

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

FILED

APR 2 / 2015

OFFICE OF APPEAL HEARINGS
DEPT OF CHILDREN & FAMILIES

APPEAL NO. 14F-10414

PETITIONER,

vs.

FLORIDA DEPT OF CHILDREN AND FAMILIES
CIRCUIT: 05 MARION
UNIT: 88999

CASE NO. [REDACTED]

RESPONDENT.
_____ /

FINAL ORDER

Pursuant to notice, administrative hearing convened before Hearing Officer Patricia Antonucci on February 5, 2015 at approximately 3:30 p.m. All parties and witnesses appeared via teleconference.

APPEARANCES

For the Petitioner: [REDACTED] Petitioner's Mother
RN, Petitioner's Aunt

For the Respondent: Evelyn Ross, ACCESS Division of Disability
Determination (DDD) Supervisor,
Department of Children and Families

ISSUE

At issue is whether it was proper for Respondent, the Department of Children and Families (DCF or 'the Department'), to deny Petitioner's application for disability-based Medicaid.

PRELIMINARY STATEMENT

This matter was originally scheduled to convene by teleconference on January 22, 2015 at 12:30 p.m. As Respondent did not timely receive the Notice of Hearing, hearing was rescheduled for February 2, 2015 at 10:00 a.m. By agreement of both parties, the hearing was reset to begin at 3:30 p.m. on February 2, 2015.

At the scheduled date and time, Petitioner mother, [REDACTED] and his aunt, [REDACTED] RN, appeared on the conference line. On the record of this proceeding, Petitioner authorized his mother and his aunt to act as his representatives. Respondent was represented by Evelyn Ross, ACCESS DDD Supervisor with DCF. Respondent present one witness: Lauren Coe, Program Operations Administrator, with the Department's Disability Determinations office.

At hearing and via subsequent Order, Respondent's Exhibits 1 through 7, inclusive, were accepted into evidence. Additional post-hearing documentation was received from both Respondent and Petitioner, and was copied to the opposing party via Order Sharing Supplemental Documentation. Said documentation is now entered, as follows:

- Respondent's Composite Exhibit 8:
 - [REDACTED] February 15, 2012 (3 pages)
 - Petitioner's School Transcript (2002 – 2006) (1 page)
 - [REDACTED] April 14, 2006 (2 pages)
 - [REDACTED] March 30, 2011 (3 pages)
- Petitioner's Exhibit 1: Diagnostic Assessment, completed by [REDACTED] PhD on September 13, 2012 (pages 1 of 4, 2 of 4, and 4 of 4)

Also via the Order Sharing Supplemental Documentation, Petitioner was instructed to file with the Office of Appeal Hearings "page 3 of 4" of the Diagnostic Assessment, along with a cover sheet (certificate of mailing) notating that a copy was also provided to Respondent. Petitioner was assigned a deadline of March 27, 2015 to submit this documentation. The requested documentation was not received, and the record of this matter closed on March 30, 2015.

FINDINGS OF FACT

Based upon the oral and documentary evidence presented at the final hearing and on the entire record of this proceeding, the undersigned makes the following Findings of Fact:

1. Petitioner is a 28-year-old male, born [REDACTED]. He resides with his mother in the family home.
2. On an unspecified date in 2012, Petitioner applied for disability benefits from the Social Security Administration (SSA). SSA denied that application.
3. At some point after SSA's determination, Petitioner was incarcerated for approximately one year. He was released and returned home in May of 2014.
4. On June 3, 2014, Petitioner filed an application for Medicaid with the Department of Children and Families. Per Respondent, along with this application, Petitioner included all paperwork the Department required to make its determination.
5. On June 9, 2014, Petitioner completed an interview based upon his application, during which he notified the Department that he had been diagnosed with an Asperger's Syndrome by [REDACTED]. On June 12, 2014, he filed an Authorization to Disclose

Information, which permitted the Department to obtain and review any and all of Petitioner's medical records.

6. Upon review, the Department determined that Petitioner did not meet any requirements for family Medicaid – i.e., he was not 65 years of age or older, he did not have a determination of disability from SSA, and he did not have any minor children. For this reason, Petitioner's case was sent to the Division of Disability Determination (DDD) to determine if Petitioner was eligible for disability-based Medicaid.

