



STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

[REDACTED]
[REDACTED]
[REDACTED]

AMENDED DECISION

MDD/161738

PRELIMINARY RECITALS

Pursuant to a petition filed October 22, 2014, under Wis. Stat. § 49.45(5), and Wis. Admin. Code § HA 3.03(1), to review a decision by the Sheboygan County Department of Human Services in regard to Medical Assistance, a hearing was held on November 26, 2014, at Sheboygan, Wisconsin.

The issue for determination is whether Petitioner the Department correctly determined that the petitioner is “not disabled” for MA – Disability purposes.

This is an amended decision. This decision supersedes the decision issued on December 1, 2014. I am issuing an Amended Decision because on December 3, 2014 a representative from the Disability Determination Bureau (DDB) e-mailed a rehearing request. I granted that request, and have addressed all of their concerns in my Amended Decision. Their e-mailed rehearing request was already mailed to Petitioner.

There appeared at that time and place the following persons:

PARTIES IN INTEREST:

Petitioner:

[REDACTED]
[REDACTED]
[REDACTED]

█

Respondent:

Department of Health Services
1 West Wilson Street, Room 651
Madison, Wisconsin 53703
By: No Appearance

ADMINISTRATIVE LAW JUDGE:

Corinne Balter
Division of Hearings and Appeals

FINDINGS OF FACT

1. Petitioner is a resident of Sheboygan County. Petitioner is married. Petitioner's husband works as a manager at a [REDACTED].
2. Petitioner is 54 years old. Petitioner will turn 55 on June 6, 2015. She has not been adjudicated by any governmental agency to be blind or disabled under the Social Security regulations.
3. Petitioner does not have a high school degree or equivalency. The last grade she completed was 9th grade. She last worked full-time on a date unknown in 2010, at the [REDACTED]. She worked in their factory as a [REDACTED]. She presently works as needed for a [REDACTED] company. Petitioner reports that her total income from January through November 2014 was \$1,013.75.
4. Petitioner has COPD, stage 3. She has had exacerbations on May 30, 2013, October 8, 2013, and October 3, 2014. She does not need supplemental oxygen. Petitioner is 62" tall, and weighs 140 pounds. Petitioner's FVC is 2.62. Her FEV1 is 1.57.
5. Petitioner filed an application for Medical Assistance – Disability benefits on April 8, 2014.
6. The Department's Disability Determination Bureau denied Petitioner's application for MA – Disability on September 12, 2014, finding her "not disabled". Petitioner requested reconsideration, and the DDB reaffirmed the denial of disability.
7. Petitioner has not, to-date, applied for Social Security disability benefits. Petitioner stated that she was waiting to take her social security. She did not seem to understand the social security disability system, and was mainly concerned with health insurance coverage. She did not qualify for BadgerCare because of her husband's income. The county agency had helped her to apply for State MA after she was denied BadgerCare.
8. On October 22, 2014, the DDB's medical consultant, Pat [REDACTED] M.D., found as follows:

Petitioner is a 54 years old and alleges COPD, Stage 3. She is a packer for a [REDACTED] company, but that's not substantially gainful activity. She is a smoker, but is cutting down. She does not use supplemental Oxygen. She has had a number of exacerbations. During an exacerbation on May 30, 2013 her FVC was 60%, FEV1 56%, Spo2 97%. At her follow-up on June 5, 2013 FVC 59%; FEV1 56%. She also has hypothyroidism that is controlled with medication.
9. Petitioner is not engaged in substantial gainful activity. Since 2013, Petitioner has not performed substantial gainful activity. She works on an as needed at a [REDACTED] company packing boxes. Her earnings from January 2014 through November 2014 were \$1,013.75.
10. Petitioner has a severe impairment of COPD.
11. Petitioner's COPD does not meet or equal any applicable listing. On August 26, 2014 Petitioner completed a pulmonary function test. Her FEV1 value was 1.54. Petitioner is only 62" tall, and therefore does not meet or equal listing 3.02. Although Petitioner's COPD does not meet or equal any applicable listing, Petitioner's COPD is near listing level.
12. Petitioner has the residual functional capacity to perform light work with no concentrated exposure to pulmonary irritants.
13. Petitioner cannot perform past relevant work. Petitioner's past relevant work is classified as medium. Petitioner's past relevant work was not an Assembler of Small Products I as defined in DOT 702.684-022. Petitioner worked as a laborer for [REDACTED]. Part of Petitioner's job was to assemble final pieces on [REDACTED] put together and [REDACTED], and to inspect [REDACTED] and [REDACTED]. However, Petitioner also describes driving a [REDACTED] climbing for 4 – 8 hours, walking for 6 – 8 hours, standing for 6 - 8 hours, stopping for 6 – 10 hours, kneeling for 6 – 10

hours, crouching for 6 – 10 hours, handling, grabbing or grasping big objects for 4 – 10 hours as while as handling small objects for 4 – 10 hours. In addition, at the hearing Petitioner credibly described this past job was primarily driving a [REDACTED]. This is consistent with Petitioner's application, which states her job duties were driving [REDACTED] and assembling goods.

