

**FILED**

**JAN 22 2015**

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

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DEPT OF CHILDREN & FAMILIES



APPEAL NO. 14F-09598

PETITIONER,  
Vs.

CASE NO.



FLORIDA DEPARTMENT OF  
CHILDREN AND FAMILIES  
CIRCUIT: 15 Palm Beach  
UNIT: 88594

RESPONDENT.

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**FINAL ORDER**

Pursuant to notice, an administrative telephonic hearing was convened before the undersigned on January 7, 2015, at 1:48 p.m. The petitioner was present and represented herself. The Department was represented by Shirley Stringer, supervisor.

**ISSUE**

The petitioner is appealing the Department's action of September 5, 2014 to deny Medicaid on the basis that she did not meet the disability criteria. Petitioner is seeking Medicaid for July 2014.

**PRELIMINARY STATEMENT**

Manuel Borge, patient advocate with Conifer Health Solutions was present as a witness for the petitioner. There was no witness for the Department.

A portion of the Department's evidence was not admitted as it was illegible. Petitioner agreed that the medical evidence in her exhibit was complete and she did not need additional time to submit anything further.

**FINDINGS OF FACT**

1. Petitioner communicates in English. She is 28 years old and has not been determined disabled by the Social Security Administration (SSA). She has not filed an application with the SSA. She is not employed.
2. A web application was filed on petitioner's behalf on August 1, 2014 for Medicaid. The request included the retroactive month of July 2014.
3. Petitioner was admitted to the hospital on July 20, 2014 and discharged on July 25, 2014. Her treating physician, Dr. [REDACTED] diagnosed her with acute post-viral motor neuropathy. The admission reason was stated as, "Acute motor weakness in the right lower extremity in the ankle joint level" and "bilateral leg numbness." There was paralysis of the right ankle joint, dorsi and plantar flexors. Petitioner had foot-drop of her right foot at the time of the emergency room visit on July 19, 2014. This has improved and petitioner no longer steps on her toes while walking. Petitioner was also seen by a neurologist, Dr. [REDACTED] who believed she had Guillain-Barré syndrome due to the involvement of both extremities at admission; this was the reason for the initial treatment with intravenous immunoglobulin. The issue with her left foot resolved while she was in the hospital. The issue with her right foot and ankle is not yet resolved.
4. Petitioner was fitted with a brace for her right foot and physical therapy was started in the hospital. She was taught exercises for use at home. Petitioner

was unable to continue the physical therapy post-hospitalization but continues to wear the brace on her right foot and does the exercises she can tolerate at home.

5. Petitioner has a history of spinal stenosis; she has no impairment due to this condition. Medical records indicate "no significant spinal stenosis or neuroforaminal compromise."
6. Upon discharge on July 25, 2014, Dr. [REDACTED] documented, "Prognosis of improvement of post viral neuropathy is guarded. It may take up to 6 months to see complete or partial improvement." (see 41 of 90 at Petitioner's Composite Exhibit 1).
7. Dr. [REDACTED] signed a statement presented to him by the patient advocate prior to the Medicaid application. The statement reads, "It is my professional opinion that the above cited patient, based on his/her physical and/or mental impairments and other medical evidence, is unable to work or perform substantial gainful activity for a period of twelve consecutive months or more." On this statement he indicated the diagnosis as "acute post viral motor neuropathy." Petitioner has not seen Dr. [REDACTED] after her release from the hospital. (see 90 of 90 at Petitioner's Composite Exhibit 1).
8. Because petitioner was under the age of 65 and no minor children, the Department forwarded her disability request to the Division of Disability Determinations (DDD) for a determination of disability for Medicaid eligibility. DDD conducted a desk review of the medical evidence and conducted a telephone interview with petitioner. DDD prepared its "case analysis" on its

review of petitioner's claim using the federal five step sequential evaluation.

DDD determined petitioner met step 1 as she is not gainfully employed. DDD determined petitioner's condition is severe at Step 2. DDD determined petitioner's impairment does not equal or meet a listing in the federal regulation required at step 3. DDD next determined petitioner cannot return to her prior relevant work as a waitress. Lastly, DDD determined at step 5 that petitioner does have capacity remaining to perform other work as it was determined that petitioner has a residual functional capacity (RFC) of light. DDD identified three jobs in the national economy that it felt petitioner could perform with her limitations. The three jobs identified were: garment sorter, swatch clerk and checker (see page 13 of Respondent's Composite Exhibit 2).

