

STATE OF FLORIDA
DEPARTMENT OF CHILDREN AND FAMILIES
OFFICE OF APPEAL HEARINGS



APPEAL NO. 13F-11610

PETITIONER,

Vs.

CASE NO.



FLORIDA DEPT OF CHILDREN AND FAMILIES
CIRCUIT: 11 Dade
UNIT: 88076

RESPONDENT.

_____ /

FINAL ORDER

Pursuant to notice, the undersigned convened an administrative hearing in the above-referenced matter on April 11, 2014, at 1:15 p.m., in Doral, Florida.

APPEARANCES

For the Petitioner: Lisandra Estevez, legal intern, University of Miami School of Law.

For the Respondent: Leslie Hinds St. Surin, legal counsel, Department of Children and Families.

STATEMENT OF ISSUE

At issue is the Department's action of October 18, 2013 to deny the petitioner's application for of SSI-Related Emergency for Medicaid for Alien benefits, on the basis that she did not meet the disability requirements of the program. The petitioner has the burden of proof.

PRELIMINARY STATEMENT

Present as a witness for the petitioner was Dr. [REDACTED] psychiatrist. She was tendered and accepted as an expert witness under psychiatry.

Present as the supervising attorney of the legal intern, from the University of Miami School of Law was Melissa Swan.

Present as witnesses for the Department were Olivia Hernandez, economic self sufficiency specialist and Consevuela Martinez, operations service manager, Division of Disability Determination (DDD). Ms. Martinez was present via the telephone.

Present as an observer, via the telephone was Larry Labelle with the Office of Appeal Hearings.

Continuances were granted on behalf of the petitioner and the respondent for hearings previously scheduled on January 30, 2014 and February 20, 2014.

FINDINGS OF FACT

1. The petitioner or her representative filed an application to receive benefits on September 9, 2013, through the Department's SSI-Related Medicaid Program. The petitioner's date of birth is [REDACTED]. As she was fifty-six years of age when the application was filed; she did not meet the 65 years of age criteria and the Department completed a disability assessment. The petitioner has not applied for Social Security benefits. The above noted application was forwarded to DDD, where they made an independent disability decision.

2. The petitioner was last employed as a telemarketer in 2003. She is not currently employed. She has a high school diploma.

3. The Division of Disability Determinations (DDD) is the State office (Department of Health) that will make disability determinations for the Department of Children and Families. DDD will make the disability determinations based on the same rules as used by the Social Security Administration. DDD reviewed the petitioner's medical information and determined that the petitioner did not meet disability requirements to be found disabled and denied the request under N-31 code. This N-31 code means: "Non sufficient impairment, customary work." The petitioner's application for disability benefits was denied by the Department approximately on October 18, 2013. A notice was provided by the Department, submitted into evidence as part of Respondent Composite Exhibit 1.

4. Also submitted as part of Respondent Composite Exhibit 1, are copies of medical reports; a copy of a Physical Functional Capacity Assessment report; and a copy of a Psychiatric Review Technique. All of which was reviewed by DDD when making their decision. The medical information presented indicates the petitioner has a diagnosis of diabetes mellitus; benign essential hypertension; peripheral neuropathy; and depressive disorder. The latest date of the petitioner's medical information as reviewed by DDD was August 27, 2013.

5. As part of DDD's review, a Physical Functional Capacity Assessment report was completed on October 16, 2013. For exertional limitations, this report indicates the petitioner can occasionally lift up to 20 pounds. The report indicates the petitioner can frequently lift up to 10 pounds. The report indicates does not indicate that the petitioner has any limitations in standing; she can sit about 6 hours in an 8 hour workday; and has unlimited ability to push and/or to pull by the use of hand or foot. For postural

limitations, this report indicates the petitioner has occasional climbing; balancing; and stooping limitations. This report indicates the petitioner has frequent limitations in kneeling and crawling; having no manipulative or visual limitations; and no communicative or environmental limitations.

6. The Psychiatric Review Technique, also completed on October 16, 2013 indicates the petitioner was being reviewed under 12.04 Affective Disorders with a diagnosis of depression. The Rating of Functional Limitations, under degree of limitations indicates that the petitioner has no restrictions of activities of daily living. The report indicates the petitioner has mild difficulties of maintaining social functioning; has mild difficulties in maintaining concentration, persistence of pace; and has no episodes of decompensation, each of extended duration. The consulting psychologist who completed this report was Thomas Clark, Ph.D. His position was that the petitioner did not meet the criteria of the listing under 12.04. He also indicated in his notes that are part of the report: "Objective observations of claimant are more benign than expected for her reported symptom range and severity."

