



STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

[REDACTED]
[REDACTED]
[REDACTED]

DECISION

MDD/161534

PRELIMINARY RECITALS

Pursuant to a petition filed September 09, 2014, under Wis. Stat. § 49.45(5), and Wis. Admin. Code § HA 3.03(1), to review a decision by the Kenosha County Human Service Department in regard to Medical Assistance, a hearing was held on December 11, 2014, at Kenosha, Wisconsin.

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

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:

Debra Bursinger
Division of Hearings and Appeals

FINDINGS OF FACT

1. Petitioner is a resident of Kenosha County. He is 53 years old. He is 69.25" tall.
2. On April 23, 2014, the Petitioner filed a Medicaid Disability Application (MADA). He alleged disability based on Chronic Obstructive Pulmonary Disorder (COPD), clinical depression and arthritis.
3. Petitioner has a GED. Previous work history includes work at a scrap metal company for 17 years, work as a truck driver for 14 years, work on an assembly line from 2006-2007 and general labor for December, 2013 – January, 2014. He is not currently working.

4. On June 2, 2014, June 30, 2014 and July 16, 2014, Petitioner had office visits with Dr. [REDACTED]. He complained of breathing difficulty, muscle pain and bilateral hand pain. Dr. [REDACTED] reported chest, lung and cardio assessment was normal, gait was normal, strength in all muscles was 5/5 on June 2, 2014 and 4/5 on June 30, 2014. No swelling or deformity was noted in joints. Petitioner was noted to have a COPD diagnosis.
5. On July 10, 2014, the Petitioner had an appointment with an eye doctor who prescribed glasses for the Petitioner.
6. On July 31, 2014, Petitioner had an office visit with Dr. [REDACTED]. Petitioner complained of depression, anxiety, sleeping difficulties, breathing difficulties and problems with grasping. Petitioner reported he was able to take care of basic needs such as activities of daily living, driving, shopping and cleaning. He noted the Petitioner had no difficulty with walking. He noted the Petitioner has had suicidal thoughts. Dr. [REDACTED] diagnosed major depressive disorder, alcohol abuse and generalized anxiety. He opined that the Petitioner is not capable of managing finances due to substance abuse and that his ability to obtain and maintain gainful employment is "significantly limited" due to physical limitations and depression.
7. On August 12, 2014, Petitioner had a pulmonary function assessment completed. His FEV1 level was 1.72.
8. On August 15, 2014, the Petitioner had an office visit with Dr. [REDACTED]. He complained of bilateral arm and hand numbness and weakness. Dr. [REDACTED] noted right elbow tenderness and pain with wrist extension. He assessed Petitioner with right long trigger finger and right elbow lateral epicondylitis. Petitioner was given a cortisone injection.
9. On August 22, 2014, the agency issued a notice to the Petitioner that it had determined he is not disabled and he does not qualify for Medicaid disability.
10. On September 6, 2014, Petitioner visited Dr. [REDACTED] and complained of left eye irritation.
11. On September 9, 2014, the Petitioner filed a reconsideration request. Petitioner alleged that his breathing issues and both hands and right arm are worse.
12. On September 12, 2014, the Petitioner had an office visit with Dr. [REDACTED]. He complained of pain in the right finger and right elbow.

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. 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. § 416.960(b). 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 Bureau 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.

The agency determined the Petitioner does have "severe impairments" which limit his ability to work so Petitioner meets this step. His impairments include major depressive disorder, anxiety and COPD. The Petitioner also alleges arthritis in his hands. I note that while the medical records include a number of complaints of hand and arm problems, there is insufficient information in the medical documentation of a diagnosis of arthritis.

There were several physician notes from office visits on June 30, 2014, July 31, 2014, August 15, 2014 and September 12, 2014 at which the Petitioner complained of hand pain. On August 15, 2014, the physician assessed the Petitioner as having trigger finger and a cortisone injection was given. On September 12, 2014, the Petitioner reported pain as a 2/10. The physician notes indicate no swelling in the joints or hands. Based on that information, this does not appear to meet the definition of a severe impairment that significantly limits the ability to do basic work activities. The examiner noted that there may be occasional fine or gross manipulation limitations with the Petitioner's upper extremities, particularly with Petitioner's right hand.