9. DDD determined petitioner's RFC of light as it determined she could occasionally lift and/or carry 20 pounds; petitioner disagrees. DDD determined petitioner can frequently lift and/or carry 10 pounds; petitioner disagrees and believes she can occasionally lift 10 pounds but not frequently. DDD determined petitioner can stand and/or walk (with normal breaks) for a total of about 6 hours in an 8 hour workday; petitioner disagrees and believes she can stand or walk about 30 minutes in an eight hour day. DDD determined petitioner can sit about 6 hours in an 8 hour workday; petitioner believes she can sit about 30 minutes and then has to shift and reposition her legs due to the pain and discomfort.
10. Petitioner described the only relief she gets from the pain is to lie down with her right leg propped up. Petitioner described her activities of daily living as involving some exercises of her right leg as it becomes numb and tingly; she walks with

the leg brace as much as she can tolerate; she does not drive as she does not have a car; she does not cook and basically buys prepared food; she is able to shower and groom herself and typically sits down while doing so as she gets off-balance. Petitioner leans on the shopping cart while walking in a store. She does not use any other assistive devices to walk. Petitioner's condition is irritated by the cold weather.

11. After the neuropathy petitioner tried to work at a telephone call center in September 2014. She maintained the job for two or three days as she experienced shooting pain from her knee to her toes and could not sit long enough to work. Prior to the neuropathy, petitioner worked at a deli for five months making sandwiches and slicing meat. She also worked at a telephone call center for about three months. Her primary work since age 16 was as a waitress. Petitioner believes she cannot find work due to the daily pain and the inability to sit or stand.
12. Petitioner completed high school and two semesters of college.
13. Petitioner takes ibuprofen however it does not help with the nerve pain. She is unable to purchase the prescribed medication or participate in the prescribed physical therapy.
14. Petitioner indicated she saw seven doctors while in the hospital and received seven different diagnoses; it seemed as if the cause was unknown. She believes she was more optimistic at the time the DDD examiner interviewed her by phone just after her hospitalization. However since it has now been several months without the improvement she had hoped for she believes her condition may

remain limiting long-term due to not receiving the prescribed ongoing treatment. Petitioner would benefit from follow up with the neurologist due to her continued pain and numbness. She is prevented from ongoing treatment due to no insurance or available funds.

### **CONCLUSIONS OF LAW**

15. The Fla. Admin. Code, Section 65A-1.710 et seq., set forth the rules of eligibility for disabled individuals. 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 at Title 20 C.F.R. §416.905. The regulations state, 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 which makes you unable to do your previous work or any other substantial gainful activity which exists in the national economy. If your severe impairment(s) does not meet or medically equal a listing in appendix 1 to subpart P of part 404 of this chapter, we will assess your residual functional capacity as provided in §§416.920(e) and 416.945. (See §416.920(g)(2) and 416.962 for an exception to this rule.) We will use this residual functional capacity assessment to determine if you can do your past relevant work. If we find that you cannot do your past relevant work, we will use the same residual functional capacity assessment and your vocational factors of age, education, and work experience to determine if you can do other work. (See §416.920(h) for an exception to this rule.)

16. The Federal Regulation at Title 20 C.F.R. §416.920, "Evaluation of disability of adults, in general" states in part:

(4) The five-step sequential evaluation process. The sequential evaluation process is a series of five "steps" that we follow in a set order. See

paragraph (h) of this section for an exception to this rule. 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 paragraphs (f) and (h) 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 paragraphs (g) and (h) of this section and §416.960(c).

17. The hearing officer reviewed the DDD determination of petitioner's claim of disability using the sequential evaluation as set forth in 20 C.F.R. §416.920. The first step is to determine whether the individual is working and earning a substantial and gainful income. DDD determined petitioner is not working and therefore meets the first step. The findings show this is correct.

18. The second step is to determine whether or not an individual has a severe impairment. DDD determined petitioner's condition is severe (see pages 41 and 90 in Petitioner's Composite Exhibit 1). Based on the evidence, the undersigned concurs. The analysis continues to the next sequential step.
19. The third step is to determine whether or not the individual's impairment(s) meets or equals a listed impairment in Appendix 1 of the Social Security Act. The listed impairments are considered severe enough to prevent an individual from doing any gainful activity, regardless of her age, education or work experience. DDD determined petitioner's impairment does not meet or equal a listing. The undersigned reviewed Title 20 C.F.R. Volume 2, Chapter III appendix 1 to subpart P of part 404, specifically "11.00 Neurological" in Part A. Petitioner's impairment is not shown in this section and the undersigned cannot conclude her impairment equals one of the stated listings in this section. The listings given are: 11.05 Benign brain tumors; 11.06 Parkinsonian syndrome; 11.07 Cerebral palsy; 11.08 Spinal cord or nerve root lesions, due to any cause; 11.09 Multiple sclerosis; 11.10 Amyotrophic lateral sclerosis; 11.11 Anterior poliomyelitis; 11.12 Myasthenia gravis; 11.13 Muscular dystrophy; 11.14 Peripheral neuropathies; 11.15 is reserved; 11.16 Subacute combined cord degeneration (pernicious anemia); 11.17 Degenerative disease not listed elsewhere, such as Huntington's chorea, Friedreich's ataxia, and spino-cerebellar degeneration; 11.18 Cerebral trauma and 11.19 Syringomyelia. The undersigned concludes petitioner does not meet a listing based on the medical evidence. Therefore, the analysis moves to step four.