7. It is not clear when the Department forwarded Petitioner's file to the DDD office. Portions of Respondent's evidence reflect that it was sent on September 8, 2014, while other portions show a review date of November 10 and November 17, 2014.

8. At hearing, Respondent clarified that an electronic version of Petitioner's case file was forwarded initially, with a paper copy to follow. At some point after DDD received the paper copy, Petitioner's case was assigned (November, 2014) to a DDD reviewer. Respondent noted that 5 months is not a typical time frame for review of an application, but explained that there was a backlog of cases from June of 2014, which caused significant delays.

9. In conducting its disability review, DDD pulled medical and school records from Petitioner's 2012 SSA file, including what has been entered as Respondent's

Composite Exhibit 8:

- [REDACTED] February 15, 2012
- Petitioner's School Transcript (2002 – 2006)
- [REDACTED] April 14, 2006
- [REDACTED]

10. At hearing, Respondent noted that in February of 2012, when reviewing Petitioner's application, SSA sent Petitioner to [REDACTED] Ph.D., for a psychiatric evaluation. The February 15, 2012 Consultation Report which DDD reviewed was generated after that appointment. Said Report reflects that Petitioner has a minimal work history and little socialization, but independently performs activities of daily living. The Report also states that Petitioner is "awaiting disposition or a trial on an unspecified sexual case," and concludes that "his history and symptoms are suggestive of Avoidant Personality Disorder."

11. Also reviewed by DDD was a March 30, 2011 Evaluation by [REDACTED] ARNP. This review, conducted prior to [REDACTED] notes that Petitioner has never held a job for more than six months and did not like high school, where he incurred several suspensions for tardiness. At the age of 17, Petitioner began serving a 5-year probation for a burglary charge. The Evaluation reflects that Petitioner is minimally communicative, shows signs of mild depression and constricted affect, sleeps during the day and stays up all night. His Diagnoses include an Axis I diagnosis of Depressive Order (NOS), and a deferred diagnosis on Axis II.

12. School records submitted into evidence appear incomplete, however what purports to be a transcript of Petitioner's high school years (2002-2006) reflects a mixture of individual course grades from As to Fs, with a grade point average of 2.0909 and a ranking of 368/00394. No one from any of Petitioner's schools appeared as a witness at hearing.

13. A 'Case Analysis' completed on November 25, 2014 by Lacey Jernigan at DDD,

notes, in pertinent parts: "27 year old alleging aspergers. 12th grade education and some wor[k] history as a stocker and cashier, however this did not amount to SGA level income." In speaking to Petitioner, Ms. Jernigan noted that he did not remember when he last saw a doctor, "however it has been more than 1 year ago. He is willing to attend a CE [consultative exam]." She further noted, "I spoke with the claimant again and he indicated that there has been no change in his status since his exam in 2/2012."

Following file review by Thomas Clark, Ph.D., including a "not severe PRTF," DDD concluded: "Summary: At this time there is no evidence of a severe impairment. This claim is closed as a N30."

14. The 'PRTF' or Psychiatric Review Technique Form, completed by Dr. Clark, reflects that the medical disposition of Petitioner's case was based on: 12.08 Personality Disorders – Avoidant Personality Disorder. There is no reference to Asperger's on the PRTF, nor is the section entitled "12.10 Autistic Disorder and Other Pervasive Developmental Disorders" completed. With regard to functional limitations, the PRTF rates Petitioner as "mild" with regard to restrictions of activities of daily living, difficulties in maintaining social functioning, and difficulties in maintaining concentration, persistence, or pace, and shows no episodes of decomposition. Dr. Clark summarizes:

27yo male with some work hx and hx of depression and avoidant personality disorder.... Socially active, enjoys video games and watching sports. Hx arrest for burglary at age 17 and also an "unspecified sexual case."

No evidence of major mental illness, but avoidant personality traits are noted. Persistence/pace is fully adequate for activities in which he is interested. He related appropriately as needed. He is independent in ADLs, with some dependence on his mother for which he is not obliged by his mental illness. Not severe.