7. The petitioner submitted into evidence, Petitioner Composite Exhibit 1, which contains a copy of a thirteen page Psychiatric and Psychosocial Evaluation of the petitioner; an eight page copy of a Physical Residual Functional Capacity Questionnaire; and a copy of a list of the petitioner's prescribed medications. Also submitted into evidence was Petitioner Exhibit 2, which contains copies of medical reports of eye examinations from Bascom Palmer Eye Institute, dated January 8, 2010, February 22, 2010, June 24, 2010 and July 20, 2010. All of the above was not reviewed by DDD.

8. The Physical Residual Functional Capacity Questionnaire was completed by the petitioner's treating physician, Dr. [REDACTED]. The format for this is slightly different than the one submitted by the Department. This physician, in describing medical reports that have an effect on the petitioner physical function, indicated that a medical report dated December 12, 2012....: "...A. Peripheral sensor motor mixed (demyelination/axon) neuropathy resulting in significant axon loss affecting lower extremity more than upper extremity. B Bilateral median nerve dysfunction at the wrist (carpel tunnel) resulting in significant axon loss: C. Left ulnar nerve dysfunction of the elbow resulting in significant axon loss."

9. This questionnaire also indicates: the petitioner can only sit for 20 minutes at a time before needing to stand and she can stand for 15 minutes at a time before needing to sit. It indicates the petitioner can stand, sit, and walk for less than 1 hour total in an 8 hour working day; and can occasionally lift and carry up to 10 pounds in a competitive work situation, but could never lift and carry between 11 to over 50 pounds. This questionnaire also indicates the petitioner can never bend, squat, or crawl; can rarely twist, climb ladders, climb stairs, stoop or crouch; and the petitioner can frequently reach or balance. It also indicates the petitioner can rarely use her hands for repetitive action in pushing and pulling and can occasionally use her hands for simple grasping.

10. The Psychiatric and Psychosocial Evaluation of the petitioner which was completed by the expert witness for this hearing on November 19, 2013. Her diagnosis of the petitioner includes bipolar disorder depressive type. This "evaluation" indicates under Activities of Daily Living; the petitioner has marked restrictions under shopping,

cooking, using public transportation, planning daily activities and initiating and participating in activities independent of supervision or directions. This "evaluation" indicates for the petitioner would have moderate restrictions in; personal hygiene, cleaning and using the telephone. For the category of difficulties in maintaining social function, the petitioner would have moderate restrictions in communicating clearly and effectively, getting along with family, friends and neighbors, cooperating with coworkers, establishing interpersonal relationships, holding a job and interacting and actively participating in group activities.

11. The Psychiatric and Psychosocial Evaluation also as reviewed under task performance and concentration difficulties for the petitioner, indicated the petitioner would have marked difficulties in concentration, ability to complete tasks in a timely manner and in the ability to assume increased mental demands associated with competitive work. Under deterioration and/or decompensation this evaluation indicated the petitioner would display (to name a few) withdrawal from situations, decompensation poor decision making and an inability to adapt to changing demands or context.

12. Under this same evaluation, the petitioner was evaluated under "effective disorder" which includes; Depressive Syndrome; Manic Syndrome and Bipolar Syndrome. For Depressive Syndrome, the reviewer indicated the petitioner had, as continuous or intermittent; anhedonia; appetite disturbance with change in weight; psychomotor agitation or retardation; decreased energy; thoughts of suicide; difficulties concentrating or difficulties thinking and feelings of guilt or worthlessness. Under Manic Syndrome, the reviewer indicated the petitioner had; hyperactivity; decreased need for sleep and easy distractibility. Under Bipolar Syndrome the reviewer indicated the

petitioner had; repeated episodes of deterioration, each of extended duration and a residual disease process that has resulted in such marginal adjustment that even a minimal increase in mental demands or change in environment would be predicted to cause the individual to decompensate. The petitioner's expert witness testified to the accuracy of the above information and that she believes the petitioner "meets" the "listing" at least under 12.04 of the appropriate Social Security Administration rules.

13. The petitioner is prescribed the following medication; Humalog; Metformin; Samatriptan; Crestor; Lisinopril; Gabapentin and Verapamil. All of the above are for the petitioner's physical conditions. She has not been (recently) prescribed any medication(s) for her psychological condition. She at one time was prescribed "Abilify" for her psychological condition.

14. Petitioner Exhibit 2 contains copies of eye exam reports from Bascom Palmer for the petitioner. All reports are from 2010. The "latest" report dates July 2010, indicates "No change in vision". It also indicates the petitioner has 20/25 vision with glasses in both eyes.