20. The fourth step is to determine whether the individual's impairment(s) prevents her from doing past relevant work. 20 C.F.R. §416.960 "When we will consider your vocational background" states in part:

(b)(3) If you can do your past relevant work. If we find that you have the residual functional capacity to do your past relevant work, we will determine that you can still do your past work and are not disabled. We will not consider your vocational factors of age, education, and work experience or whether your past relevant work exists in significant numbers in the national economy.

(c) Other work. (1) If we find that your residual functional capacity does not enable you to do any of your past relevant work or if we use the procedures in §416.920(h), we will use the same residual functional capacity assessment when we decide if you can adjust to any other work. We will look at your ability to adjust to other work by considering your residual functional capacity and the vocational factors of age, education, and work experience, as appropriate in your case. (See §416.920(h) for an exception to this rule.) Any other work (jobs) that you can adjust to must exist in significant numbers in the national economy (either in the region where you live or in several regions in the country).

(2) In order to support a finding that you are not disabled at this fifth step of the sequential evaluation process, we are responsible for providing evidence that demonstrates that other work exists in significant numbers in the national economy that you can do, given your residual functional capacity and vocational factors. We are not responsible for providing additional evidence about your residual functional capacity because we will use the same residual functional capacity assessment that we used to determine if you can do your past relevant work.

21. The findings show petitioner's primary work since age 16 has been as a waitress.

The undersigned considers this her past relevant work. This work is listed in the Dictionary of Occupational Titles at 311.477.030 as light work (Petitioner's Residual Functional Capacity was determined by DDD to be light). Light work is defined in 20 C.F.R. §416.967 as:

To determine the physical exertion requirements [sic] of work in the national economy, we classify jobs as sedentary, light, medium, heavy, and very heavy. These terms have the same meaning as they have in the Dictionary of Occupational Titles, published by the Department of Labor.

In making disability determinations under this subpart, we use the following definitions: ... (b) *Light work*. Light work involves lifting no more than 20 pounds at a time with frequent lifting or carrying of objects weighing up to 10 pounds. Even though the weight lifted may be very little, a job is in this category when it requires a good deal of walking or standing, or when it involves sitting most of the time with some pushing and pulling of arm or leg controls. To be considered capable of performing a full or wide range of light work, you must have the ability to do substantially all of these activities. If someone can do light work, we determine that he or she can also do sedentary work, unless there are additional limiting factors such as loss of fine dexterity or inability to sit for long periods of time.

Sedentary work is defined in paragraph (a) of the same cite as:

(a) *Sedentary work*. Sedentary work involves lifting no more than 10 pounds at a time and occasionally lifting or carrying articles like docket files, ledgers, and small tools. Although a sedentary job is defined as one which involves sitting, a certain amount of walking and standing is often necessary in carrying out job duties. Jobs are sedentary if walking and standing are required occasionally and other sedentary criteria are met.

22. Petitioner believes she can lift 10 pounds occasionally and sit about 30 minutes before having to reposition her legs in an eight hour work day. She believes she can stand or walk about 30 minutes in an eight hour day. Petitioner alleges pain that is not controlled with over the counter medication and the relief is brought by lying down with her leg propped up. Petitioner's treating physician indicated "It may take up to 6 months to see complete or partial improvement." In addition, the treating physician gave his opinion that petitioner is unable to work or perform substantial gainful activity for a period of 12 consecutive months or more. This is an uncontested expert opinion; there was no expert rebuttal testimony or rebuttal evidence presented at the hearing. The above definition of sedentary explains that "Jobs are sedentary if walking and standing are required occasionally..." Occasionally is defined as the activity existing up to 1/3 of the time. Based on

the uncontested testimony that appears consistent with the medical evidence, the undersigned concludes the RFC of light (requiring more exertion than sedentary) is incorrect.

23. The fifth step is to determine whether the individual's impairment prevents her from performing other work. Petitioner's ability to adjust to other work is determined by the RFC and the vocational factors of age, education, and work experience. The burden shifts at this step to the Department to prove that petitioner can perform other work in the national economy. Based on the conclusion that the RFC of light is incorrect, the previously identified three jobs are not applicable. Based on petitioner's testimony, medical record and the controlling law, it does not appear petitioner can be gainfully employed at sedentary work. Again, the record includes an uncontested expert opinion; there was no rebuttal testimony or evidence presented at the hearing. The undersigned concludes the Department did not meet its burden at step five. Therefore, the petitioner cannot do any other work in the national economy and is to be considered disabled with onset date of July 2014.

### **DECISION**

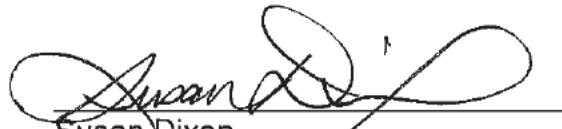
Based on the record and findings, the appeal is granted. The Department is to determine eligibility on all other factors and issue a written notice of its decision, to include the retroactive month of July 2014 (and copy the authorized representative).

If Medicaid is approved, a disability review date of one year from this decision is to be established.

**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 22 day of January, 2015,  
in Tallahassee, Florida.



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