



STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

██████ ██████ ██████
c/o ██████ ██████
██████████████████
██████████████████

DECISION

MKB/155142

PRELIMINARY RECITALS

Pursuant to a petition filed August 20, 2013, under Wis. Stat. § 49.45(5), and Wis. Admin. Code § HA 3.03(1), to review a decision by the Disability Determination Bureau in regard to Medical Assistance, a telephonic hearing was held on March 13, 2014.

The issue for determination is whether the agency properly determined that the petitioner is not disabled.

There appeared at that time and place the following persons:

PARTIES IN INTEREST:

Petitioner:

██████ ██████ ██████
c/o ██████ ██████
██████████████████
██████████████████

Respondent:

Department of Health Services
1 West Wilson Street, Room 651
Madison, Wisconsin 53703

By: No Appearance
Disability Determination Bureau
722 Williamson St.
Madison, WI 53703

ADMINISTRATIVE LAW JUDGE:

Peter McCombs
Division of Hearings and Appeals

FINDINGS OF FACT

1. Petitioner is a resident of Brown County.
2. He is almost 7 years old and lives with his family.
3. Petitioner's primary diagnoses are Attention Deficit/Hyperactivity Disorder and Sensory Processing Disorder.

4. On October 3, 2013, the agency terminated petitioner's Katie Beckett enrollment finding he is not disabled. On or about November 18, 2013, the Petitioner filed a request for reconsideration. The respondent subsequently upheld its determination of no disability on January 24, 2014, finding that petitioner's medical conditions had improved.

DISCUSSION

The Children's Long Term Support (CLTS) program started on January 1, 2004, after the federal Department of Health and Human Services informed the state department that federal MA funding would no longer be available for in-home autism services. The department drafted and released the Interim Medicaid Home and Community-Based Waivers Manual ("the Manual") that became effective with the start of the CLTS program. It can be found on the internet at <http://dhs.wisconsin.gov/bdds/waivermanual/index.htm>.

The Manual provides that an individual must meet several eligibility criteria for these programs, one of which is that he must be disabled under social security standards. Manual, §2.05B.

Current standards for childhood disability were enacted following the passage of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996. The current definition of a disabling impairment for children is as follows:

If you are a child, a disabling impairment is an impairment (or combination of impairments) that causes marked and severe functional limitations. This means that the impairment or combination of impairments:

- (1) Must meet, medically equal or functionally equal the requirements of the listings [Listing of Impairments in appendix 1 of Subpart P of part 404 of this chapter], or
- (2) Would result in a finding that you are disabled under § 416.994a.

20 C.F.R. §416.911(b). §416.994a referenced in number (2) describes disability reviews for children found disabled under the prior law.

The process of determining whether an individual meets this definition is sequential. See 20 C.F.R. §416.924. First, if the claimant is doing "substantial gainful activity", he is not disabled and the evaluation stops. Petitioner is not working, so he passes this step.

Second, physical and mental impairments are considered to see if the claimant has an impairment or combination of impairments that is severe. If the impairment is a slight abnormality or a combination of slight abnormalities that causes no more than minimal functional limitations, it will not be found to be severe. 20 C.F.R. §416.924(c). In this case, the agency found the Petitioner's impairment is severe.

Next, the review must determine if the claimant has an impairment(s) that meets, medically equals or functionally equals in severity any impairment that is listed in appendix 1 of subpart P of Part 404 of the regulations. I reviewed listing number 112.11 for ADHD. To be eligible the child must have marked impairments in two of the following: cognitive/communicative functioning, social functioning, personal functioning, and maintenance of concentration, pace, and persistence. If the child does not meet a listing, the review moves to the next step. I will move there immediately because the next step incorporates the listing areas but adds two additional areas (motor control and physical health).

If a child does not meet or equal the listing, the last step of the analysis is the assessment of functional limitations as described in sec. 416.926a of the regulations. This means looking at what the child cannot do because of the impairments in order to determine if the impairments are functionally equivalent in severity to any listed impairment. Assessments of marked impairments of the child occur in the following six domains: (1) cognitive/communicative functioning, (2) maintaining concentration, persistence, and pace, (3) social functioning, (4) motor control, (5) personal functioning, and (6) physical health. To be

found disabled, the child must have marked limitations in two of the six areas, or an extreme limitation in one of the areas. 20 C.F.R. §416.926a(b)(2).

"Marked" limitation and "extreme" limitation are defined in the regulations at 20 C.F.R. §416.926a(e). Marked limitation means, when standardized tests are used as the measure of functional abilities, a valid score that is two standard deviations below the norm for the test (but less than three standard deviations). For children from ages three to age eighteen, it means "more than moderate" and "less than extreme". The regulation provides that a marked limitation "interferes seriously with the child's ability to independently initiate, sustain, or complete domain-related activities. Day-to-day functioning may be seriously limited when the child's impairment(s) limits only one activity or when the interactive and cumulative effects of the child's impairment(s) limit several activities." In comparison, "extreme" limitation means a score of at least three standard deviations below the norm or, for children ages three to age eighteen, "the impairment(s) interferes very seriously with the child's ability to independently initiate, sustain or complete domain-related activities."

Petitioner was found by the agency to have marked limitations only in domain 2. The petitioner was represented at the hearing by his mother. She disagreed with the agency's assessment that petitioner has improved.

The test scores of the Petitioner reflect that his limitations, while severe, do not meet the definition of "marked" or "extreme" limitations, with the exception of maintaining concentration, persistence, and pace (domain 2). Cognitively, petitioner is at grade level for reading and math. While he receives support for math and written language, his disabilities here are not at the level of seriously limiting his functioning.

Socially, the respondent found that petitioner is well-behaved and has friends; no behavioral difficulties were noted. The petitioner's mother submitted 16 school Behavior Reports covering the time period of September 24, 2013 – March 6, 2014. Those reports identified some minor issues such as failure to obey a teacher, but also included more significant instances of physical assaults on peers. As a result, the records show that the petitioner has been regularly disciplined, and has served one in-school suspension and one out-of-school suspension. The out-of school suspension occurred in February, 2014. These records demonstrate that petitioner's limitation here interferes seriously with the child's ability to independently initiate, sustain, and/or complete domain-related activities. As such, I conclude that the petitioner has established this as a marked limitation.

The impairment in personal functioning is that petitioner needs to be reminded to carry out tasks, and he has occasional related behavioral issues. However, he is able to do activities of daily living, making the impairment less than marked.

Concentration is a particular problem, and respondent concedes that the records reveal that this is a marked limitation. I concur.

Motor control problems included undeveloped fine motor skills and issues with carrying things, but overall he is able to function with motor control.

Petitioner's physical health is not significantly impaired, and thus is not a marked impairment.

In summary, I find that petitioner has established marked limitations in domains 2 and 3. At this point I must conclude that the DDB's determination was incorrect. There is sufficient evidence to show that petitioner's impairments are more limiting than found by the DDB experts who reviewed this case.

CONCLUSIONS OF LAW

The DDB incorrectly determined that petitioner no longer is disabled, as petitioner has marked limitations in two domains.

THEREFORE, it is

ORDERED

That this matter shall be remanded to the respondent with instructions to determine petitioner disabled and to reinstate petitioner's Katie Beckett program eligibility, assuming that all petitioner meets all other eligibility requirements. All actions required by this Order shall be completed within 10 days following issuance of this Decision.

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 17th day of April, 2014

\sPeter McCombs
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 17, 2014.

Bureau of Long-Term Support
Division of Health Care Access and Accountability