



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

In the Matter of

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

DECISION

MDD/154474

PRELIMINARY RECITALS

Pursuant to a petition filed September 9, 2013, under Wis. Stat. § 49.45(5), and Wis. Admin. Code § HA 3.03(1), to review a decision by the Shawano County Department of Social Services and the Wisconsin Disability Determination Bureau (DDB or Bureau) in regard to Medical Assistance (MA), a hearing was held on February 11, 2014, by telephone.

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

There appeared at that time and place the following persons:

PARTIES IN INTEREST:

Petitioner:

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

Petitioner's Representative:

██████ ██████ (not appearing)
██
██

Respondent:

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

ADMINISTRATIVE LAW JUDGE:

Nancy J. Gagnon
Division of Hearings and Appeals

FINDINGS OF FACT

1. Petitioner is a resident of Shawano County.
2. Petitioner applied for MA on January 30, 2013. By letter dated August 20, 2013, the Bureau found that petitioner was not disabled. Petitioner sought reconsideration, but the Bureau affirmed its determination on December 23, 2013.

3. DDB's original basis for determining that the petitioner was not disabled was code N32—"individual has the capacity for substantial gainful activity, other than relevant past work."
4. The petitioner is not currently employed.
5. The petitioner suffers from back and multiple joint pains and a history of heart attacks (myocardial infarction). The most recent heart attack occurred in January 2013. A stent was placed at that time, and the petitioner's ejection fraction remained within normal limits.

In October 2008, the petitioner suffered a crush injury to his left forearm at work. Due to twisting of the back when heavy metal fell on his arm, the petitioner also sustained soft tissue damage in his left upper back. The x-ray taken at the time of injury did not show a fracture of the arm. His treatment consisted of physical therapy, a series of steroid injections, and use of prescription painkillers and muscle relaxants as needed. The petitioner continues to have daily pain in the neck, left arm and left upper back to the present time. Upon examination performed in December, 2013, it was noted that the petitioner had normal-appearing musculature in the arm and back, normal strength, no radiation of pain, normal range of motion in his shoulders and neck (flexion 50 degrees, extension 60 degrees, lateral flexion 45-50 degrees, rotation 80 degrees), and no radiculopathy involving the neck or back. Hand dexterity was deemed to be adequate. All reflexes were normal. November 2013 imaging revealed only normal lumbar alignment and "mild narrowing of the L5-S1 disc space." The petitioner has not displayed neurological deficits or muscle weakness as a result of his condition.

6. The petitioner has effective ambulation without the use of an assistive device (*e.g.*, a cane). He has not undergone reconstructive surgery of a major weight-bearing joint. There is no diagnosis in his submitted medical records to establish that he has a herniated nucleus pulposus, spinal arachnoiditis, spinal stenosis, facet arthritis or vertebral fracture resulting in compromise of a nerve root or the spinal cord. He has not fractured an upper extremity, or his pelvis, femur, tibia, or toes. He has not received continuing surgical management to restore function following a soft tissue injury.
7. The petitioner is able to walk adequately, and sit for at least six hours, with breaks (per doctor report of 12/1/2013). He is able to stand for four hours, with breaks. The petitioner can lift 30 pounds infrequently and at least 10 pounds frequently. He is able to climb stairs. The petitioner is sensitive to hair spray, perfume, and cleaning solutions.
8. The petitioner's past relevant employment was as a self-employed granite worker, logging machine operator, and as a roofer. In these jobs, he frequently lifted heavy objects.
9. The petitioner's impairments, in total, constitute a "severe" impairment. DDB asserts that the petitioner retains the residual functional capacity to perform light work.
10. The petitioner, age 39 at the time of hearing, completed the eleventh grade. His previous employment was in semi-skilled occupations, with non-transferable skills.
11. This Administrative Law Judge was unable to confirm that the petitioner has applied for SSI or Title II Social Security Disability benefits within one year preceding the instant MA application.

DISCUSSION

The standards used for determining disability are set forth at 20 C.F.R. §416.901 and 20 C.F.R. 404, Appendix 1. To be found disabled, the petitioner must pass several steps in a prescribed disability evaluation procedure. 20 C.F.R. §416.920. The first query is whether or not the petitioner is engaging in "substantial gainful activity." He is not; therefore, he passes the first test in the sequential evaluation. The

second requirement in the evaluation is that he has a severe impairment expected to last for at least 12 months. A severe impairment is one which significantly limits a person's physical or mental abilities to do basic work activities. I conclude (and the DDB has conceded by using the denial code N32) that the petitioner has a severe impairment.

