



STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

[REDACTED]
[REDACTED]
[REDACTED]

DECISION

MDD/154667

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 Brown County Human Services and the Wisconsin Disability Determination Bureau (DDB or Bureau) in regard to Medical Assistance (MA), a hearing was held on February 13, 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:

[REDACTED]
[REDACTED]
[REDACTED]

Petitioner's Representative:

[REDACTED]
[REDACTED]
[REDACTED]

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 Brown County.
2. Petitioner applied for MA on January 17, 2013. By letter dated November 12, 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 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 was not employed at the time of hearing.
5. The petitioner suffers from chronic pulmonary insufficiency, colitis, Barrett's esophagus, GERD, history of mild depression, and problems of the back and shoulder. The petitioner has a long history of smoking, and his COPD is treated with daily Advair and Spiriva inhalers. His blood pressure is typically normal, and his heart is not enlarged. Testing in March 2013 revealed an ejection fraction of 61%, and a stress test was within normal limits. A September 2013 pulmonary function test yielded scores of 3.45 for FVC and 1.61 for FEV1. The petitioner's GERD is controllable with an omeprazole prescription, and his Barrett's esophagus is being adequately monitored. His last colonoscopy was normal.

The petitioner has historically undergone a L4-L5 fusion, and rotator cuff repairs to both shoulders. Range of motion testing in 2013 showed normal range in the lumbar spine, normal strength, normal reflexes, and full use of the hands. However, left-sided back tenderness was noted. Also noted was left shoulder pain, with some range of motion loss in that shoulder. The examining doctor agreed that the petitioner would not be able to lift over his head with the left shoulder. The petitioner is right-handed.

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 a tarsal bone, an upper extremity, or his pelvis. He has not received continuing surgical management to restore function following a soft tissue injury.
7. The petitioner is able to walk adequately for short and medium distances, and sit for 30 minute installments. The petitioner can lift at least 25 pounds frequently. He is able to climb stairs, but has trouble bending. The petitioner is sensitive to chemicals found in resins and epoxies, following an episode of contact dermatitis related to a job.
8. The petitioner's past relevant employment was as a screen printer, laborer, machine operator, and door sander. In these jobs, he frequently lifted objects weighing up to 50 or more pounds.
9. The petitioner's impairments, in total, constitute a "severe" impairment. DDB asserts that the petitioner retains the residual functional capacity to perform medium work.
10. The petitioner, age 56 at the time of hearing, completed the tenth grade. His previous employment was in semi-skilled occupations, with non-transferable skills.
11. The petitioner has not 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 of tissue biopsy, or by appropriate medically acceptable imaging, manifested by severe burning or painful dysesthesia, resulting in the need for changes in position or posture more than once every 2 hours;

or

C. Lumbar spinal stenosis resulting in pseudoclaudication, established by findings on appropriate medically acceptable imaging, manifested by chronic nonradicular pain and weakness, and resulting in inability to ambulate effectively, as defined in 1.00B2b.

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, as defined in 1.00B2b, and return to effective ambulation did not occur or is not expected to occur within 12 months of onset.

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.

The petitioner's symptoms related to COPD and occasional chest discomfort also do not satisfy the Listing standard for heart disease or impairments at § 4.01 *et seq.*

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 (door sander).

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 person of advanced age, with a limited education, and experience in semi-skilled labor (non-transferable skills). 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 medium work. The other 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. The result from the SSA's Medical-Vocational Guidelines is a determination of "not disabled," and I concur with this result. See Appendix 2, rule 203.12.

Due to recent law changes, the petitioner may wish to look into other sources of subsidized health insurance. If the petitioner's adjusted gross household income is under \$15,730 per year (household of two, as the petitioner is married), the petitioner may wish to apply for Wisconsin's BadgerCare Plus program. He can apply at his county human services department or online at

<https://access.wisconsin.gov>. If the household income exceeds \$15,570, he may wish to look into the subsidized "Obamacare" insurance, online at www.healthcare.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 10th day of March, 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 March 10, 2014.

Brown County Human Services
Disability Determination Bureau
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