



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

In the Matter of

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

DECISION

MDD/155173

PRELIMINARY RECITALS

Pursuant to a petition filed January 22, 2014, under Wis. Stat. § 49.45(5), and Wis. Admin. Code § HA 3.03(1), to review a decision by the Disability Determination Bureau ["DDB"] in regard to Medical Assistance ["MA"], a Hearing was held via telephone on March 20, 2014.

The issue for determination is whether petitioner is disabled for purposes of MA.

There appeared at that time via telephone 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:

Sean P. Maloney
Division of Hearings and Appeals

FINDINGS OF FACT

1. Petitioner (53 years old) is a resident of Dane County.
2. Petitioner is obese; she weighs about approximately 232 pounds and is 5 feet 6 inches tall; she has a history of back problems dating back about 7 years; she has documented L5-S1 listhesis and some degenerative changes; she takes Tylenol for pain.

3. Petitioner reports that due to almost constant lower back pain she is most comfortable on the floor and cannot sleep in the same bed as her husband because when he moves it hurts her back; that there are days she can walk and days she cannot; that she cannot shovel the snow or mow the lawn (although on her *Function Report -- Adult* dated August 17, 2013 she states that she is able to “mow lawn, vacuum, mop floors I have to sit in a chair” and “with the help of family I can make complete meals.”); she states that she can sit for 3 hours per day, stand for 4 hours per day, and walk for 1 hour per day.
4. Petitioner completed the 12th grade and is a high school graduate; she also completed a typing course after high school; she is literate and can read and write in English; she testified that she can not lift “much” (“5 pounds at most”) but in her *Function Report -- Adult* dated August 17, 2013 she states that a doctor has not limited the amount of weight she can lift; in a *Neck Disability Index* report dated August 23, 2013 she states she “can lift very light weights”; in a *Revised Oswestry Disability* report dated August 23, 2013 she states “ I can manage light to medium weights if they are conveniently positioned.”
5. Petitioner is not currently working (although she still babysits her grandchild but does so for free; her grandchildren are old enough so she does not need to lift them); she last worked in 2002 as child care worker; she has also worked as an office assistance, at data entry, in a factory, at a newspaper, and for an insurance company; in her *Function Report -- Adult* dated August 17, 2013 she states that she can pay bills, count change, handle a savings account, and use checkbook/money orders.
6. DDB determined that petitioner is not disabled because she is capable of doing work other than work she has done in the past (Reg-Basis Code N32).

DISCUSSION

To be eligible for MA as disabled, a person must meet the definition of *disabled* that is used for Supplemental Security Income ["SSI"] purposes. See, Wis. Stat. § 49.47(4)(a)4. (2011-12). The applicable SSI disability standards are found in the Code of Federal Regulations, Title 20, Part 416, Subpart I (§ 416.901 et. seq.), and, by reference, Appendices 1 and 2, Subpart P, Part 404.

To be *disabled*, for an adult, means the inability to do any substantial gainful activity (i.e., the inability to work) by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than twelve months. See, 20 C.F.R. § 416.905(a) (2013). Unless the impairment is expected to result in death, it must have lasted or must be expected to last for a continuous period of at least 12 months. This is called the *duration requirement*. See, 20 C.F.R. § 416.909 (2013).

To determine if a person is disabled, a 5 Step prescribed sequential evaluation procedure is used. See, 20 CFR § 416.920 (2013). If a person can be found to be disabled or not disabled at any point in the prescribed sequential evaluation procedure the prescribed sequential evaluation procedure is terminated and no further evaluation is made. See, 20 C.F.R. § 416.920(a)(4) (2013).

DDB found petitioner to be not disabled at Step 5 of the prescribed sequential evaluation procedure because it determined that petitioner is capable of doing work other than work she has done in the past (Reg-Basis Code N32).

The 5 Step prescribed sequential evaluation procedure is as follows.

(1) Current Work

The first step in the prescribed sequential evaluation procedure is to determine whether the person is currently working and, if so, if the work the person is doing is substantial gainful activity. For an adult to be disabled they must be unable to do any substantial gainful activity which exists in the national economy. See, 20 C.F.R. § 416.905(a) (2013). If a person is working and the work he or she is doing is *Substantial Gainful Activity*, that person will be found not disabled regardless of his or her medical condition or his or her age, education, and work experience. see, 20 C.F.R. § 416.920(b) (2013).