The third step in the sequential evaluation is the determination as to whether the petitioner's impairments meet or are equivalent to one of the disability listing standards found in Appendix 1. I have reviewed the listing standards that might apply to the petitioner's ailments, and conclude that none of his ailments meets or equals a listed standard. The petitioner's condition does not meet a standard at Listing 1, which pertains to the musculo-skeletal system:

1.01 Category of Impairments, Musculoskeletal

1.02 Major dysfunction of a joint(s) (due to any cause): Characterized by gross anatomical deformity (e.g., subluxation, contracture, bony or fibrous ankylosis, instability) and chronic joint pain and stiffness with signs of limitation of motion or other abnormal motion of the affected joint(s), and findings on appropriate medically acceptable imaging of joint space narrowing, bony destruction, or ankylosis of the affected joint(s). With:

A. Involvement of one major peripheral weight-bearing joint (i.e., hip, knee, or ankle), resulting in inability to ambulate effectively, as defined in 1.00B2b;

OR

B. Involvement of one major peripheral joint in each upper extremity (i.e., shoulder, elbow, or wrist-hand), resulting in inability to perform fine and gross movements effectively, as defined in 1.00B2c.

...

1.04 Disorders of the spine (e.g., herniated nucleus pulposus, spinal arachnoiditis, spinal stenosis, osteoarthritis, degenerative disc disease, facet arthritis, vertebral fracture), resulting in compromise of a nerve root (including the cauda equina) or the spinal cord. With:

A. Evidence of nerve root compression characterized by neuro-anatomic distribution of pain, limitation of motion of the spine, motor loss (atrophy with associated muscle weakness or muscle weakness) accompanied by sensory or reflex loss and, if there is involvement of the lower back, positive straight-leg raising test (sitting and supine);

OR

B. Spinal arachnoiditis, confirmed by an operative note or pathology report ...;

or

C. Lumbar spinal stenosis resulting in pseudoclaudication,

1.05 Amputation (due to any cause). ...**1.06 Fracture of the femur, tibia, pelvis, or one or more of the tarsal bones.** With:

A. Solid union not evident on appropriate medically acceptable imaging and not clinically solid;

and

B. Inability to ambulate effectively,

1.07 Fracture of an upper extremity with nonunion of a fracture ...

1.08 Soft tissue injury (e.g., burns) of an upper or lower extremity, trunk, or face and head, under continuing surgical management, as defined in 1.00M, directed toward the salvage or restoration of major function, and such major function was not restored or expected to be restored within 12 months of onset. Major function of the face and head is described in 1.00.

Id., §1.01, *et seq.*, online at <http://www.ssa.gov/disability/professionals/bluebook/AdultListings.htm>. The petitioner's condition does not satisfy the above criteria. In particular, § 1.08 was not satisfied. I also conclude that the combination of the petitioner's impairments does not equal the severity of a Listing standard.

In the fourth step of the evaluation process, DDB considers whether an applicant can return to prior employment. If the applicant *can* return to one of his prior jobs, he is not disabled. If the applicant *cannot* return to any of his prior jobs, the analysis moves to the fifth step. The petitioner and DDB agree that the petitioner cannot return to some of his prior jobs (for example, granite worker).

The fifth step of the evaluation process considers whether the petitioner, when his age, education, job skills and exertional capacity are considered, retains the ability to do *any* work in the economy. In disability jargon, the petitioner is a younger person, with a limited education, and experience in semi-skilled labor. 20 CFR §416.963-.965. He has no communicative limitations, with the exception of poor spelling. The DDB asserts that the petitioner has the ability to exert himself at the level required for light work. The remaining exertional categories are sedentary and light work. Light work involves the occasional lifting of 10 pounds, while medium work involves regular lifting of objects of up to 25 pounds. Even if I characterized the petitioner as being limited to sedentary work due to his arm problem, the result from the SSA's Medical-Vocational Guidelines would still be a determination of "not disabled." See Appendix 1, rule 201.25.

It was suggested during hearing that the petitioner apply for BadgerCare Plus health insurance at his earliest convenience. He has become a father within the last month, and the infant and infant's mother reside with him. Neither parent is currently employed, which suggests that the household will be under the program's income limit. The petitioner may apply online at <https://access.wisconsin.gov>.

CONCLUSIONS OF LAW

Petitioner is not disabled as that term is used for MA purposes pursuant to Wis. Stat. § 49.47(4).

THEREFORE, it is

ORDERED

That the petition for review 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 19th day of February, 2014

\sNancy J. Gagnon
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 February 19, 2014.

Shawano County Department of Social Services
Disability Determination Bureau
ssamsa@hrserase.com