



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

In the Matter of

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

DECISION

MDD/154833

PRELIMINARY RECITALS

Pursuant to a petition filed December 26, 2013, under Wis. Stat. § 49.45(5), and Wis. Admin. Code § HA 3.03(1), to review a decision by the Eau Claire County Department of Human Services in regard to Medical Assistance, a hearing was held on April 16, 2014, at Eau Claire, Wisconsin.

The issue for determination is whether the petitioner is disabled.

There appeared at that time and place the following persons:

PARTIES IN INTEREST:

Petitioner:

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

Respondent:

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

ADMINISTRATIVE LAW JUDGE:

Michael D. O'Brien
Division of Hearings and Appeals

FINDINGS OF FACT

1. The petitioner is a resident of Eau Claire County.
2. The petitioner applied for medical assistance based upon a disability on April 10, 2013. The Disability Determination Bureau most recently denied the application on March 13, 2014.
3. The petitioner applied for SSI or SSDI before applying for medical assistance based upon a disability. A social security administrative law judge denied that claim in a decision issued March 15, 2013.

4. The petitioner is 53 years old. He obtained a GED and writes and speaks the English language.
5. The petitioner is diagnosed with atrial fibrillation, congestive heart failure, morbid obesity, and diabetes. His diagnosis of congestive heart failure was made after the federal administrative law judge denied his claim. The ejection fraction of the petitioner's heart is "completely normal." *Marshfield Clinic Record*. January 3, 2013.
6. The petitioner was hospitalized from December 24, 2013, until December 27, 2013, because of atrial fibrillation, nausea, vomiting, and diarrhea. His discharge summary indicated that he could resume normal activities.
7. An X-ray taken of the petitioner's chest on December 24, 2013, contained the following findings: "Borderline cardiomegaly. Some pulmonary venous congestive changes. No acute infiltrate seen." The physician's impression was: "Pulmonary congestion pattern could represent early congestive failure."
8. An X-ray of the petitioner's chest taken on December 27, 2013, found the following: "The heart is upper normal in size. Vascularity is normal distribution. No confident consolidative infiltrate is detected. No Pleural fluid collection or pneumothorax is seen."
9. The petitioner's heart rate was normal on January 3, 2013. He turned down dietary advice on that date.
10. The petitioner cannot do any work for more than 15 minutes at a time and requires breaks at least that long when he does so.

DISCUSSION

The petitioner seeks medical assistance based upon a disability. To be found disabled he must meet the Supplemental Security Income (SSI) definition of disability. 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. Because the medical assistance and social security standards are the same, if the Social Security Administration finds that a person is not disabled for social security or SSI purposes, that decision is usually binding on any state agency making a medical assistance disability determination until the Social Security Administration changes its decision. 42 CFR § 435.541(b). The Social Security Administration decision is not binding and the state agency must make a determination if the applicant does the following:

- (i) Alleges a disabling condition different from, or in addition to, that considered by SSA in making its determination; or
- (ii) Alleges more than 12 months after the most recent SSA determination denying disability that his or her condition has changed or deteriorated since that SSA determination and alleges a new period of disability which meets the durational requirements of the Act, and has not applied to SSA for a determination with respect to these allegations.
- (iii) Alleges less than 12 months after the most recent SSA determination denying disability that his or her condition has changed or deteriorated since that SSA determination, alleges a new period of disability which meets the durational requirements of the Act, and—
 - (A) Has applied to SSA for reconsideration or reopening of its disability decision and SSA refused to consider the new allegations; and/or
 - (B) He or she no longer meets the nondisability requirements for SSI but may meet the State's nondisability requirements for Medicaid eligibility. [This cannot apply because Wisconsin's requirements are the same as the federal government's]

The petitioner has applied for both social security and medical assistance based upon a disability, alleging morbid obesity, diabetes, and atrial fibrillation. A social security administrative law judge determined on

March 15, 2013, that he was not disabled. He has appealed that ruling and is waiting for a decision from the Appeals Council. At his hearing before me, he contended that his condition had deteriorated and that he was recently diagnosed with congestive heart failure. He has not applied to the Social Security Administration to reopen his case so that it can consider new information—his request to the Appeals Council apparently asks only that it reconsider the evidence available at the time of the federal administrative law judge’s decision—and congestive heart failure and atrial fibrillation are both conditions pertaining to the cardiovascular system. In addition, the congestive heart failure diagnosis is not definitive. Nevertheless, it has been over a year since the administrative law judge ruled on the petitioner’s disability, and his two allegations concerning the cardiovascular system are separate diagnoses, even if they pertain to the same part of the body. Therefore, I will consider the merits of the petitioner’s medical assistance appeal and not defer to the Social Security Administration’s ruling.