14. Petitioner's acquired jobs skills do not transfer to other occupation within the residual functional capacity defined above.
15. Petitioner is disabled effective December 1, 2014 under a non-mechanical operation of grid rule 202.02.

DISCUSSION

In order to be eligible for MA as a disabled person, an applicant must meet the same tests for disability as those used by the Social Security Administration to determine disability for Supplemental Security Income (Title XVI benefits). Wis. Stat. § 49.47(4)(a)4. Title XVI of the Social Security Act defines "disability" as the inability to engage in any substantial gainful activity due to physical or mental impairments which can be expected to either result in death or last for a continuous period of not less than 12 months. 20 C.F.R. § 404.1505. Therefore, this administrative law judge is required to review the petitioner's current MA appeal utilizing the same tests for disability as those used by the Social Security Administration in determining disability for Supplemental Security Income (Title XVI benefits).

Although the determination of disability depends upon medical evidence, it is not a medical conclusion; it is a legal conclusion. Thus, while the observations, diagnoses, and test results reported by a physician are relevant evidence, the opinions of the doctors as to whether an individual is disabled are not conclusive as to that determination.

In addition, the definitions of disability in the regulations governing MA, Supplemental Security Income (SSI), and Social Security Disability Insurance (SSDI) programs require more than mere medical opinions that a person is disabled in order to be eligible. There must be medical evidence that an impairment exists, that it is severe, that it affects an individual's basic work activities, and that it will last 12 months or longer as a severe impairment. Therefore, while an individual's testimony as to his or her impairments is important, it is not determinative. Allegations of physical or mental limitations must be supported by medical evidence in the record.

THE FIVE-STEP DISABILITY DETERMINATION PROCESS

The above requirements are delineated in five sequential tests established in the Social Security Administration regulations. These are general steps to evaluating a disability application, whether it includes only physical, only mental, or a combination of physical and mental impairments. Those tests are as follows:

1. An individual who is working and engaging in substantial gainful activity will be found to be not disabled regardless of medical findings. However, if an individual is not working, or is working but the earnings do not rise to the substantial gainful level, proceed to Step 2. 20 C.F.R. § 416.920(b).
2. An individual who does not have a "severe impairment" which significantly limits his or her ability to work will be found not disabled. However, if an individual is found to have a severe impairment, proceed to Step 3. 20 C.F.R. § 416.920(c).

3. If the individual's severe impairment meets or equals a listing in 20 C.F.R. § 404, subpart P, Appendix 1, that individual will be determined disabled. However, if the individual's severe impairment does not meet or equal a listing, proceed to Step 4. 20 C.F.R. § 416.920(d).
4. If the individual is capable (has the Residual Functional Capacity) to perform past work, the individual will be determined not disabled. However, if the individual does not have the capacity to perform past work, proceed to Step 5. 20 C.F.R. § 416.920(e).

(Note, if the individual has marginal education (less than 7th grade) and work experience of 35 or more years of unskilled arduous physical labor and can no longer perform past work at a customary exertional level, he or she will be determined disabled under 20 C.F.R. § 416.962) 20 C.F.R. § 416.920(f)(2).
5. If the individual is capable of performing any substantial gainful activity in the national economy, that individual will be determined not disabled. However, if the individual cannot perform any substantial gainful activity in the national economy, that individual will be determined disabled. 20 C.F.R. § 416.920(f)(1).

If it is determined that an applicant for MA is not disabled at the second step in the review, it is not necessary to review the case under any later test or tests. 20 C.F.R. §404.1521.

In addition, where an individual has an impairment or combination of impairments resulting in *both* (1) physical limitations and (2) mental (emotional and psychological) limitations, both of those separate types of impairments must be evaluated. As explained by the Code of Federal Regulations:

When we assess your *physical* abilities, we first assess the nature and extent of your physical limitations and then determine your residual functional capacity for work activity on a regular and continuing basis . . . When we assess your *mental* abilities, we first assess the nature and extend of your mental limitations and restrictions and then determine your residual functional capacity for work activity on a regular and continuing basis.

