



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

In the Matter of

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

DECISION

MDD/154665

PRELIMINARY RECITALS

Pursuant to a petition filed December 18, 2013, under Wis. Stat. § 49.45(5), and Wis. Admin. Code § HA 3.03(1), to review a decision by the Milwaukee Enrollment Services in regard to Medical Assistance (MA), a hearing was held on February 12, 2014, by telephone.

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

There appeared at that time the following persons:

PARTIES IN INTEREST:

Petitioner:

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

Petitioner's Representative:

██████████ ██████████ (did not appear)
██
██

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 Milwaukee County.
2. Petitioner applied for MA on January 14, 2013. By letter dated October 9, 2013, the Bureau found that petitioner was not disabled. Petitioner sought reconsideration, but the Bureau affirmed its determination on January 8, 2014.
3. DDB's basis for determining that the petitioner was not disabled was code N32 – a severe impairment that does not prevent substantial gainful activity in a different occupation.

4. The petitioner was not employed at the time of application.
5. The petitioner is bothered by grand mal epileptic seizures, migraines, depression, GERD, and pain and swelling in his right elbow (bursitis) and hand. The petitioner has several seizures per year, and takes the medication Dilantin to assist in controlling them. He occasionally forgets to take medication. Seizures were noted to have occurred in January, February, April, July, and October 2012, possibly in November 2012, and in June 2013 (temporarily off Dilantin).

The petitioner also takes medication for his depression. Due to that condition, he performs most of his "activities of daily living," but sometimes feels tired and skips meals. The Bureau correctly determined that he has a "mild" impairment in restrictions of activities of daily living. The Bureau also correctly determined that the petitioner has a "moderate" impairment in "maintaining social functioning." He lives with a girlfriend, and speaks to close relatives, but leaves his residence infrequently. Finally, the Bureau correctly determined that he has a "moderate" impairment in the area of "maintaining concentration/persistence or pace." The petitioner is an intelligent man who has adequate judgment and speaks clearly. However, he has trouble with his memory and concentration on more involved tasks.

6. The petitioner has no limitations with respect to standing, sitting, reaching, or communicating. There are no restrictions on the petitioner's ability to grasp or pull objects, and he has no chemical sensitivities. However, he does have difficulty with lifting, bending, crouching, and climbing stairs, due to seizure history. Vision and hearing are within normal limits. He is restricted to lifting no more than 5 pounds, due to seizure history.
7. The petitioner's past relevant employment as a fork lift operator and transitional programmer for New Hope Project. In the employment as a fork lift operator, he sometimes lifted heavy loads.
8. The petitioner's impairments, in total, constitute a "severe" impairment. He cannot return to his prior employment due to the high exertional requirements involved with being a forklift operator. DDB initially asserted that the petitioner could do medium work, but seemed to change that determination to sedentary work on Reconsideration.
9. The petitioner, age 40 at the time of hearing, has a 12th grade education, plus post-secondary training through ITT. His previous employment was in a semi-skilled occupation.
10. The petitioner has not applied for SSI or Title II Social Security Disability benefits within a year of this 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 11. 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 the relevant Listing 11 standard, which pertains to seizure disorders:

11.01 Category of Impairments, Neurological

11.02 *Epilepsy - convulsive epilepsy, (grand mal or psychomotor), documented by detailed description of a typical seizure pattern, including all associated phenomena; occurring more frequently than once a month, in spite of at least 3 months of prescribed treatment.* With:

A. Daytime episodes (loss of consciousness and convulsive seizures) or

B. Nocturnal episodes manifesting residuals which interfere significantly with activity during the day.

11.03 *Epilepsy - nonconvulsive epilepsy (petit mal, psychomotor, or focal), documented by detailed description of a typical seizure pattern including all associated phenomena, occurring more frequently than once weekly in spite of at least 3 months of prescribed treatment.* With alteration of awareness or loss of consciousness and transient postictal manifestations of unconventional behavior or significant interference with activity during the day.

Id., §11.01 - .03, online at <http://www.ssa.gov/disability/professionals/bluebook/AdultListings.htm>.

The explanatory notes that accompany the Listing above contain this relevant passage:

A. The reporting physician should indicate the extent to which description of seizures reflects his own observations and the source of ancillary information. Testimony of persons other than the claimant is essential for description of type and frequency of seizures if professional observation is not available.

Under 11.02 and 11.03, the criteria can be applied only if the impairment persists despite the fact that the individual is following prescribed antiepileptic treatment. Adherence to prescribed antiepileptic therapy can ordinarily be determined from objective clinical findings in the report of the physician currently providing treatment for epilepsy. Determination of blood levels of phenytoin sodium or other antiepileptic drugs may serve to indicate whether the prescribed medication is being taken. When seizures are occurring at the frequency stated in 11.02 or 11.03, evaluation of the severity of the impairment must include consideration of the serum drug levels.

The petitioner's condition does not meet or equal any of the Listing 11.0 standards above. His documented seizures occur with insufficient frequency. His depression also does not meet the standards for that disorder, found at Listing 12.0.

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 his prior job as a forklift operator.

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 high school education, and experience in semi-skilled labor. 20 CFR §416.963-.965. He has no communicative limitations. The DDB asserts that the petitioner has the ability to exert himself at the level required for at least sedentary work. The exertional categories are sedentary, light and medium work. Light work involves the occasional lifting of 10 pounds, while medium work involves regular lifting of objects of up to 25 pounds. Looking at these limitations, the vocational rule finds the petitioner to be “not disabled.” See Appendix 2, rule 201.27 for sedentary workers.

The petitioner may wish to apply for Wisconsin’s Medicaid/BadgerCare Plus health insurance at his earliest convenience. The law is changing effective April 1, 2014. As of that date, the petitioner will no longer have to prove that he is disabled to qualify. He will only have to be under the income limit for one person of \$11,670 per year. He can apply at his human services department, or 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 18th day of March, 2014

\sNancy J. Gagnon
Administrative Law Judge
Division of Hearings and Appeals
MDDmeetsL11



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
Internet: <http://dha.state.wi.us>

The preceding decision was sent to the following parties on March 18, 2014.

Milwaukee Enrollment Services
Disability Determination Bureau
[REDACTED]@ncogroup.com