



STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

[REDACTED]

DECISION

MDD/158033

PRELIMINARY RECITALS

Pursuant to a petition filed March 17, 2014, under Wis. Stat. § 49.45(5), and Wis. Admin. Code § HA 3.03(1), to review a decision by the Taylor County Department of Human Services in regard to Medical Assistance, a hearing was held on August 18, 2014, at Medford, 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:

[REDACTED]

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 Taylor County.
2. The petitioner is 52 years old.
3. The petitioner last worked in 2006. He was a medical transport driver. He worked 20 hours per week and earned \$8 per hour.
4. The petitioner has a compression fracture at T-12, degenerative joint disease, diabetes, chronic pain, and hypertension.

5. The petitioner is 5'9 ½" tall and weighs 230 pounds.
6. The petitioner graduated from high school. He writes and speaks the English language.
7. The petitioner is prevented by pain from frequently lifting more than a few pounds

DISCUSSION

The petitioner seeks medical assistance based upon a disability. Less than a year before he applied for medical assistance, the Social Security Administration determined that he was ineligible for SSI because he was not disabled. He contends that his condition has gotten worse since then. Generally, a state medical assistance agency, including the Division of Hearings and Appeals, must defer to any federal disability decision made within a year of the medical assistance application. However, the petitioner is no longer financially eligible for SSI because his wife's income is too high. Because he no longer meets the "nondisability" requirements for SSI and he alleges that his condition has deteriorated since the federal decision, the Wisconsin Division of Hearings and Appeals can determine whether he is disabled without deferring to the Social Security Administration. 42 C.F.R. § 435.541(c)(4)i.i.

Although the Wisconsin Division of Hearings and Appeals can make its own decision, the petitioner must still prove that he meets the disability standards set by SSI regulations. 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. He 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 C.F.R. § 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 C.F.R. § 416.921. The petitioner is not working and the Bureau determined in its initial denial that he was limited to light work, so it implicitly concedes that he has a severe impairment.

The Bureau was then required to determine whether she had an impairment that 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 C.F.R. § 416.925(a). The petitioner has some anxiety and emotional problems, but he and his attorney did not present any specific evidence and arguments that he meets any of the listings.

The fourth and fifth steps occur if the impairment does not meet the listings. The Bureau must determine whether the petitioner 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 C.F.R. § 416.960. The petitioner's only past work was as a medical transport driver, which he did 20 hours a week in 2006 and earned \$8 per hour. This is not relevant work because he earned less than what was needed for it to be considered significant gainful activity. www.ssa.gov/OACT/COLA/sga.html; [https://secure.ssa.gov/poms.nsf/lrx/\[REDACTED\]](https://secure.ssa.gov/poms.nsf/lrx/[REDACTED])

The petitioner is 52 year old, which is considered to be approaching advanced age. 20 CFR § 416.963(d). A person approaching advanced age who can speak English is not considered disabled if he can do light work. *See* 20 CFR Pt. 404, Subpt. P, App. 2, Rule 202.10. Light work is work that requires him to lift at

least 20 pounds occasionally and 10 pounds frequently. 20 C.F.R. § 404.1567(b). The next lower level of work is sedentary, which requires that a person occasionally lift up to 10 pounds at a time and occasionally walk and stand. 20 C.F.R. § 404.1567(a).

The petitioner complains of chronic pain. Federal regulations provide guidance for evaluating symptoms, including pain, at 20 CFR § 404.1529. Pain is considered when determining whether a person is disabled, but the symptoms must be “consistent with objective medical evidence and other evidence.” The regulation goes on to point out that

statements about your pain or other symptoms will not alone establish that you are disabled; there must be medical signs and laboratory findings which show that you have a 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 your pain or other symptoms which may reasonably be accepted as consistent with the medical signs and laboratory findings), would lead to a conclusion that you are disabled.