20 C.F.R. 416.945(b) and (c).

PROCESSING OF PETITIONER'S DISABILITY APPLICATION

For Step 1, Petitioner is not working and meets this step.

For Step 2, in determining whether a disability is "severe" under 20 C.F.R. § 416.920(c), the DDB applies the following test:

If you do not have any impairment or combination of impairments, which significantly limits your physical or mental ability to do basic work activities, we will find that you do not have a severe impairment and are, therefore, not disabled. We will not consider your age, education and work experience.

In this particular case, the DDB determined Petitioner had a severe impairment, chronic obstructive pulmonary disease (COPD), and that she met Step 2, meaning the analysis continued to Step 3. I agree with the DDB on this point. Petitioner has Stage III COPD, which has lasted longer than 12 months. This impairment has more than minimal limitations in her ability to perform basic work activities.

Under Step 3, Petitioner's conditions do not meet or equal any listed impairment. Although Petitioner has COPD, on August 26, 2014 Petitioner completed a pulmonary function test where her FEV1 value was

1.54. Petitioner is only 62” tall, and therefore does not meet or equal listing 3.02. I note that were Petitioner taller, she would have met the requirements of listing 3.02.

I find that Petitioner has the residual functional capacity to perform light work with no concentrated exposure to pulmonary irritants. This finding is consistent with the opinion of the DDB’s own medical consultant, Dr. Pat [REDACTED]. On, November 3, 2014, Dr. [REDACTED] opined that Petitioner could perform light work with no concentrated exposure to pulmonary irritants. Dr. [REDACTED] considered Petitioner’s COPD exacerbations on May 30, 2013, October 8, 2013 and October 3, 2014. In addition, Dr. [REDACTED] considered the results of various pulmonary function tests from 2013 and 2014. I give significant weight to Dr. [REDACTED]’s opinions as it is generally consistent with the medical evidence.

The medical records show that Petitioner has a significant case of COPD. She had two exacerbations in 2013 and one exacerbation in 2014. During these exacerbations, Petitioner reported progressive shortness of breath, chest congestion and cough. During the October 2014 exacerbation, Petitioner reported coughing up phlegm that was streaked with blood at times. The medical records show that Petitioner has been prescribed a number of medications, which have only been somewhat effective at controlling the symptoms. For example, in April 2014, Petitioner’s doctors changed her medications due to ineffectiveness. At an appointment on April 30, 2014, Petitioner reported that she was breathing better and feeling more comfortable. Unfortunately, by August 1 2014 Petitioner reported that she was using Albuterol up to five times per day and was having difficulties breathing in the humid weather. On numerous occasions since 2013, respiratory examinations have been abnormal.

Petitioner presented as a credible witness at the hearing. She testified that she could be on her feet for six hours during an eight hour work day. Petitioner testified credibly that she could be on her feet, but a lot of up and down or significant movement was impossible for her with her COPD. Petitioner can also lift up to 10 pounds frequently and 20 pounds occasionally. Unfortunately, Petitioner continues to smoke cigarettes. While, smoking is not recommended, it does not affect the credibility of her allegations. Listing 3.02 (A) indicates that COPD could be due to any cause. In addition, Petitioner has generally been compliant the other portions of her treatment regimens and she has cut down on her cigarette usage. Considering the entire record, Petitioner would not be able to sustain the physical demands of medium work on a regular and continuing basis.

PAST RELEVANT WORK (PRW)

Petitioner is not capable of performing her past relevant work as the past relevant work exceeds the residual functional capacity. The job at issue is Petitioner’s job as a general laborer from 1999 until 2010 at the [REDACTED]. Petitioner reported that her job title was a general laborer. I note that I previously believed Petitioner worked as a [REDACTED] DOT 921.683-050. I made this finding based significantly on Petitioner’s testimony at the administrative hearing. At the hearing, which DDB did not attend Petitioner gave me the impression that her primary duty was operating a [REDACTED]. In their own notes, the DDB states “PRW [past relevant work] not fully described.” Nonetheless, I think that the DDB is correct that Petitioner’s job was more than a simple [REDACTED]. Although Petitioner credibly testified that she was a [REDACTED], which is consistent with her application for disability, Petitioner also stated that she assembled parts and performed other duties. The DDB has a legitimate point that part of Petitioner’s past relevant work included assembling objects.