15. At hearing, DDD testified that it did not request any additional or current records for review, because Petitioner told DDD that he had not seen a doctor since 2012. Although Petitioner and/or his family indicated a diagnosis of Asperger's during the application/interview process, and Respondent was keenly aware of that allegation (see, e.g., DDD's Case Analysis), Respondent did not contact Petitioner's family members or seek any medical documentation related to Asperger's. Respondent confirms that Petitioner also made the Department aware of an Asperger's evaluation by [REDACTED]. It is DDD's contention that DDD considered Asperger's during its review process, but did not request medical records (or send Petitioner for a consultative exam) as it appeared Petitioner had not undergone any more recent treatment and/or because if Petitioner was treated while incarcerated, it would be difficult to obtain that type of record. Respondent thus contends that it obtained sufficient evidence to make its determination.

16. Via Disability Determination and Transmittal signed November 25, 2014, DDD notified ACCESS staff that it had reviewed Petitioner's case under a primary diagnosis of Depression and secondary diagnosis of Avoidant Personality Disorder. The Transmittal also reflected DDD's denial of disability, under Code N30 (No significant impairment and no functional limitations).

17. Based upon this denial, by letter dated December 3, 2014, Respondent notified Petitioner that his Medicaid application of June 3, 2014 was denied for June, July, August, September, October, November, and December of 2014, and January of 2015 because "You or a member(s) of your household do not meet the disability requirement."

18. Petitioner requested a hearing to challenge this determination.

19. At hearing, Petitioner's mother and aunt provided testimony regarding their daily observations of Petitioner. They noted that Petitioner is severely anxious when outside of the home, and spends most of his time indoors. They further testified that Petitioner was diagnosed as being on the Autism Spectrum *prior to* his incarceration, by [REDACTED], a private physician. They questioned why the Department had never requested medical records, sent Petitioner for further examinations, or sought to review Petitioner's intellectual status before denying him Medicaid benefits, stating that if Petitioner was questioned directly, he would say anything to get off the phone as quickly as possible.

20. Petitioner's aunt, a Registered Nurse, testified that in her observations of Petitioner, she finds him to have "extreme" deficits in social functioning and "marked" difficulty with concentration. Both his aunt and his mother are concerned about Petitioner, as he currently has no medical coverage and his family cannot afford to purchase insurance through the Marketplace.

21. Although Petitioner's family believed their attorney had filed a new application with SSA in June of 2014, Respondent indicated that its review of SSA cases showed only the 2012 application, with no applications pending for Petitioner.

22. A November 13, 2012 Diagnostic Assessment, supplemented by Petitioner after hearing, reflects Petitioner's evaluation by [REDACTED] Ph.D. This Assessment (incomplete copy filed, as noted above), was completed approximately 9 months after the [REDACTED] assessment reviewed by DDD. During her evaluation, [REDACTED] reviewed an intellectual assessment, including test scores, conducted by Dr. [REDACTED] on August 28, 2012. [REDACTED] notes that while in school, Petitioner attended special

education classes due to a speech delay, and did not speak until he was 5 years old.

With regard to his current status, [REDACTED] writes:

[Petitioner presented as]... lethargic except in speech, which was rapid in bursts, with an uneven cadence. Eye contact was extremely poor... he often engaged in repetitive motor movements that were purposeless... His affect was flat and his face was expressionless most of the time. He did not readily engage in reciprocal social interaction and often required prompts or directive questioning to obtain adequate responses.... Language skills were generally adequate, although his reasoning at times was illogical.... Social activity was greatly restricted and he does not have any significant relationships beyond family. He reported no interests other than collecting sports statistics.... Based on his verbal skills during the interview, he appeared to be functioning in the low range of intellectual ability.

...

He is charged with a serious offense related to an incident in which he allegedly had sexual intercourse with an adult female who was under the influence of alcohol and prescription medication that compromised her level of consciousness to some degree, according to the allegations.... An adjustment disorder is suggested, but further assessment is needed to rule out a major depressive episode.

