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

[redacted]

APPEAL NO. 13F-12017

PETITIONER,

Vs.

CASE NO. [redacted]

FLORIDA DEPT OF CHILDREN AND FAMILIES
CIRCUIT: 11 Dade
UNIT: 88601

RESPONDENT.
_____/

FINAL ORDER

Pursuant to notice, the undersigned convened an administrative hearing in the above-referenced matter on March 6, 2014, at 10:55 a.m., with all parties appearing telephonically. The hearing was reconvened on April 3, 2014, at 9:00 a.m., with all parties participating telephonically.

APPEARANCES

For the Petitioner: Maria Velasquez, resolve application specialist, Chamberlin Edmonds.

For the Respondent: Jean Thevenin, economic self sufficiency specialist II, Department of Children and Families was present at the reconvened hearing.

STATEMENT OF ISSUE

At issue is the Department's action of January 8, 2013 to deny the petitioner's application for of SSI-Related Emergency for Medicaid for Alien benefits, on the basis

that he did not meet the disability requirements of the program. The petitioner has the burden of proof.

Prior to addressing the merits of this case, it was necessary to determine if a timely hearing request was made.

PRELIMINARY STATEMENT

Present as the representative for the respondent at the first hearing was Lois Samuel, economic self sufficiency specialist supervisor.

Present as a witness for the respondent was Consevuela Martinez, Division of Disability Determination (DDD).

A continuance was granted on behalf of the petitioner and respondent for a hearing previously scheduled on February 6, 2014.

At the first hearing, there was a discussion if a timely hearing request was made. The respondent noted that this hearing should be dismissed as not timely requested. The petitioner's representative indicated that the hearing was requested in July 2013. A hearing was set up by the Office of Appeal Hearings and the hearing was scheduled. The petitioner's representative indicated that she never received notice of this hearing schedule nor did she receive a Notice that the hearing was considered as abandoned. This hearing official, after reviewing the hearing records agreed with the petitioner that this is a timely hearing request, as no notice that the previous hearing was abandoned was actually sent to the petitioner's representative.

The hearing was reconvened as the respondent was not prepared to discuss the merits of the case at the first hearing scheduled.

FINDINGS OF FACT

1. The petitioner or his representative filed an application to receive benefits on December 17, 2012, through the Department's SSI-Related Medicaid Program. The petitioner's date of birth is [redacted] As he was forty-nine years of age when the application was filed; he did not meet the 65 years of age criteria and the Department completed a disability assessment. The petitioner was born in his native country of Argentina and currently does not have legal noncitizen status, thus would not be eligible 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 customer service representative in May 2012. He is not currently employed. He has a high school diploma. He does not speak English.

3. The Division of Disability Determinations (DDD) is the State office 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 determined disabled and denied the request under N-35 code. This N-35 code means: "Impairment not expected to be disabling for 12 full months." The petitioner's application for disability benefits was denied by the Department approximately on January 8, 2013. No notice was provided by the Department, but the Department

submitted into evidence Respondent Composite Exhibit 1 which contains copies of medical records; computer printouts and DDD face sheet.

4. The petitioner submitted into evidence Petitioner Composite Exhibit 1, which contains medical records and physical therapy records dated in 2012 and dated in 2013. The petitioner was in a motorcycle accident in 2012. He incurred a compound fracture to his lower right leg. He had surgically placed pins and rods in his fibula and tibia bones. In a medical report dated December 12, 2012 indicates: "Impression: Stable hardware with interval distraction of the proximal tibial osteotomy site with woven bone formation. Stable alignment of the tibia and fibula."

5. A medical report dated January 4, 2013 indicates: "Severe osteopenia." A more current medical report dated December 12, 2013 of a physical examination in reference to the petitioner's right leg indicates: "He is doing very well..." It should also be noted that the reports provided from the petitioner's therapy sessions indicates the petitioner received physical therapy in 2013.

6. A medical report dated February 18, 2013 of a physical examination for the petitioner indicates: "...The medial wound is now approximately 1 cm x 4 cm with a clean base and it is healing well. He is nuerovascularly intact throughout the right lower extremity. He is unable to range his right knee. He has from approximately 0 to 5 degrees of flexion in the right knee. He says most of his pain is coming from his knee."

7. The petitioner's representative testified that she was told by the petitioner that he cannot stand or walk for more than 30 minutes. She stated that he indicated that he

is unable to cook; clean his house or drive a car. She indicated that his ankle wound has not healed. The hearing officer notes all of the above is hearsay.

CONCLUSIONS OF LAW

8. 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.

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

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

11. 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.

12. 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."

13. 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.

14. 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.

15. 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).)

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

17. 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's medical history is remarkable for damaged right leg that includes bone; knee; and ankle damage. DDD had denied the petitioner at this step in January 2013 as the petitioner's impairment was not expected to last for a period of at least 12 months.

18. The more current (December 2013) medical examination report provided indicates that the petitioner has received treatment for his condition and there has been improvement regarding his right leg as "He is doing very well..." No other medical evidence has been provided. In the absence of medical information regarding the petitioner's current condition(s) and any limitations, the hearing officer cannot conclude that his condition has lasted for 12 months. The respondent's January 2013 denial is affirmed as the petitioner has not demonstrated that he meets the disability criteria found in Title XVI of the Social Security Act appearing in 20 C.F.R. §416.905 and is therefore, not considered disabled. The petitioner has not met his burden of proof.

DECISION

Based upon the foregoing Findings of Fact and Conclusions of Law, this appeal is DENIED.

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 8th day of May, 2014, in Tallahassee, Florida.

Robert Akel

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Hearing Officer
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Copies Furnished To [redacted] Petitioner
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