In the rehearing request, the DDB notes that “there is a chance that [Petitioner] still retains the capacity to do [her past relevant] work as she performed it.” The DDB believed that Petitioner’s past relevant work was a small parts assembler DOT 706.684-022. I carefully considered this concern. However, the DDB’s own prior findings are inconsistent with the complaints in the December 3, 2014 email. The DDB’s own record from April 23, 2014 noted that Petitioner would be unable to perform her past work as she described it, noting that Petitioner reported that she would have to stand and walk for more than six hours

per day. The October 22, 2014 DDB note indicated that Petitioner should be denied benefits based on finding that she could perform “other work” and using Social Security Grid Rule 202.10 as a guide.

The DDB also highlights that Petitioner “describes her past relevant work as assembling final pieces on a small engine, putting together and wiring switch gear, DRIVING A [REDACTED] and inspecting [REDACTED] and [REDACTED]” Petitioner also noted that she spent four to eight hours climbing, four to ten hours handling and grasping large objects and six to ten hours stooping, kneeling and crouching. When looking at the Dictionary of Occupational Title’s (DOT) description of a small parts assembler, I do not believe that the description is an accurate representation of Petitioner’s past relevant work. The description of the job indicates that Petitioner would typically work at a bench or on an assembly line, which is not consistent with Petitioner’s description of her job as a laborer.

Given the DDB’s concerns about my classification of Petitioner’s past relevant work. I looked up a general laborer occupation in the DOT. The most applicable job was “Laborer, Stores” DOT 927.687-058. That classification describes the duties of a warehouse worker. The DOT describes this job as an unskilled medium job, which would also exceed Petitioner’s residual functional capacity. Finally, even if the Petitioner’s past relevant work was a small parts assembler, the DOT does not specify that the job is performed in a clean environment with no concentrated exposure to pulmonary irritants.

Even if the DDB is correct in stating that Petitioner’s past relevant work was not entirely as a [REDACTED] [REDACTED], operating a [REDACTED] was part of Petitioner’s job. Thus, one must consider composite jobs. The Social Security Administration’s Policy Manual describes composite jobs as follows:

Composite jobs have significant elements of two or more occupations and as such, have no counterpart in the DOT. If you can accurately describe the main duties of PRW [past relevant work] only by considering multiple DOT occupations, the claimant may have performed a composite job. If you determine that PRW was a composite job, you must explain why. When comparing the claimant’s RFC to a composite job as it was performed, find the claimant capable of performing the composite job only if he or she can perform all parts of the job. A composite job will not have a DOT counterpart, so do not evaluate it at the part of step 4 considering work “as generally performed in the national economy.” At step 5 of sequential evaluation, a claimant may be able to use skills he or she gained from a composite job to adjust to other work. *Social Security Program Operations Manual System (POMS) DI 25005.020 Past Relevant Work (PRW) as the Claimant Performed It.*

In this case the DDB concluded that Petitioner’s past relevant work was an assembler of small parts, which is considered light work. The DDB states in their rehearing request that “it appears that the [REDACTED] driver duties were only one portion of the work she did.” Under the composite job rules if driving [REDACTED] is one portion of what she did, and that is classified as medium work under DOT # 921.683-050, then Petitioner cannot perform the composite job because she is not capable of performing medium work under the DDB’s RFC.

The composite job requirements do not allow one to pick a portion of the job, conclude Petitioner can perform that portion of the job, and disregard the other portions of the job that are heavier work. If Petitioner cannot perform the heavier work portions of the job, then Petitioner is unable to perform her past relevant work, and I must proceed to step 5.

The Petitioner does not appear to have any transferable work skills. If one were to accept that Petitioner was a general laborer, that job is unskilled so transferability of work skills is not an issue. However, the [REDACTED] [REDACTED] job is a semi-skilled occupation. The requirements of transferable work skills are described in 20 CFR 404.1568 (d). *See also Social Security Program Operations Manual System (POMS) DI 25015.015 Work Experience As A Vocational Factor.* I have not been presented with any evidence showing that Petitioner

obtained skills from that job that would enable her to transfer into other semi-skilled jobs with very little vocational adjustment. While the [REDACTED] job is semi-skilled, it is the lowest level of semi-skilled job.

