



STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

[REDACTED]

DECISION

MDD/159164

PRELIMINARY RECITALS

Pursuant to a petition filed May 6, 2014, under Wis. Stat. § 49.45(5), and Wis. Admin. Code § HA 3.03(1), to review a decision by the Fond du Lac County Department of Social Services and the Wisconsin Disability Determination Bureau (DDB or Bureau) in regard to Medical Assistance (MA), a hearing was held on September 2, 2014, by telephone. A hearing set for August 26, 2014, was rescheduled at the petitioner's request.

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]

Petitioner's Representative:

[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 Fond du Lac County.
2. Petitioner applied for MA on November 18, 2013. By letter dated April 10, 2014, the Bureau found that petitioner was not disabled. Petitioner sought reconsideration, but the Bureau affirmed its determination on July 18, 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 was not employed at the time of application or hearing.
5. Per an MRI, the petitioner has lumbar spondylosis with an annular tear at L5/S1 with degenerative disk disease (narrowing disk space). There is also a degenerative facet joint at L4/5. Imaging showed no central or neural foraminal narrowing. He has historically received a facet injection, physical therapy and traction for back pain; he continues to require prescription pain medication. The petitioner's lower back pain does not radiate into his legs or feet. There is no radiculopathy involving the neck or upper back, there is some in the lumbar region. The petitioner has not displayed neurological deficits or muscle weakness as a result of his condition. Range of motion in the hips is normal.
6. The petitioner has effective ambulation without the use of an assistive device. He has not undergone reconstructive surgery of a major weight-bearing joint. There is no diagnosis in his submitted medical records to establish that he has a herniated nucleus pulposus, spinal arachnoiditis, spinal stenosis, facet arthritis or vertebral fracture resulting in compromise of a nerve root or the spinal cord. He has not fractured a tarsal bone, an upper extremity, the femur or his pelvis. He has not received continuing surgical management to restore function following a soft tissue injury.
7. The petitioner has a normal walking gait, per observation by [REDACTED] [REDACTED], M.D. However, he cannot walk for extended periods of time. He is also bothered by having to stand for extended periods of time. A physician's residual functional capacity screening indicates that the petitioner can sit for six hours with breaks. The petitioner can lift at least 25 pounds infrequently. He is able to drive short distances, but experiences pain with bending, kneeling, stair climbing and twisting.
8. The petitioner's full-scale IQ score is 80, with math skills being particularly low. He has a diagnosis of ADHD. Upon evaluation in March 2014 by [REDACTED] [REDACTED], PsyD., the petitioner was observed to not have delusions, hallucinations, psychotic thought processes, homicidal or suicidal ideation, or a history of self-harm. The petitioner has a moderate impairment in concentration, and a mild to moderate impairment in social functioning. *See*, [REDACTED] report. He has had one inpatient psychological hospitalization, several years ago.
9. The petitioner's past relevant employment was as a bar-tender, farmer, forklift driver, painter and assembly worker. In these jobs, he frequently lifted objects weighing up to 50 pounds.
10. The petitioner's impairments, in total, constitute a "severe" impairment. DDB asserts that the petitioner retains the residual functional capacity to perform heavy work.
11. The petitioner, age 31 at the time of hearing, completed the eleventh grade, although some courses were through special education. His previous employment was in semi-skilled occupations, with non-transferable skills.
12. The petitioner has not applied for SSI or Title II Social Security Disability benefits within one year preceding the instant MA application. The petitioner mentioned at this hearing that he thought he had done so. This Judge confirmed with the DDB that they have no record (database cross-check) of an SSI/Title II Social Security application or decision as of the date of this hearing.

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.” He is not; therefore, he passes the first test in the sequential evaluation. The second requirement in the evaluation is that he 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 his 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:

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.

The petitioner's ADHD, mathematical reasoning deficits, and tendency to become anxious also do not satisfy the Listing standard at § 12.06. Also, his IQ test did not cause him to meet the Listing standard for mental retardation. *See*, §12.05.

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 his prior jobs, he is not disabled. If the applicant *cannot* return to any of his prior jobs, the analysis moves to the fifth step. The petitioner and DDB agree that the petitioner cannot return to some of his prior jobs (painter, forklift driver, assembly worker, farming).

The fifth step of the evaluation process considers whether the petitioner, when his 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 high school education, and experience in semi-skilled labor. 20 CFR §416.963-.965. He has no communicative limitations in English. The DDB asserts that the petitioner has the ability to exert himself at the level required for light work. The remaining exertional categories are sedentary and light work. Light work involves the frequent lifting of 10 pounds,

while sedentary is less. The petitioner's education is "limited," and he is restricted to light work due to his back problem. The result from the SSA's Medical-Vocational Guidelines for a person able to do light work is a determination of "not disabled." See Appendix 2, rule 202.18.

The petitioner may wish to apply for the BadgerCare Plus health insurance, if he has not already done so. With a law change effective April 1, 2014, a childless adults, such as Mr. [REDACTED], who has income under 100% of the poverty line, is eligible for coverage. See, <http://access.wi.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 7th day of October, 2014

\sNancy J. Gagnon
Administrative Law Judge
Division of Hearings and Appeals



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The preceding decision was sent to the following parties on October 7, 2014.

Fond Du Lac County Department of Social Services
Disability Determination Bureau