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

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In the Matter of

[REDACTED]  
[REDACTED]  
[REDACTED]

AMENDED DECISION

MDD/154778

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**PRELIMINARY RECITALS**

Pursuant to a petition filed December 03, 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 February 06, 2014, at Racine, Wisconsin.

On March 17, 2014, a decision was issued finding the Petitioner disabled and ordering certification of Medicaid benefits, if the Petitioner was otherwise qualified.

Upon review, it was determined that a material error of law occurred due to changes in SSA standards/Federal Regulations and that per Wis. Stats. §227.49(1) an amended decision should be issued to correct that error. The amended language appears in bold.

The issue for determination is whether the Disability Determination Bureau (DDB) correctly denied Petitioner's application for Disability-based Medicaid benefits.

There appeared at that time and place the following persons:

**PARTIES IN INTEREST:**

Petitioner:

[REDACTED]  
[REDACTED]  
[REDACTED]

Respondent:

Department of Health Services  
1 West Wilson Street, Room 651  
Madison, Wisconsin 53703  
By: DDB by file

**ADMINISTRATIVE LAW JUDGE:**

Mayumi M. Ishii  
Division of Hearings and Appeals

### FINDINGS OF FACT

1. Petitioner is a resident of Racine County.
2. On March 18, 2013, the Petitioner filed an application for disability-based Medicaid benefits. In his application, the Petitioner stated that he became disabled due to gangrene in his left foot. (DDB file.)
3. On June 18, 2013, the Petitioner filed a second application for disability-based Medicaid benefits. The Petitioner did not complete the section under the question, "What is your disability?" However, he did indicate that he had a difficult time walking because he is missing two toes, one on his left foot and one on his right. (DDB file)
4. On or about July 23, 2013, the Petitioner filed a third application for disability-based Medicaid benefits, stating that he is disabled because of Atherosclerosis, cellulitis and abscess, Type II or unspecified type diabetes - uncontrolled, tobacco use, cellulitis and abscess of foot, except toes, traumatic amputation, gangrene, cellulitis of foot, right, ulcer of other part of foot, right, and, "non-compliance". (DDB file)
5. On November 15, 2013, the Department of Health Services sent the Petitioner a notice indicating that he did not qualify for Medicaid-Disability benefits. (DDB file)
6. On December 3, 2013, the Petitioner filed for reconsideration of the DDB's decision. In that application, the Petitioner indicated that his condition had not changed since he filed his initial application. (DDB file)
7. On January 10, 2013, the DDB again denied Petitioner's application and on January 14, 2014, the DDB forwarded its file to the Division of Hearings and Appeals for review. (DDB file)
8. The Petitioner suffered gangrenous infections in both feet that resulted in the amputation of his left "big" toe and his right third toe. The infection has reoccurred in Petitioner's left foot and may require further amputations of Petitioner's toes to control the infection. (DDB file; Testimony of Petitioner)
9. Petitioner suffers from peripheral neuropathy. (DDB file)
10. Petitioner is 53 years old, has a ninth grade education and worked for 24 years as a mechanic at a bowling alley. (DDB file; Testimony of Petitioner)

### DISCUSSION

It is a well-established principle that a moving party generally has the burden of proof, especially in administrative proceedings. State v. Hanson, 295 N.W.2d 209, 98 Wis. 2d 80 (Wis. App. 1980) *citing to* State v. McFarren, 62 Wis. 2d 442, at 499, 215 N.W.2d 459 at 463 (1974). In a case involving an application for medical assistance, the applicant has the initial burden to establish he or she met the application requirements. Estate of Gonwa ex rel Gonwa v. Wisconsin Dept. of Health and Family Services, 265 Wis.2d 913, 668 N.W.2d 122, 2003 WI App 152.

A person between ages 18 and 65, with no minor children, must be blind or disabled to be eligible for MA. A finding of disability must be in accordance with Federal Social Security/SSI standards. *See Wis. Stats. §49.47(4)(a)4.*

Although the determination of disability depends upon medical evidence, it is not a medical conclusion; it is a legal conclusion. The definitions of disability in the regulations governing MA require more than mere medical opinions that a person is disabled in order to be eligible. There must be medical evidence that an impairment exists, that it affects basic work activities, that it is severe, and that it will last 12 months or longer as a severe impairment. Thus, while the observations, diagnoses, and test results reported by the Petitioner's physicians are relevant evidence in determining impairment, the doctors' opinions as to whether the petitioner is disabled for the purposes of receiving MA are not relevant.