20 CFR § 404.1529(a).

Further, there must be “[m]edical signs and laboratory findings, established by medically acceptable clinical or laboratory diagnostic techniques, [that] show the existence of a medical impairment(s) which results from anatomical, physiological, or psychological abnormalities and which could reasonably be expected to produce the pain or other symptoms alleged...The finding that...impairment(s) could reasonably be expected to produce...pain or other symptoms does not involve a determination as to the intensity, persistence, or functionally limiting effects of [the] symptoms.” 20 CFR § 404.1529(b). Intensity is determined from both objective medical and all other evidence after the applicant presents enough evidence to show that some medical condition has caused the symptoms. 20 CFR § 404.1529(c). Although the Bureau will “always attempt to obtain objective medical evidence and, when it is obtained,...will consider it in reaching a conclusion as to whether [the applicant is] disabled,” it will not reject “statements about the intensity and persistence of...pain or other symptoms or about the effect...symptoms have on [the applicant’s] ability to work solely because the available objective medical evidence does not substantiate [her] statements.” 20 CFR § 404.1529(c)(2). The rules acknowledge that “symptoms, such as pain, are subjective and difficult to quantify.” 20 CFR § 404.1529(c)(3). Therefore, when determining disability, the Bureau considers “any symptom-related functional limitations and restrictions which [the recipient], [his] treating or examining physician or psychologist, or other persons report, which can reasonably be accepted as consistent with the objective medical evidence and other evidence.” *Id.* The Bureau considers the applicants statements about pain, but also reviews whether there is any inconsistency in the evidence and conflicts between the applicant’s statements the rest of the evidence. 20 CFR § 404.1529(c)(4). The recipient’s symptoms will be determined to diminish her capacity for basic work activities to the extent that her “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.” Where the impairments do not meet a listed impairment, the agency will consider the impact of those impairments and “any related symptoms, including pain, on [the applicant’s] residual functional capacity.” 20 CFR § 404.1529(d)(4).

The petitioner was injured almost 10 years ago. He has a compression fracture in his back and arthritis. While the objective factors that could cause the pain are not overwhelming, they are sufficient to provide a basis for his complaints. There was testimony that he sleeps no more than a couple hours per night, he breaks down into tears from pain and frustration with pain, he cannot straighten his back, and he cannot walk over 20 feet at a time. His doctor, who specializes in addiction, determined that his pain is severe enough to prescribe morphine as needed every 12 hours. In addition, both his regular doctor and his nurse practitioner completed statements indicating that he could not perform any work greater than work equivalent to sedentary work. I find their statements compelling because, unlike the agency’s reviewers,

they saw him regularly. Based upon this, I find that the petitioner has proven by the preponderance of the credible evidence that he is disabled.

It is difficult to determine from the evidence exactly when the petitioner's disability began. His medical file indicates that he has been prescribed morphine since at least January 2013. He applied for benefits on May 13, 2013. Medical assistance rules allow benefits to begin "no earlier than the first day of the month 3 months prior to the month of application." Wis. Admin. Code, § DHS 103.08(1). This means that the petitioner can be found eligible as of February 1, 2013. While the evidence is not overwhelming, he has established by the preponderance of the credible evidence that he has been disabled since at least then. Therefore, I will order the agency to find him eligible as of that date, assuming he met the program's financial requirements.

CONCLUSIONS OF LAW

The petitioner has been disabled since February 1, 2013.

THEREFORE, it is

ORDERED

That this matter is remanded to the county agency with instructions to continue processing the petitioner's request for medical assistance and find him eligible retroactive to February 1, 2013, for all periods in which he met the program's financial conditions. The agency shall assume that he has been disabled since February 1, 2013.

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 27th day of August, 2014

\sMichael D. O'Brien
Administrative Law Judge
Division of Hearings and Appeals



State of Wisconsin \DIVISION OF HEARINGS AND APPEALS

Brian Hayes, Administrator
Suite 201
5005 University Avenue
Madison, WI 53705-5400

Telephone: (608) 266-3096
FAX: (608) 264-9885
email: DHAmail@wisconsin.gov
Internet: <http://dha.state.wi.us>

The preceding decision was sent to the following parties on August 27, 2014.

Taylor County Department of Human Services
Disability Determination Bureau