15. The petitioner indicated that she has made three suicide attempts, once with pills and once by cutting her veins. She indicated that she goes from not eating anything all day to eating a lot. She indicated that she sleeps only one to two hours a day. She indicated that she cannot concentrate and is easily distracted. She indicated that she can go from being very happy to very sad. She indicated that she does not do any housework including cooking. She indicated she will stay in bed with the doors closed because she does not to be around any people. She indicated that she has pain in her legs. She indicated that she has a problem holding on to items as her hand

"tingles" and "goes to sleep". She indicated she is unable to lift anything or stand for too long or sit for too long. She indicated that she has not seen a psychiatrist in fifteen years and based on "no money", receives no treatment for her psychiatric condition.

16. The respondent representative suggested that the "new" information should be reviewed by DDD. The DDD witness indicated that DDD would review the "new" information only if the petitioner filed a new application for benefits or if the hearing officer orders that it be reviewed. The petitioner's representative did not agree to file a new application.

CONCLUSIONS OF LAW

17. The Department of Children and Families, Office of Appeal Hearings has jurisdiction over the subject matter of this proceeding and the parties, pursuant to Fla. Stat § 409.285. This order is the final administrative decision of the Department of Children and Families under § 409.285, Fla. Stat.

18. This proceeding is a de novo proceeding pursuant to Fla. Admin. Code § 65-2.056.

19. In accordance with Fla. Admin. Code § 65-2.060 (1), the burden of proof was assigned to the petitioner.

20. Federal Regulation 42 C.F.R. § 435.541 sets standards for when it is appropriate for the state Medicaid agency to make a determination of disability for individuals who apply for Medicaid. The regulation states in relevant part:

(c) *Determinations made by the Medicaid agency.* The agency must make a determination of disability in accordance with the requirements of this section if any of the following circumstances exist:...

(4) The individual applies for Medicaid as a non-cash beneficiary, whether or not the State has a section 1634 agreement with SSA, and—

(i) Alleges a disabling condition different from, or in addition to, that considered by SSA in making its determination; or

(ii) Alleges more than 12 months after the most recent SSA determination denying disability that his or her condition has changed or deteriorated since that SSA determination and alleges a new period of disability which meets the durational requirements of the Act, and has not applied to SSA for a determination with respect to these allegations.

21. The Department's Florida Program Policy Manual, section 1440.1204

Blindness/Disability Determinations (MSSI, SFP), states in part "If the individual has not received a disability decision from SSA, a blindness/disability application must be submitted to the Division of Disability Determinations (DDD) for individuals under age 65 who are requesting Community Medicaid under community MEDS-AD, Medically Needy, and Emergency Medicaid for Alien Programs."

22. Fla. Admin. Code R. 65A-1.710 sets forth the rules of eligibility for SSI-Related Medicaid Coverage Groups. The MEDS-AD Demonstration Waiver is a coverage group for aged and disabled individuals (or couples), as provided in 42 U.S.C. § 1396a(m). For an individual less than 65 years of age to receive benefits, he or she must meet the disability criteria of Title XVI of the Social Security Act appearing in 20 C.F.R. § 416.905. The regulation states in part:

(a) The law defines disability as the inability to do any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months. To meet this definition, you must have a severe impairment(s) that makes you unable to do your past relevant work (see § 416.960(b)) or any other substantial gainful work that exists in the national economy.

23. Federal Regulation 42 C.F.R. § 435.541 indicates that the state a Medicaid agency's determination of disability must be in accordance with the requirements for evaluating evidence under the SSI program specified in 20 C.F.R. §§ 416.901 through 416.998.

24. Federal Regulation 20 C.F.R. §416.920, Evaluation of Disability of Adults, explains the five-step sequential evaluation process used in determining disability. The regulation states in part:

(a) General—(1) Purpose of this section. This section explains the five-step sequential evaluation process we use to decide whether you are disabled, as defined in § 416.905.

(2) Applicability of these rules. These rules apply to you if you are age 18 or older and you file an application for Supplemental Security Income disability benefits.

(3) Evidence considered. We will consider all evidence in your case record when we make a determination or decision whether you are disabled.

(4) The five-step sequential evaluation process. The sequential evaluation process is a series of five "steps" that we follow in a set order. If we can find that you are disabled or not disabled at a step, we make our determination or decision and we do not go on to the next step. If we cannot find that you are disabled or not disabled at a step, we go on to the next step. Before we go from step three to step four, we assess your residual functional capacity. (See paragraph (e) of this section.) We use this residual functional capacity assessment at both step four and at step five when we evaluate your claim at these steps. These are the five steps we follow:

(i) At the first step, we consider your work activity, if any. If you are doing substantial gainful activity, we will find that you are not disabled. (See paragraph (b) of this section.)