Under the regulations established to interpret Title XVI, a claimant's disability must meet the 12-month durational requirement before being found disabling. In addition, the disability must pass five sequential tests established in the Social Security Administration regulations. Those tests are as follows:

1. An individual who is working and engaging in substantial gainful activity will not be found to be disabled regardless of medical findings. *20 CFR 404.1520 (b)*.
2. An individual who does not have a "severe impairment" will not be found to be disabled. A condition is not severe if it does not significantly limit physical or mental ability to do basic work. *20 CFR 416.921(c)*.
3. If an individual is not working and is suffering from a severe impairment which meets the duration requirement and meets or equals a listed impairment in Appendix I of the federal regulations, a finding of disabled will be made without consideration of vocational factors (age, education, and work experience.) *20 CFR 404.1520(d)*.
4. If an individual is capable of performing work he or she has done in the past, a finding of not disabled must be made. *20 CFR 404.1520(f)*.
5. If an individual's impairment is so severe as to preclude the performance of past work, other factors, including age, education, past work experience and residual function capacity must be considered to determine if other types of work the individual has not performed in the past can be performed. *20 CFR 404.1520(g)*.

These tests are sequential. If it is determined that an applicant for MA is employed or does not suffer from a severe impairment it is not necessary to proceed to analyze the next test in the above sequence.

The DDB found Petitioner to suffer from a severe impairment expected to last 12 months or more, but it also found that despite the impairment, Petitioner is still able to engage in substantial meaningful activity based upon the tests described below.

#### TEST 1

The first test asks whether an individual is working and engaging in substantial gainful activity.

“Substantial activity” is defined as, “work activity that involves doing significant physical or mental activities. Your work may be substantial, even if it is done part time basis.....” *20 CFR 404.1572(a)*

“Gainful work activity” is defined as, “work activity that you do for pay or profit. Work activity is gainful if it is the kind of work usually done for pay or profit, whether or not a profit is realized.” *20 CFR 404.1572(b)*

Earnings can be used to determine whether a person is engaging in substantial gainful activity. *20 CFR 404.1574(a) and (b)*. The 2014 substantial gainful activity (SGA) income limit for non-blind individuals is \$1070 per month. (*Please see* [www.ssa.gov](http://www.ssa.gov))

Petitioner is not currently working. As such, he passes test 1.

#### TEST 2

Petitioner passes test 2 because the DDB did not dispute, in its reports, Petitioner’s assertion that he suffers from severe impairment.

TEST 3

The question presented here is whether petitioner's impairment meets the criteria listed in Appendix 1 to Subpart P of Part 404 of the Code of Federal Regulation (CFR). These are commonly referred to as the "listing criteria". If Petitioner meets the aforementioned criteria, tests 4 and 5 do not need to be done; she qualifies as disabled. If Petitioner does not meet the criteria, then he must pass tests 4 and 5 to be considered disabled.

Petitioner's chief complaint is that he is disabled by diabetes and related complications, specifically gangrene infections and amputation of his toes.

*Diabetes Mellitus*

Appendix 1, subsection **9.00(B)(5)** describes the symptoms that must exist in order for a diabetic person to be considered legally disabled for purposes of receiving Medicaid benefits. It states that in order to qualify for MA, a person with diabetes, must also have:

- a. **Hyperglycemia that causes diabetic Ketoacidosis which results in:**
  - 1. **Cardiac arrhythmias, which are evaluated under subsection 4.00,**
  - 2. **Intestinal necrosis, which is evaluated under subsection 5.00,**
  - 3. **Cerebral edema and seizures that are evaluated under subsection 11.00, or**
  - 4. **Mood or eating disorders which are evaluated under subsection 12.00**
- b. **Chronic hyperglycemia that leads to:**
  - 1. **Gangrene and subsequent amputation of an extremity under subsection 1.00,**
  - 2. **Diabetic Retinopathy under subsection 2.00,**
  - 3. **Coronary Artery disease and peripheral vascular disease under subsection 4.00,**
  - 4. **Diabetic gastroparesis that results in abnormal gastrointestinal motility under subsection 5.00,**
  - 5. **Diabetic nephropathy under subsection 6.00,**
  - 6. **Poorly healing bacterial and fungal skin infections under subsection 8.00, Diabetic peripheral and sensory neuropathies under subsection 11.00, or**
  - 7. **Cognitive impairments, depression and anxiety under subsection 12.00 OR**
- c. **Hypoglycemia that results in:**
  - 1. **Seizures or loss of consciousness under subsection 11.00, or**
  - 2. **Altered mental status and cognitive deficits, which are evaluated under 12.00**

*CFR, Appendix 1 Subpart P of Part 404, subsection 9.00(b)(5)(a)-(b) – 2013 Edition*

Taking into consideration Petitioner's testimony and his medical records, it appears his most significant issue is with an on-going gangrene infection that has resulted in the amputation of one toe on each foot and the likely amputation of additional toes.

Under Subsection 1.05 of *Appendix 1 Subpart P of Part 404 – 2013 Edition*, a person who has suffered an amputation is considered disabled only if he suffers an amputation of

- A. **Both hands; or**
- B. **On or both lower extremities at or above the tarsal region, with stump complications resulting in medical inability to use a prosthetic device to ambulate effectively as defined in 1.00B2b, which have lasted or are expected to last for at least 12 months; or**
- C. **One hand and one lower extremity at or above the tarsal region, with inability to ambulate effectively, as defined in 1.00B2b; or**
- D. **Experienced Hemipelvectomy or hip disarticulation.**

Petitioner has had toes (metatarsals) amputated. He has not had an amputation above the tarsal region (heel /ankle area). As such, he does not meet the listing criteria for a gangrenous amputation.

