014, the SSA made a determination that the Petitioner is not disabled.

DISCUSSION

An adult under 65 without minor children may receive medical assistance if he is disabled. Wis. Stat. §§ 49.46(1) and 49.47(4). To qualify as disabled, an individual 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. An individual is disabled if unable to 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 the individual meets this definition by evaluating, in sequence, current employment status, the severity of the medical condition, and the 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 applicant works at a job that is considered to be substantial gainful employment, the individual will be found to be not disabled without further review. If the individual is not working, the Bureau must determine if s/he has a "severe impairment." A severe impairment is one that limits the ability to do basic work activities. 20 C.F.R. § 416.921. In this case, the Petitioner is not working. The DDB determined the Petitioner's impairments are severe impairments.

The third step is to determine if the impairment meets or equals a listed impairment found at Appendix 1, Subpart P, Part 404. These listings are impairments that are considered disabling without additional review. 20 C.F.R. § 416.925(a). The Petitioner does not meet the specific criteria for any of the listed impairments.

The fourth and fifth steps occur if the impairment does not meet the listings. The Bureau must determine whether the individual can perform past jobs. If not, the agency must determine if the individual can do any other types of work that would be considered substantial gainful activity. 20 C.F.R. § 416.960.

A physical residual function capacity assessment of the Petitioner was completed on September 18, 2013 by Dr. Pat Chan. Dr. Chan concluded the Petitioner's exertional limitations include: occasionally lifting and/or carrying 20 pounds; frequently lifting or carrying 10 pounds; standing and/or walking a total of 6 hours in an 8 hour workday; sitting a total of 6 hours in an 8 hour workday; unlimited pushing and/or pulling. Dr. Chan also concluded the Petitioner has no postural limitations and no visual limitations. Dr. Chan concluded the Petitioner should do no more than occasional overhead reaching on the right due to right shoulder subluxation and pain but otherwise, the Petitioner has no other manipulative limitations. Dr. Chan noted that the Petitioner has limited hearing loss on the left but no speaking limitations. Dr. Chan concluded the Petitioner should avoid exposure to heights/hazards due to syncopal episodes but otherwise has no other environmental limitations.

A second physical residual functional capacity assessment of the Petitioner was completed on December 11, 2013 by Dr. Mina Korshidi. She had the same conclusions as Dr. Chan with regard to Petitioner's exertional limitations. She further concluded the Petitioner has no postural limitations except that he should not climb on ladders/ropes/scaffolds. She concluded Petitioner's significant degenerative joint disorder limits his overhead reaching with his right arm. She found no visual limitations and no communicative limitations. She concluded there are no environmental limitations except that Petitioner should avoid exposure to unprotected heights and hazardous machinery due to syncopal episodes.

Two psychiatric reviews were conducted by the agency, one on September 19, 2013 by Dr. Donahoo and one on December 12, 2013 by Dr. Jennings. Both concluded that the Petitioner's psychological impairments are not severe. Both found that the Petitioner's anxiety disorder does not limit his ability to maintain social functioning and does not result in episodes of decompensation. Dr. Jennings concluded that the anxiety disorder does not restrict the Petitioner's activities of daily living. Dr. Donahoo found that

the disorder mildly restricts his activities. Both also concluded that his anxiety disorder creates mild difficulties in maintaining concentration, persistence or pace. Dr. Jennings based her conclusions on the primary care physician noting that medications prescribed to address psychological diagnoses are helping and there is a plan to wean the Petitioner from the medications in 2 – 6 months. Both noted that the Petitioner reports being able to prepare simple meals, perform household cleaning and laundry, walk, drive or ride in a car, leave the house 2 – 3x/week, shop 1 – 2x/week and manage money. Dr. Jennings also noted that the Petitioner reported hobbies/interests including reading, playing music, listening to music, doing light work on guitars, socializing with others, attending church and going to the library 2 – 3x/week. He reported to both doctors that he is able to follow instructions and pay attention but he has difficult with his memory and handles stress poorly. Both doctors noted that during Petitioner's inpatient treatment for physical impairments, no significant psychological symptoms were noted and he has not required any inpatient treatment.

The Petitioner relies primarily on the assessment of his primary care physician, Dr. Montemurro, to assert that he is unable to return to work and has been unable to work since at least December, 2012. While the Petitioner has consistently complained of right shoulder and knee pain since prior to December, 2012, there are some differences in physician assessments of the severity of the Petitioner's condition. In December, 2012, Dr. Montemurro noted in the records that Petitioner's back pain was worsening, his right knee pain caused difficulty with ambulation, his right shoulder pain caused difficulty with use and his bi-polar condition was poorly controlled. Dr. Slimack noted in December, 2012 that Petitioner ambulated without difficulty and that there was mild degenerative joint disease in the R knee. There was an MRI of the right shoulder in December, 2012 showing a complete disruption of the anterior tendon. Records indicate that Petitioner's range of motion in the R shoulder is limited.