These findings suggest the following diagnoses (DSM-IV: Diagnostic and Statistical Manual of Mental Disorders, 1994):

Axis I	299.80	Asperger's Disorder
	309.0	Adjustment Disorder with Depressed Mood
		R/O Major Depressive Disorder
Axis II		None
Axis III		No medical conditions
Axis IV		Moderate stressors: legal problems
Axis V		Global Assessment of Functioning: GAF=55/100

CONCLUSIONS OF LAW

23. 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 Fla. Stat. § 409.285.

24. This proceeding is a *de novo* proceeding pursuant to Fla. Admin. Code R. 65 2.056.

25. In accordance with Fla. Admin. Code R. 65-2.060(1), the burden of proof was assigned to Petitioner, who seeks coverage under Florida Medicaid.

26. With regard to Medicaid eligibility, Fla. Admin. Code, Section 65A-1.710 et seq., sets forth the rules 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. These 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.)
(emphases added)

27. The Department's Policy Manual Section 1440.1204 outlines the process for Medicaid application review, noting:

If the individual has not received a disability decision from SSA [within 12 months of Medicaid application], 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.

(emphasis added)

28. Federal Regulations at Title 20 C.F.R. §416.920(4), "Evaluation of disability of adults, in general" state, in part:

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).

29. In the instant case, DDD found that Petitioner did not have Substantial Gainful Activity (SGA). The undersigned agrees, and thus considers Step 1 – “Is the claimant presently unemployed?” – to be met, as Petitioner has no employment.

30. DDD denied Petitioner’s application at Step 2 – “Is the claimant’s impairment severe?” – stating that Petitioner does not have a severe impairment and/or functional limitations.

31. The court in *Muckenthaler v. Department of Children and Families*, 732 So.2d 362 (2 DCA 1999), heard an appeal challenging denial of disability at Step 2. In this opinion, the court described Step 2 as a ‘threshold inquiry,’ citing *McDaniel v. Bowen*, 800 F.2d 1026 at 1031 (11th Cir. 1986), which explained:

The claimant's burden at step two is mild. An impairment is not severe only if the abnormality is so slight and its effect so minimal that it would clearly not be expected to interfere with the individual's ability to work, irrespective of age, education or work experience. Claimant need show only that her impairment is not so slight and its effect not so minimal.

32. Even in reviewing *only* the medical records evaluated by DDD, the undersigned cannot conclude that Petitioner’s impairment is so slight as to require denial at Step 2. As noted in the PRFT, Petitioner’s activities of daily living, social functioning, and concentration *are* impacted by his impairment, even if only to a “mild” degree, and “avoidant personality traits are noted.” In conjunction with review of Petitioner’s 2012 and 2011 evaluations (again, those also reviewed by DDD), which reflect little socialization, minimal communication,

and a tendency towards sleeping during the day while staying up all night, it cannot be determined that Petitioner's impairment "is so slight and its effect so minimal that it would clearly not be expected to interfere with the individual's ability to work..." (*Id.*)

33. When also considering the medical records from [REDACTED] it becomes increasingly apparent that Respondent did not have a full record of Petitioner's impairments when conducting its review. Because the Petitioner made Respondent aware of his Asperger's diagnosis, filed an Authorization to Disclose Information, *and* provided the name of the diagnosing physician, Respondent had an obligation to (at least attempt to) obtain and incorporate these records into its review and PRTF.

34. The undersigned does not have sufficient information to complete an independent 5-Step Evaluation. As noted above, review at Step 2 is a threshold review, such that denial at this step for any impairment other than one which is extremely "slight" would be improper. The undersigned thus concludes that Respondent's disability denial is the result of a prematurely concluded 5-Step Sequential Evaluation.

35. Respondent, DCF/ DDD, must be given the opportunity to thoroughly review Petitioner's case. If said review again results in a Medicaid denial, Petitioner will be notified of his right to appeal that, specific decision.


DECISION

Based upon the foregoing Findings of Fact and Conclusions of Law, this case is REMANDED to Respondent for further review, consistent with the legal requirements and policy, cited herein.

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 27th day of April, 2015,
in Tallahassee, Florida.


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