Under Subsection 8.04 of *Appendix 1 Subpart P of Part 404-2013 edition*, a person with a chronic infection of skin/mucous membrane is considered disabled if he has extensive fugging or extensive ulcerating skin lesions that persist for at least 3 months, despite continuing treatment as prescribed.

Under Subsection 8.00(c)(1) of *Appendix 1 Subpart P of Part 404-2013 edition*, “extensive skin lesions” are defined as lesions that, “involve multiple body sites or critical body areas, and result in a very serious limitation” that include, but are not limited to:

- a. Skin lesions that interfere with the motion of your joints and that very seriously limit your use of more than one extremity; that is two upper extremities, two lower extremities, or one upper and one lower extremity.
- b. Skin lesions on the palms of both hands that very seriously limit your ability to do find and gross motor movements.
- c. Skin lesions on the soles of both feet, the perineum, or both inguinal [groin] areas that very seriously limit your ability to ambulate.

I could not find a definition for a “serious limitation” of extremities. However, given that Petitioner’s lesions affected toe joints in two feet, it is reasonable to apply the definition of “ineffective ambulation” found in Subsection 1.00(B)(2)(b)(1)-(2) of *Appendix 1 Subpart P of Part 404-2013 edition*, which states, “Ineffective ambulation is defined generally as having insufficient lower extremity functions (see 100J) to permit independent ambulation without the use of a hand-held assistive device(s) [i.e. canes, crutches, etc] that limits the function of both upper extremities.” *Emphasis added.*

The reports from [REDACTED] and [REDACTED], the DDB’s medical consultants who reviewed Petitioner’s medical records, both indicate that Petitioner was using one cane to ambulate. Petitioner testified to the same. However, there is no indication in the record that Petitioner is so disabled, that in order to walk, he needs an assistive device that interferes with both hands.

Based upon the foregoing, it is found that the Petitioner does not meet the listing criteria and the analysis of his case must move on to tests 4 and 5.

#### TEST 4

The fourth test asks whether Petitioner is capable of work he performed in the past. Per *40 CFR 404.1560 (b)(1)*, the question, more specifically, is did Petitioner engage in substantial gainful activity (significant physical or mental activities for which she could have been paid) within the past 15 years, and if so, can Petitioner continue to perform that work?

According to the Case Development Worksheet, in an entry dated December 3, 2013, the Petitioner is not able to perform the work required in the job he held as a bowling alley mechanic for 24 years, which required heavy lifting and frequent walking. Thus, Petitioner passes the fourth test.

#### TEST 5

This test asks whether Petitioner can perform any other work, despite his limitations. This is commonly referred to as a person’s Residual Functional Capacity. Petitioner testified that he simply cannot stand for any length of time because of the pain and swelling in his feet. The Petitioner further testified that he might lose the remaining toes in his left foot, because the gangrene infection has reoccurred.

Petitioner is 53 years old and is therefore considered an individual closely approaching advanced age. 20 C.F.R. §404.1563(d) Petitioner testified that his education ended in the 9<sup>th</sup> grade.

The DDB file indicates that the DDB's medical consultants reviewed the Petitioner's medical records and determined that Petitioner had a residual functional capacity to perform light work.

The definition of light work is found at 20 C.F.R. § 404.1567 and provides as follows:

(b) Light work. 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.

Because the DDB determined the Petitioner is able to perform light work, it applied the criteria found in *Part 404, Subpart P, Appendix 2, Table 2, part 202.11* and deemed the Petitioner to be NOT disabled.

Looking at Table 2 found in *Part 404, Subpart P, Appendix 2, part 202.11*, it states that an individual, who is capable of light work, who is closely approaching advanced age, who has limited or less education, with skills that are NOT transferrable, is generally considered NOT disabled for purposes of receiving Medicaid benefits. Thus, the DDB acted correctly.

The Petitioner might wish to apply for healthcare coverage under the BadgeCare+ program, which is now accepting applications for childless adults with income below 100% of the Federal Poverty Level. The Petitioner can apply for the BadgerCare+ program, by going on-line at [access.wisconsin.gov](http://access.wisconsin.gov). If the Petitioner has difficulty with the website, he can call 1-██████████.

#### CONCLUSIONS OF LAW

The Disability Determination Bureau (DDB) correctly denied Petitioner's application for Disability-based Medicaid benefits.

**THEREFORE, it is ORDERED**

The petition 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 31st th day of March, 2014.

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\sMayumi M. Ishii  
Administrative Law Judge  
Division of Hearings and Appeals



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The preceding decision was sent to the following parties on March 31, 2014.

Racine County Department of Human Services  
Disability Determination Bureau