Medical records from July, 2013 indicate mild changes in Petitioner's right knee but no acute findings. Mild degenerative changes were noted in his right shoulder and bilateral hips. Stable post-operative findings were noted in the Petitioner's lower lumbar spine with range of motion within normal functional limits. It was noted that range of motion remained limited in the right shoulder.

Based on the evidence presented, I conclude that the Petitioner cannot perform past work. He has not worked since 2010. Because of the length of time since he has worked and the continued pain in his shoulder and back, I conclude that he cannot return to performing the same work he was performing more than 4 years ago.

Because the Petitioner cannot do past work, it is necessary to determine whether he can do any other types of work in the society that would be considered substantial gainful activity. 20 C.F.R. § 416.960. He is considered to be closely approaching advanced age (age 50-54). 20 CFR §416.963(a). He graduated from high school and can read and write the English language, but has no transferable skills at this point because of the length of time since he last worked. 20 CFR § 404.1565. Because he is closely approaching advanced age and has a high school education with no transferable skills, he is disabled if he is limited to sedentary work but not if he is limited to light work. See 20 CFR Pt. 404, Subpt. P, App. 2, Rules 201.14 and 202.14.

Sedentary work is defined in the regulations as follows:

> Sedentary work involves lifting no more than 10 pounds at a time and occasionally lifting or carrying articles like docket files, ledgers, and small tools. Although a sedentary job is defined as one which involves sitting, a certain amount of walking and standing is often necessary in carrying out job duties. Jobs are sedentary if walking and standing are required occasionally and other sedentary criteria are met.

20 C.F.R. § 404.1567(a).

Light work is defined in the regulations as follows:

> Light work involves lifting no more than 20 pounds at a time with frequent lifting or carrying of objects weighing up to 10 pounds. Even though the weight lifted may be very little, a job is in this category when it requires a good deal of walking or standing, or when it involves sitting most of the time with some pushing and pulling of arm or leg controls. To be considered capable of performing a full or wide range of light work, you must have the ability to do substantially all of these activities. If someone can do light work, we determine that he or she can also do sedentary work, unless there are additional limiting factors such as loss of fine dexterity or inability to sit for long periods of time.

20 C.F.R. § 404.1567(b).

The Petitioner testified at the hearing that he had been able to perform all activities of daily living with the exception of driving until his most recent hospitalization in May, 2014. He worked a few days/month for a friend who owns a coffee shop, making and serving coffee. He did not get paid but enjoyed being able to do something. He stated that he looked for odd jobs that he was able to perform with the limited range of motion in his right shoulder.

Post-hearing, the Petitioner submitted medical records from his most recent hospitalization following a fall and head trauma. It is clear that the Petitioner had some significant changes in his physical and mental health beginning in May, 2014. He was admitted to the hospital on May 5, 2014 with headache, fatigue, near syncope and weakness. A CT showed venous thrombosis cerebral. He had issues with word finding, confusion and agitation. He had poor balance and weakness. He had a period of home health care from May – July, 2014. The home health plan of care included PT, OT, speech therapy and assistance with activities of daily living.

There is no dispute that Petitioner has a complex medical history. Based on the medical records produced and the Petitioner's testimony, I conclude he was able to perform light work at least until the most recent hospitalization in May, 2014. Petitioner was occasionally working at his friend's coffee shop and at other odd jobs that he could do with his limitations. Evaluations of the Petitioner by various physicians document that he had limited range of motion in his right shoulder and pain in his back and right knee but their findings do not indicate that the condition or changes were such to limit his work to the sedentary level.

Since the Petitioner's condition has changed significantly since the Disability Determination Bureau's most recent assessments of the Petitioner in 2013 and the Bureau had not considered this evidence, I had initially remanded the matter to the Bureau to consider whether his most recent physical and mental health changes meet the disability criteria. The day after that remand the Social Security Administration determined that the Petitioner is not disabled based on its review of the medical evidence. A finding of no disability for Social Security/SSI purposes is binding on a State Medicaid agency. 42 CFR 435.541(b)(1). Therefore, the original order of remand to the Bureau is now moot.

CONCLUSIONS OF LAW

Based on the evidence and on the finding by the Social Security Administration, the agency properly determined the Petitioner is not disabled.

THEREFORE, it is **ORDERED**

That 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 Milwaukee,
Wisconsin, this 8th day of October, 2014

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\sDebra Bursinger
Administrative Law Judge
Division of Hearings and Appeals

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The preceding decision was sent to the following parties on October 8, 2014.

Racine County Department of Human Services
Disability Determination Bureau
Attorney Brenda Manning