A *Substantial Gainful Activity* ["SGA"] means work that: (a) involves doing significant and productive physical or mental duties; and, (b) is done (or intended) for pay or profit. See, 20 C.F.R. §§ 416.910 & 416.972 (2013).

Petitioner is not currently working.

(2) Severe Impairment

The second step in the prescribed sequential evaluation procedure is to determine whether the person has a *severe impairment* expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months. A *severe impairment* is one which significantly limits the person's physical or mental ability to do *basic work activities*. See, 20 C.F.R. §§ 416.920(c) & 416.921(a) (2013). *Basic work activities* are the abilities and aptitudes necessary to do most jobs. See, 20 C.F.R. § 416.921(b) (2013). Examples of *basic work activities* include:

- (a) physical functions such as walking, standing, sitting, lifting, pushing, pulling, reaching, carrying, or handling;
- (b) capacities for seeing, hearing, and speaking;
- (c) understanding, carrying out, and remembering simple instructions;
- (d) use of judgment;
- (e) responding appropriately to supervision, co-workers, and usual work situations; and,
- (f) dealing with changes in a routine work setting.

see, 20 C.F.R. § 416.921(b) (2013).

DDB has conceded that petitioner has a *severe impairment* by its use of Reg-Basis Code N32 and its finding at Step 5 that petitioner is not disabled because she is capable of doing work other than work she has done in the past. See, 20 C.F.R. § 416.920(a)(4) (2013).

(3) The *Listing of Impairments*

The third step in the prescribed sequential evaluation procedure is to determine whether the person's medical condition meets or equals the impairment listings of Appendix 1. See, 20 C.F.R. § 416.920(d) (2013); 20 C.F.R. Appendix 1 to Subpart P (immediately after § 404.1599), *Listing of Impairments* ["Listing"]. The Listing describes, for each of the major body systems, impairments which are considered severe enough to prevent a person from doing any gainful activity. See, 20 C.F.R. § 416.925(a) (2013). If a person has an impairment(s) which meets the duration requirement and which is listed in the Listing, or is equal to a listed impairment(s), the person will be found disabled without considering the person's age, education, and work experience. See, 20 C.F.R. § 416.920(d) (2013); See also, 20 C.F.R. § 416.925 et. seq. (2013).

An impairment will not be considered to be one listed in the Listing solely based on a diagnosis. It must also satisfy all the criteria of the Listing. see, 20 C.F.R. § 416.925(d) (2013).

It is important to note that an impairment being listed in the Listing is only a sufficient condition to be found disabled -- it is not a necessary condition. In other words, a person can be found disabled without their impairment being listed in the Listing.

Based on the evidence in the record of this matter, petitioner's impairments do not meet or equal a listing in the Listing of Impairments. See, 20 C.F.R. Part 404, Subpart P, Appendix 1, §§ 1.00 & 10.00.

(4) Past Relevant Work

The fourth step in the prescribed sequential evaluation procedure is to determine whether the person's impairments prevent the person from performing past relevant work. If the person can still do past relevant work, and that work is an SGA, than the person must be found not disabled. See, 20 C.F.R. § 416.920(f) (2013).

DDB has conceded that petitioner cannot do past relevant work by its use of Reg-Basis Code N32 and its finding at Step 5 that petitioner is not disabled because she is capable of doing work other than work she has done in the past. See, 20 C.F.R. § 416.920(a)(4) (2013).

(5) Work Other Than Past Relevant Work

The fifth step in the prescribed sequential evaluation procedure is to determine whether the person can perform work other than past relevant work. If the person cannot do work other than past relevant work, he or she will be found disabled. See, 20 C.F.R. § 416.920(g) (2013). With certain exceptions not relevant here¹, in order to decide if a person can do any work, other than previous work that the person has done, the person's *Residual Functional Capacity* ["RFC"] must be considered -- along with the person's age, education, and work experience. 20 C.F.R. §§ 416.920(e) & 416.945 et. seq. (2013).

¹ See, 20 C.F.R. § 416.962 (2013)

A person's RFC is the most a person can do despite the person's limitations. It is an assessment based upon all the relevant evidence in the case record. 20 C.F.R. § 416.945(a)(1) (2013).