Next, I must examine whether the agency properly determined that the Petitioner's COPD and depressive and anxiety disorders meet the requirements of Step 3. For Step 3, the Petitioner's impairments must meet or equal a listing in 20 C.F.R. § 404, subpart P, Appendix 1. In this case, the agency determined his impairments do not meet or equal a listing.

For an individual with COPD that is Petitioner's height (69.25") to meet the listing for COPD in the regulations, the FEV1 must be equal to or less than 1.45. 20 C.F.R. §404, subpart P, Appendix 1, §3.02(a). The Petitioner's pulmonary function test on August 12, 2014 reports an FEV1 of 1.72. Thus, the Petitioner does not meet or equal the listing for COPD.

For an individual with major depressive disorder to meet the listing in the regulations, the requirements of both A and B or C must be satisfied:

A. Medically documented persistence, either continuous or intermittent, of one of the following:

1. Depressive syndrome characterized by at least four of the following:

- a. Anhedonia or pervasive loss of interest in almost all activities; or
- b. Appetite disturbance with change in weight; or
- c. Sleep disturbance; or
- d. Psychomotor agitation or retardation; or

- e. Decreased energy; or
- f. Feelings of guilt or worthlessness; or
- g. Difficulty concentrating or thinking; or
- h. Thoughts of suicide; or
- i. Hallucinations, delusions, or paranoid thinking; or

2. Manic syndrome characterized by at least three of the following:

- a. Hyperactivity; or
- b. Pressure of speech; or
- c. Flight of ideas; or
- d. Inflated self-esteem; or
- e. Decreased need for sleep; or
- f. Easy distractibility; or
- g. Involvement in activities that have a high probability of painful consequences which are not recognized; or
- h. Hallucinations, delusions or paranoid thinking;

or

3. Bipolar syndrome with a history of episodic periods manifested by the full symptomatic picture of both manic and depressive syndromes (and currently characterized by either or both syndromes);

AND

B. Resulting in at least two of the following:

- 1. Marked restriction of activities of daily living; or
- 2. Marked difficulties in maintaining social functioning; or
- 3. Marked difficulties in maintaining concentration, persistence, or pace; or
- 4. Repeated episodes of decompensation, each of extended duration;

OR

C. Medically documented history of a chronic affective disorder of at least 2 years' duration that has caused more than a minimal limitation of ability to do basic work activities, with symptoms or signs currently attenuated by medication or psychosocial support, and one of the following:

1. Repeated episodes of decompensation, each of extended duration; or
2. A residual disease process that has resulted in such marginal adjustment that even a minimal increase in mental demands or change in the environment would be predicted to cause the individual to decompensate; or
3. Current history of 1 or more years' inability to function outside a highly supportive living arrangement, with an indication of continued need for such an arrangement.

20 C.F.R. Part 404, Subpart P, Appendix 1, Section 12.04.

The agency concluded that the medical documentation demonstrates that the Petitioner meets the requirements in A; however, the documentation does not support that he meets the requirements of B. Specifically, the agency found that the Petitioner does have some limitations in social functioning and maintaining concentration but they are not “marked” limitations. Also, the agency found the documentation does not support that the Petitioner meets the requirements in C.

In order to meet the requirements of the listing, he must have “marked” limitations in at least two categories in B.

“A marked limitation may arise when several activities or functions are impaired, or even when only one is impaired, as long as the degree of limitation is such as to interfere seriously with your ability to function independently, appropriately, effectively, and on a sustained basis.”