STEP 5 – SUBSTANTIAL GAINFUL ACTIVITY / GRID RULES

Once Petitioner proves that she cannot return to her former work, the agency must show that there are jobs in the national economy that the Petitioner can perform. “‘In the ordinary case,’ the agency meets their burden at the fifth step [of the disability determination analysis] ‘by resorting to the applicable medical vocational guidelines (the grids), 20 C.F.R. § 404, Subpt. P, App. 2 (1986).’” *Rosa v. Callahan*, 168 F.3d 72, 78 (2d Cir. 1999) (quoting *Bapp*, 802 F. 2d at 604). The grids “take into account the Petitioner’s residual functional capacity in conjunction with the Petitioner’s age, education, and work experience.” *Id.*

In this case were Petitioner of an advanced age, 55, Petitioner would be disabled under grid rule 202.02. 20 C.F.R., § 404, Subpt. P, App. 2. Under that grid rule at age 55 Petitioner would not be able to perform any substantial gainful activity in the national economy. In this case Petitioner is not yet 55. Petitioner is six months and 5 days from age 55.

The regulations at 20 CFR § 404.1560(c), 404.1563(a), 416.963(a) provide that age, residual functional capacity, education, and work experience are the vocational factors relevant to determining disability at the last step of the sequential evaluation process. Sections 404.1563 and 416.963 note that age “refers to how old you are (your chronological age), and the extent to which your age affects your ability to adapt to a new work situation and to do work in competition with others.” These regulations also define the age categories of “younger person” (under age 50), “person approaching advanced age” (50-54), and “person of advanced age” (55 or over); note the role of age as a vocational factor; and state that “we will not apply the [] age categories mechanically in a borderline situation.” *Id.*

In this particular case I concluded that there are additional vocational adversities that warrant a non-mechanical operation of the grid rules. Petitioner has only a 9th grade education. I find that Petitioner’s educational level poses a significant vocational adversity for her. Furthermore, Petitioner has not received any type of significant vocational or technical training. Although her work history could be considered semi-skilled, I still believe that non-mechanical operation of the grid rules is appropriate due to other adverse circumstances. In this case, Petitioner noted that her vision was also a problem for her in performing her past relevant work. This is an additional limitation. Petitioner has had one full time semi-skilled job over the last 15 years. She was not able to perform that job due to an additional impairment before she was even diagnosed with COPD. Petitioner’s COPD is an additional adverse circumstance in that Petitioner’s COPD is near listing level severity. This condition is not likely to improve prior to her 55th birthday. For these reasons, I find Petitioner disabled as of December 1, 2014 under a non-mechanical operation of grid rule 202.02.

The DDB is correct that Petitioner cannot be disabled on a date after my decision was issued. That was a mistake on my part. For that reason, I have concluded that Petitioner is disabled as the date of my previous decision, December 1, 2014. There is no hard and fast rule for the non-mechanical operation of the grid rules. These are at the ALJs discretion, and we are still within months, approximately six months of Petitioner being of “an advanced age.”

CONCLUSIONS OF LAW

Petitioner is disabled with an onset date of December 1, 2014 under a non-mechanical application of grid rule 202.02.

THEREFORE, it is

ORDERED

That this case is remanded to the DDB, with the instruction that Petitioner is disabled with an onset date of December 1, 2014.

REQUEST FOR A REHEARING

This is a final administrative decision. If you think this decision is based on a serious mistake in the facts or the law, you may request a rehearing. You may also ask for a rehearing if you have found new evidence which would change the decision. Your request must explain what mistake the Administrative Law Judge made and why it is important or you must describe your new evidence and tell why you did not have it at your first hearing. If you do not explain these things, your request will have to be denied.

To ask for a rehearing, send a written request to the Division of Hearings and Appeals, P.O. Box 7875, Madison, WI 53707-7875. Send a copy of your request to the other people named in this decision as "PARTIES IN INTEREST." Your request for a rehearing must be received no later than 20 days after the date of the decision. Late requests cannot be granted.

The process for asking for a rehearing is in Wis. Stat. § 227.49. A copy of the statutes can be found 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 served and filed with the appropriate court no more than 30 days after the date of this hearing decision (or 30 days after a denial of rehearing, if you ask for one).

For purposes of appeal to circuit court, the Respondent in this matter is the Department of Health Services. After filing the appeal with the appropriate court, it must be served on the Secretary of that Department, either personally or by certified mail. The address of the Department is: 1 West Wilson Street, Room 651, Madison, Wisconsin 53703. A copy should also be sent to the Division of Hearings and Appeals, 5005 University Avenue, Suite 201, Madison, WI 53705-5400.

The appeal must also be served on the other "PARTIES IN INTEREST" named in this decision. The process for appeals to the Circuit Court is in Wis. Stat. §§ 227.52 and 227.53.

Given under my hand at the City of Milwaukee,
Wisconsin, this 23rd day of December, 2014

\sCorinne Balter
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 December 23, 2014.

Sheboygan County Department of Human Services
Disability Determination Bureau
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