A limited ability to perform certain physical demands of work activity such as sitting, standing, walking, lifting, carrying, pushing, pulling, or other physical functions (including manipulative or postural functions, such as reaching, handling, stooping, or crouching), may reduce the person's ability to do past and other work. 20 C.F.R. § 416.945(b) (2013). Pain and other symptoms may cause a limitation of function beyond that which can be determined on the basis of the anatomical, physiological or psychological abnormalities considered alone; e.g., someone with a low back disorder may be fully capable of the physical demands consistent with those of sustained medium work activity, but another person with the same disorder, because of pain, may not be capable of more than the physical demands consistent with those of light work activity on a sustained basis. In assessing the total limiting effects of a person's impairment(s) and any related symptoms, all of the medical and nonmedical evidence must be considered. 20 C.F.R. § 416.945(e) (2013).

In evaluating the intensity and persistence of a person's symptoms, all of the available evidence, including the person's medical history, the medical signs and laboratory findings, and statements from the person, the person's treating or nontreating sources, or other people about how the person's symptoms affect them must all be considered. 20 C.F.R. § 416.929(c)(1) (2013). Because symptoms, such as pain, are subjective and difficult to quantify, any symptom-related functional limitations and restrictions which the person, the person's treating or nontreating sources, or other people report, which can reasonably be accepted as consistent with the objective medical evidence and other evidence, will be taken into account as follows: the person's symptom's, including pain, will be determined to diminish the person's capacity for *basic work activities* to the extent that the person's alleged functional limitations and restrictions due to symptoms, such as pain, can reasonably be accepted as consistent with the objective medical evidence and other evidence. 20 C.F.R. §§ 416.929(c)(3) & (4) (2013); See also, 20 C.F.R. § 416.945(e) (2013). In this case, the limitations petitioner reports are not entirely consistent with the medical documentation in this matter.

The physical exertion requirements of work in the national economy are classified as *sedentary*, *light*, *medium*, *heavy*, and *very heavy*. 20 C.F.R. § 416.967(intro.) (2013).

Sedentary work involves lifting no more than 10 pounds at a time and occasionally lifting or carrying articles like docket files, ledgers, and small tools. Although a sedentary job is defined as one which involves sitting, a certain amount of standing is often necessary in carrying out job duties. Jobs are sedentary if walking and standing are required occasionally and other sedentary criteria are met. 20 C.F.R. § 416.967(a) (2013).

Light work, among other criteria, involves lifting no more than 20 pounds at a time with frequent lifting or carrying of objects weighing up to 10 pounds. 20 C.F.R. § 416.967(b) (2013).

Medium work involves lifting no more than 50 pounds at a time with frequent lifting or carrying of objects weighing up to 25 pounds. 20 C.F.R. § 416.967(c) (2013).

Heavy work involves lifting no more than 100 pounds at a time with frequent lifting or carrying of objects weighing up to 50 pounds. 20 C.F.R. § 416.967(d) (2013).

Very Heavy work involves lifting objects weighing more than 100 pounds at a time with frequent lifting or carrying of objects weighing up to 50 pounds or more. 20 C.F.R. § 416.967(e) (2013).

Based on the above law and on the evidence in the record of this matter petitioner meets at least the *Sedentary* requirement.

Petitioner completed the 12th grade and is a high school graduate. She is literate in English. Thus, she is considered to have at least a *high school education and above*. A person with a *high school education and above* is generally considered able to do semi-skilled through skilled work. See, 20 C.F.R. § 416.964(b)(4) (2013). Petitioner's prior work experience (she continues babysit her grandchildren; although she is not paid) is *semi-skilled work*. See, 20 C.F.R. §§ 416.968(b) & (d) (2013). Further petitioner's skills are transferable as illustrated by the variety of different jobs she has held. See, 20 C.F.R. § 416.968(d) (2013). Additionally, petitioner is 53 years old and, as such, is considered a *person closely approaching advanced age*. See, 20 C.F.R. § 416.963(d) (2013).

A person closely approaching advanced age, with an RFC of *Sedentary*, who has a *high school education and above*, who has semi-skilled work experience with skills that are transferable, and who is literate in English must be found to be not disabled. See, 20 C.F.R. Part 404, Subpart P, Appendix 2, Table No. 1, §§ 201.14 – 201.16 (2013). Therefore, I must find petitioner to be not disabled.

CONCLUSIONS OF LAW

For the reasons discussed above, petitioner is not disabled for MA purposes.

NOW, THEREFORE, it is

ORDERED

That the petition for review herein be and the same is hereby 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 26th day of March, 2014

\sSean P. Maloney
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 26, 2014.

Dane County Department of Human Services
Disability Determination Bureau