The agency concluded the Petitioner has moderate limitations in maintaining attention and concentration, performing activities within a schedule and completing a normal workday without interruptions or at a consistent pace without an unreasonable number of rest periods. The agency also concluded he has moderate limitations with accepting instructions and responding appropriately to criticism from supervisors and in the ability to get along with co-workers or peers. He was also found to have moderate limitations with responding appropriately to changes in the work setting. In all other aspects reviewed, the Petitioner was found to have no significant limitations. The agency noted that the Petitioner is able to complete all ADLs and he has a history of long term jobs without psych related decompensation.

Based on the medical documentation and the Petitioner’s testimony, I find the agency’s conclusions to be reasonable. The Petitioner does have limitations as a result of his depressive disorder as noted but the evidence is insufficient to demonstrate that these limitations seriously interfere with his ability to function appropriately on a sustained basis.

For an individual with anxiety disorder to meet the listing in the regulations, the requirements of both A and B or A and C must be satisfied:

A. Medically documented findings of at least one of the following:

1. Generalized persistent anxiety accompanied by three out of four of the following signs or symptoms:
 - a. Motor tension; or

- b. Autonomic hyperactivity; or
- c. Apprehensive expectation; or
- d. Vigilance and scanning;

or

- 2. A persistent irrational fear of a specific object, activity, or situation which results in a compelling desire to avoid the dreaded object, activity, or situation; or
- 3. Recurrent severe panic attacks manifested by a sudden unpredictable onset of intense apprehension, fear, terror and sense of impending doom occurring on the average of at least once a week; or
- 4. Recurrent obsessions or compulsions which are a source of marked distress; or
- 5. Recurrent and intrusive recollections of a traumatic experience, which are a source of marked distress;

AND

B. Resulting in at least two of the following:

- 1. Marked restriction of activities of daily living; or
- 2. Marked difficulties in maintaining social functioning; or
- 3. Marked difficulties in maintaining concentration, persistence, or pace; or
- 4. Repeated episodes of decompensation, each of extended duration.

OR

C. Resulting in complete inability to function independently outside the area of one's home.

The agency concluded the Petitioner did not meet the requirements in A. In addition, as noted with the assessment of the Petitioner's depressive disorder, the agency did not find the Petitioner to have marked restrictions in two categories in B. Therefore, it found he does not meet the listing requirements for anxiety disorder.

I find that the agency reasonably concluded the Petitioner does not meet the listing requirements for anxiety disorder based on the evidence submitted. There was no evidence of the conditions listed in A and insufficient evidence to demonstrate marked limitations of the conditions in B.

Because the Petitioner's conditions do not meet the listing requirements in Step 3, I must determine if the agency properly determined that the Petitioner has the capacity to perform past work or is capable of performing any substantial gainful activity in the national economy (Steps 4 and 5).

Based on the evidence, I find the agency reasonably concluded that the Petitioner has the capacity to perform past work or any substantial gainful activity in the national economy. Specifically, only physical

limitations found by the agency was that the Petitioner must not be exposed to hazardous fumes or allergens due to the COPD condition and occasional limitations with gross and fine manipulation with upper extremities. Petitioner stated that he is able to drive and there are no restrictions on lifting, carrying, standing, sitting or walking. There is no evidence of marked limitations with regard to the depressive or anxiety disorders. Therefore, the agency reasonably concluded the Petitioner is able to participate in unskilled work activity with light restrictions. This could include past relevant work as a truck driver or general labor.

Based on the totality of the evidence, I find the agency reasonably and properly concluded the Petitioner is not disabled. I note that the Petitioner recently filed a disability application with the Social Security administration (SSA). If the SSA finds the Petitioner is disabled, he will be eligible for Medicaid disability and can re-apply. Additionally, I note that the Petitioner may refile for MADA if his conditions change.

CONCLUSIONS OF LAW

The agency properly determined that the Petitioner is not disabled.

THEREFORE, it is

ORDERED

That the Petitioner's appeal 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 Milwaukee,
Wisconsin, this 5th day of January, 2015.

\sDebra Bursinger
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 January 5, 2015.

Kenosha County Human Service Department
Disability Determination Bureau