

2. The petitioner reports she weighed 130 lbs. on September 6, 2016; while her doctor reported her weight on August 23, 2016, as 142 lbs. She is 5'5 ½" tall. She has a history of stage IIIB anal cancer. She was treated in the first quarter of 2016 with chemo-radiation. A regimen of chemotherapy was not completed due to tolerability problems. Her treatment ended in early May, 2016. See, Exhibit #3, Assessment/Plan of 8/23/16.
3. The only other medical condition of note at application was a vision defect; however, with corrective lenses, her vision is 20/25 bilaterally. At application, she had normal range of motion, strength and no other alleged or actual severe impairments. She takes 81 mg. aspirin and OTC stool softeners every day, and no other medications.
4. The petitioner filed an application with the Wisconsin Department of Health Services, Disability Determination Bureau ("DDB"), seeking MA – Disability coverage on February 10, 2016.
5. Her application was denied on May 11, 2016, with a finding of "no disability". The petitioner requested reconsideration on May 23, 2016.
6. On July 14, 2016, the DDB denied the petitioner's application on reconsideration, again finding her "not disabled". On that date, her application file was referred to the Division of Hearings & Appeals for a hearing on the denied MA-Disability application.
7. A hearing was held on September 6, 2016. The record was held open at the petitioner's request for new medical records from pending appointments with medical providers.
8. On August 23, 2016, the petitioner's oncologist noted an inflamed (1.2 cm) left inguinal lymph node, and scheduled it for a needle biopsy, noting that if it was residual disease, she may need to have "salvage surgery".
9. On or about September 2, 2016, several biopsy samples were taken from the inflamed lymph node area noted on August 23, 2016, for laboratory analysis.
10. On September 2, 2016, the biopsy was analyzed and concluded to be well-differentiated squamous cell carcinoma. This report was provided to DHA on September 19, 2016. The course of future treatment and the expected recovery timeline is unclear on this record.

DISCUSSION

To be eligible for MA as disabled, a person must meet the definition of that term as it is used for SSI purposes. See, WI Stat § 49.47(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. Specifically, to be disabled means to be unable to engage in any substantial gainful activity because of a medically determinable physical or mental condition which will result in death, or will, or has, lasted at least twelve months. To determine if this definition is met, the applicant's current employment status, the severity of his/her medical condition, and their ability to return to vocationally relevant past work or adapt to new forms of employment are evaluated in that sequence. See 20, C.F.R. § 416.905 and § 416.920.

Under the regulations established to interpret Title XVI, a claimant's disability must meet the 12 month durational requirement before being found disabling. In addition, the disability must pass five sequential tests established in the Social Security Administration regulations. Those tests are as follows:

1. An individual who is working and engaging in substantial gainful activity will not be found to be disabled regardless of medical findings. 20 C.F.R. § 416.920.

2. An individual who does not have a "severe impairment" will not be found to be disabled. 20 C.F.R. § 416.920(c).
3. If an individual is not working and is suffering from a severe impairment which meets the duration requirement and meets or equals a listed impairment in Appendix I of the federal regulations, a finding of disabled will be made without consideration of vocational factors (age, education, and work experience.) 20 C.F.R. § 416.920(d).
4. If an individual is capable of performing work he or she has done in the past, a finding of not disabled must be made. 20 C.F.R. § 416.920(f).
5. If an individual's impairment is so severe as to preclude the performance of past work, other factors, including age, education, past work experience and residual functional capacity must be considered to determine if other types of work the individual has not performed in the past can be performed. 20 C.F.R. § 416.920(f).

The Bureau conceded that the petitioner meets step one because she was not working. However, the Bureau determined that her condition did not form a "severe impairment" under the Social Security Regulations because she was expected to recover from her cancer condition, after surgery and chemotherapy, within 12 months of onset, i.e., by January 29, 2017. Her application was therefore denied without reaching any further steps in the analysis.

On reconsideration, the Bureau again determined she was expected to recover to a non-severe impairment status by January 29, 2017, and further considered that even if she was passed at step 2, she would still fail to meet or equal the Adult Listing of Impairment found at § 13.18.

However, in this record, the petitioner now establishes that she has had a re-occurrence of malignant cancer cells in her inguinal lymph node, and it is suggested by her clinical exam of August 23, 2016, that this will require additional surgery and treatment as a relapse. This likewise throws the Bureau's determination that she will have a non-severe impairment level improvement by January 29, 2017, in doubt.

The medical evidence in this record is insufficient to support any type of conclusion as to whether she meets steps 3, 4 or 5 at this time due to a worsened condition. The record does not establish that she has a disabling condition. But it also does not establish that she does not. This unusual situation justifies that the matter be remanded to DDB for action to obtain updated clinical records and perform a review of the most recent information, with a written determination.

If the petitioner again disagrees with the ultimate re-determination ordered here, then she should file an appeal with the Division of Hearings & Appeals, or at least contact the Division to ensure that such a hearing review will occur on the re-determination.

CONCLUSIONS OF LAW

That the petitioner's condition has worsened; it is unknown if she is now disabled under MA – Disability and Social Security Administration rules and regulations; and the matter must be remanded to the DDB for review and re-determination.

NOW, THEREFORE, it is ORDERED

That the matter is remanded to the Department’s Disability Determination Bureau with instructions to: immediately request additional medical records and a time limit waiver from the petitioner (and her providers as appropriate); and review and re-determine her eligibility for MA-Disability, with written notice. These actions shall be completed within 30 days of the date of this Decision.

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, **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 20th day of September, 2016

\s _____
Kenneth D. Duren
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 September 20, 2016.

Marinette County Department of Human Services
Disability Determination Bureau