The petitioner is disabled if he cannot 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 an applicant meets this definition by evaluating in sequence his current employment status, the severity of his medical condition, and his ability to return to vocationally relevant past work or to adapt to new forms of employment. 20 CFR § 416.905 and § 416.920.

The SSI regulations require a five-step process. First, if the person is working at a job that is considered to be substantial gainful employment, he will be found to be not disabled without further review. If he is not working, the Bureau must determine if he has a “severe impairment.” A severe impairment is one that limits a person’s ability to do basic work activities. 20 CFR § 416.921. The petitioner is not working, and the Bureau conceded that he has a severe impairment.

The third step is to determine if the impairment meets or equals a listed impairment found at Appendix 1, Subpart P, Part 404. The listings are impairments that are considered disabling without additional review. 20 CFR § 416.925(a). The petitioner has atrial fibrillation and congestive heart failure. The Department determined that he did not meet the criteria found in Appendix I, § 4.00, et seq. based upon a pulmonary function test completed on September 17, 2013. To qualify as disabled, the ejection fraction must not exceed 30%. Appendix I, § 4.02A1. The petitioner’s scores were between 58 and 63%, which is well above the listing. He challenges the pulmonary function test because it incorrectly listed his height and weight. It listed his height as 81 inches without shoes; he testified that he is 73 ¾ inches. The test listed his weight as 386 pounds. He points out that at his next medical examination, which occurred on October 8, 2013, indicated he weighed 431 pounds, meaning that he would have had to have gained 45 pounds in this short of a period. The petitioner’s hearing was held in person. He clearly is not 6’ 9” tall, and probably did not gain 45 pounds. Nevertheless, I assume the report concerned him because it had his date of birth, smoking history, and physician correct. In addition, the manner in which he was weighed may not have been the same both times. His measurement at his pulmonary test indicated that it was without shoes, which along with different clothing could cause a significant difference, although probably not one this large. Finally, he has edema, which means that he is prone to fluid retention. In the end, even if one of the reports is inaccurate, I have no way of knowing which report correctly reported his weight. He contends that the talked to a person at the Disability Determination Bureau who told him that an error in height or weight could affect the test results. I will take his word for this, but his ejection fraction is approximately twice the value required to be found disabled. I have also reviewed the petitioner’s medical records and the rest of the standards in § 4.00, et seq. and find no standards that he meets. Based upon this, I find that he does not meet the impairment listing.

The fourth and fifth steps occur if the impairment does not meet the listings. The Bureau must determine whether he can perform past jobs. If not, then the agency must determine if he can do any other types of work in the society that would be considered substantial gainful activity. 20 CFR § 416.960. The petitioner worked in construction, where he often had to lift over 100 pounds at a time. He can no longer perform this work. Disability rules state that those with a marginal education who have done only arduous

unskilled labor for 35 years will be considered unable to perform light work. Construction work is arduous. But the petitioner has more than a marginal education because he went past the 6th grade. 20 CFR § 416.964(b)(2). Construction work is not unskilled. Nor did he do that work for 35 years: he is now 53 and has not worked since he was 49 or 50, meaning that to have worked in construction for 35 years he would have to have started when he was 14 or 15 years old. As a result, his disability must be determined by the regular rules concerning whether he can do other gainful activity.

Because he is 53 years old, he is considered to be approaching advanced age. 20 CFR § 416.963. He did not graduate from high school, but he did obtain a GED, and he obviously has above-average intelligence. Based upon this, I find that his education is equivalent to a high school graduate rather than one whose education is limited. A person approaching advanced age with this level of education is not disabled if he can perform at least light work. 20 CFR Pt. 404, Subpt. P, App. 2, Rule 202.13. Light work is work that requires him to lift at least 20 pounds occasionally and lifting or carrying 10 pounds frequently. This category also requires a good deal of walking or standing and pushing and pulling when sitting. 20 CFR § 404.1567(b).

There is medical documentation of the petitioner's physical problems. He was in the hospital from December 24 – 27, 2013, for atrial fibrillation. While there, medical tests from the first day of his stay indicate that his "[p]ulmonary congestion pattern could represent early congestive failure." He weighs close to 400 pounds and has the aches and pain associated with that. But for the most part his medical records indicate that his heart is functioning close to normally. An X-ray of his chest taken on the day he left found the following: "The heart is upper normal in size. Vascularity is normal distribution. No confident consolidative infiltrate is detected. No Pleural fluid collection or pneumothorax is seen." His discharge summary indicates that he could immediately carry on normal activities. When he returned a week later for a follow-up visit his heart rate was normal. His primary documented problem is that his cardiovascular problems leave him "generalized fatigue and shortness of breath." His physician believes that this will prevent him from carrying out any "meaningful occupational activity." *Exhibit 2*. His doctor did not define meaningful occupational therapy, so it is impossible to determine if he meant that the petitioner could not perform his past work, any kind of work, or some type of work in between the two. He cannot be expected to lift 100 pounds throughout the day as he has done, but looking only at the tests or other objective information in his medical file, nothing indicates that he cannot lift 20 pounds on occasion and 10 pounds frequently and thus do light work.