(ii) At the second step, we consider the medical severity of your impairment(s). If you do not have a severe medically determinable physical or mental impairment that meets the duration requirement in § 416.909, or a combination of impairments that is severe and meets the duration requirement, we will find that you are not disabled. (See paragraph (c) of this section.)

(iii) At the third step, we also consider the medical severity of your impairment(s). If you have an impairment(s) that meets or equals one of our listings in appendix 1 to subpart P of part 404 of this chapter and meets the duration requirement, we will find that you are disabled. (See paragraph (d) of this section.)

(iv) At the fourth step, we consider our assessment of your residual functional capacity and your past relevant work. If you can still do your past relevant work, we will find that you are not disabled. (See paragraph (f) of this section and § 416.960(b).)

(v) At the fifth and last step, we consider our assessment of your residual functional capacity and your age, education, and work experience to see if you can make an adjustment to other work. If you can make an adjustment to other work, we will find that you are not disabled. If you cannot make an adjustment to other work, we will find that you are disabled. (See paragraph (g) of this section and § 416.960(c).)

25. The Florida Public Assistance Policy Manual section 1440.1400 outlines and explains REQUIREMENT TO FILE FOR OTHER BENEFITS (MSSI, SFP):

Individuals *must* apply for and diligently pursue to conclusion an application for all other benefits for which they may be eligible as a condition of eligibility. Need cannot be established nor eligibility determined upon failure to do so. Benefits that must be applied for include, but are not limited to:

1. Pensions from local, state, or federal government,
2. Retirement benefits,
3. Disability,
4. Social Security benefits,...

26. In evaluating the first step, the Petitioner is unemployed and not engaging in substantial gainful activity. Therefore, the first step is met.

27. In evaluating the second step, the impairments must last or are expected to last for a continuous period of at least 12 months to meet durational requirements. The petitioner has a diagnosis of diabetes mellitus; benign essential hypertension; peripheral

neuropathy and depressive bipolar disorder all of which could be considered severe.

The second step is met.

28. In evaluating the third step, the impairment(s) would have to meet or equal one of the listings in appendix 1 to subpart P of part 404. The petitioner was evaluated under 12.04 *Affective Disorders*: Characterized by a disturbance of mood, accompanied by a full or partial manic or depressive syndrome. Mood refers to a prolonged emotion that colors the whole psychic life; it generally involves either depression or elation. The required level of severity for these disorders is met when the requirements in both A and B are satisfied, or when the requirements in C are 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 distractability; 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.

The petitioner has met the listing, as the medical information presented (Petitioner Exhibit 1) indicates the petitioner's level of severity for these disorders is met when the requirements in both A and B has been satisfied, both have been satisfied, as under A, at least four of the following as noted above have been met which are: a; b; c; d; f; g and h (seven have been met). Additionally, under B, the petitioner has marked restriction of activities of daily living and marked difficulties under concentration persistence, or pace.

29. The hearing officer concludes that based on the above, the petitioner does meet the disability criteria of Title XVI of the Social Security Act appearing in 20 C.F.R. §416.905 and is considered disabled effective with the application filed. The petitioner has met her burden of proof. The hearing officer orders the Department to continue processing the application for Medicaid benefits. The hearing officer is also setting a "diary date" of one year (12 months) from the date of this filed Final Order for the petitioner to be reviewed for Medicaid eligibility based on disability, by the Department of Children and Families.

30. The petitioner stated that she was going to apply for Social Security Disability benefits through the Social Security Administration (SSA). The Departments

policy dictates that "Individuals *must* apply for and diligently pursue to conclusion an application for all other benefits for which they may be eligible as a condition of eligibility..." The Department must also adopt any SSA disability determination.

DECISION

Based upon the foregoing Findings of Fact and Conclusions of Law, this appeal is GRANTED as stated in the Conclusions of Law.

NOTICE OF RIGHT TO APPEAL


This decision is final and binding on the part of the Department. If the petitioner disagrees with this decision, the petitioner may seek a judicial review. To begin the judicial review, the petitioner must file one copy of a "Notice of Appeal" with the Agency Clerk, Office of Legal Services, Bldg. 2, Rm. 204, 1317 Winewood Blvd., Tallahassee, FL 32399-0700. The petitioner must also file another copy of the "Notice of Appeal" with the appropriate District Court of Appeal. The Notices must be filed within thirty (30) days of the date stamped on the first page of the final order. The petitioner must either pay the court fees required by law or seek an order of indigency to waive those fees. The petitioner is responsible for any financial obligations incurred as the Department has no funds to assist in this review.

DONE and ORDERED this 30th day of May, 2014,

in Tallahassee, Florida.



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