



STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

[REDACTED]
[REDACTED]
[REDACTED]

DECISION

MDD/154984

PRELIMINARY RECITALS

Pursuant to a petition filed October 16, 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 27, 2014, by telephone. At the petitioner's request, the hearing record was held open to March 24, 2014, for submission of updated medical documents, which were received.

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] (no appearance)
[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 June 11, 2013. By letter dated September 24, 2013, the Bureau found that petitioner was not disabled. Petitioner sought reconsideration, but the Bureau affirmed its determination on January 21, 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 is not currently employed.
5. The petitioner suffers from pain in the neck and lower back from degenerative arthropathy, and fibromyalgia. She has asthma, GERD, a history of migraines, and historical bouts of anxiety; these latter four conditions are not disabling. She has repeatedly complained of numbness and tingling in her legs and right hand. Blood tests in late 2013 were essentially normal. A 2013 EMG nerve conduction study showed active bilateral radiculopathy related to the cervical spine. A 2013 MRI of the cervical spine showed severe left-sided neural foraminal stenosis at C4-5 and C5-6, and moderate to severe right-sided neural foraminal stenosis at C6-7. The August 2013 MRI of the lumbar spine showed no significant stenosis. The petitioner underwent a C5-6 and C6-7 anterior cervical discectomy and fusion on March 5, 2014. The fusion restored normal disc space height at C5-6 and C6-7. The petitioner has not displayed neurological deficits or muscle weakness as a result of her condition; strength was 5/5 in all limbs in March 2014.
6. The petitioner has not undergone reconstructive surgery of a major weight-bearing joint. There is no diagnosis in her submitted medical records to establish that she has a herniated nucleus pulposus, spinal arachnoiditis, facet arthritis or vertebral fracture resulting in compromise of a nerve root or the spinal cord. As noted above, she *did* have cervical spine stenosis that was impinging on a nerve root—hence her recent surgery. She has not fractured the femur, tibia, a tarsal bone, an upper extremity, or her pelvis. She has not received continuing surgical management to restore function following a soft tissue injury.
7. The petitioner walks with a cane for balance, but her balance and her gait are repeatedly described in records as "normal." In her application, she stated that she could stand for up to three hours, and sit for two hours. Currently, it is unknown as to whether the petitioner can lift more than 10 pounds. She is able to drive or ride in a car.
8. The petitioner's past relevant employment is unknown. She has raised four children.
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 47 at the time of hearing, completed the tenth grade. Her previous employment was more than 15 years ago, so it is irrelevant and she has only 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." She is not; therefore, she passes the first test in the sequential evaluation. The second requirement in the evaluation is that she 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 her 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 (see especially 1.04):

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. Specifically, she had spinal stenosis that was compromising a nerve root in the cervical spine, and there was evidence via neuro-anatomic distribution of pain since June 2013. The petitioner has received oral painkillers, steroid injections and physical therapy in 2013 to relieve her suffering. The petitioner complained of pain before that, but the documentation does not establish that all of these conditions were observed by medical providers previously. A disabling condition must last for at least 12 months. Now that the petitioner has had successful surgery to relieve her pain, it is not certain that her condition will remain severe enough until June 2014. Thus, I cannot conclude that she meets the disability 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 her prior jobs, she is not disabled. If the applicant *cannot* return to any of her prior jobs, the analysis moves to the fifth step. The petitioner and DDB agree that the petitioner cannot return to some prior jobs, as there are no relevant prior jobs.

The fifth step of the evaluation process considers whether the petitioner, when her 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 unskilled labor. 20 CFR §416.963-.965. She has no communicative limitations, and speaks English. The DDB asserts that the petitioner has the ability to exert herself at the level required for light work. The pertinent exertional categories are sedentary and light work. Sedentary work involves never lifting more than 10 pounds, 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 limited her to sedentary work, the result from the SSA's Medical-Vocational Guidelines would still be a determination of "not disabled." See Appendix 2, rule 201.18.

As an informational note, if the petitioner and her husband have annual adjusted gross income under \$15,730, they may be eligible for BadgerCare Plus health insurance, without having to prove that anyone is disabled. This is the result of a recent law change. They can apply for BadgerCare Plus 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

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 22nd day of April, 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 April 22, 2014.

Brown County Human Services
Disability Determination Bureau