Although his medical file contains little evidence that he cannot perform light work, the testimony tells a different story. Because of shortness of breath, high blood pressure, dizzy spells, chest pressure, fatigue, and rapid heart rate he states that he can no longer golf or play basketball; throw around a football, Frisbee, or baseball; fish, hunt or camp; or go snowmobiling or riding off road. His wife testified that when his legs swell he falls frequently. According to his son, who worked with him, he needed breaks every 15 minutes and would get physically ill if he tried to do any heavy lifting. His sister, who is a registered nurse, stated that he tried to help her with a household remodeling project but could only paint for 15 minutes at a time or less and then had to rest for a half an hour. A young woman who has lived with the petitioner's family for the last four years testified that he spends large amounts of time just sitting in a chair looking unresponsive and withdrawn. The witnesses were credible. The testimony supports the conclusion that although the petitioner may be able to lift the weight required to do light work, he could not do so long enough to engage in gainful employment.

The question is how much weight can be given to this testimony. Disability regulations indicate that symptoms will be considered if they are "consistent with the objective medical evidence and other evidence." 20 CFR § 404.1529(a). This means that the statements of lay witnesses can be used to establish a disability. But statements about "symptoms will not alone establish" that a person is disabled. He must also present "medical signs and laboratory findings" that show "medical impairment(s) which could reasonably be expected to produce the pain or other symptoms alleged and which, when considered

with all of the other evidence (including statements about the intensity and persistence of [the] pain or other symptoms which may reasonably be accepted as consistent with the medical signs and laboratory findings), would lead to a conclusion that [the person is] disabled.” *Id.*

Although the medical evidence does not establish that the petitioner is disabled, it provides a foundation for the subjective testimony that does suggest he is. He has diabetes, atrial fibrillation and morbid obesity, all of which would affect his endurance. He is also someone who has engaged in heavy, physical labor and an active lifestyle through most of his adult life, so he does not appear to be lazy or a malingerer. There is little doubt that his own habits have contributed to his weight, which in turn has played a major role in his declining health, but, except when drugs and alcohol are involved, disability decisions do not depend upon maintaining an exemplary lifestyle. The petitioner has the burden of proving by the preponderance of the credible evidence that he is disabled, which means that he cannot perform light work throughout the day. This is a fairly low burden that he has met.

The remaining question is when his disability began. A federal administrative law judge found that he was not disabled in March 2013. The first evidence that there was a condition somewhat different than this condition occurred when he was hospitalized in December 2013. I find that his disability began in that month and order that the agency continue processing his application for medical assistance and find him eligible no earlier than the first day of that month.

CONCLUSIONS OF LAW

The petitioner has been disabled since December 24, 2013.

THEREFORE, it is

ORDERED

That this matter is remanded to the county agency with instructions that within 10 days of the date of this decision it continue processing the petitioner’s medical assistance application. When doing so, it shall assume that he has been disabled since December 24, 2013, and find him eligible for benefits no earlier than the first day of that month.

REQUEST FOR A REHEARING

You may request a rehearing if you think this decision is based on a serious mistake in the facts or the law or if you have found new evidence that would change the decision. Your request must be **received within 20 days after the date of this decision**. Late requests cannot be granted.

Send your request for rehearing in writing to the Division of Hearings and Appeals, 5005 University Avenue, Suite 201, Madison, WI 53705-5400 **and** to those identified in this decision as "PARTIES IN INTEREST." Your rehearing request must explain what mistake the Administrative Law Judge made and why it is important or you must describe your new evidence and explain why you did not have it at your first hearing. If your request does not explain these things, it will be denied.

The process for requesting a rehearing may be found at Wis. Stat. § 227.49. A copy of the statutes may be found online or 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 filed with the Court **and** served either personally or by certified mail on the Secretary of the Department of Health Services, 1 West Wilson Street, Room 651, Madison, Wisconsin 53703, **and** on those identified in

this decision as “PARTIES IN INTEREST” **no more than 30 days after the date of this decision** or 30 days after a denial of a timely rehearing (if you request one).

The process for Circuit Court Appeals may be found at Wis. Stat. §§ 227.52 and 227.53. A copy of the statutes may be found online or at your local library or courthouse.

Given under my hand at the City of Madison,
Wisconsin, this 24th day of April, 2014

\sMichael D. O'Brien
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 April 24, 2014.

Eau Claire County Department of Human Services
Disability Determination Bureau