

Jan 20, 2016

Office of Appeal Hearings
Dept. of Children and Families

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

[REDACTED]

APPEAL NO. 15F-06590

PETITIONER,

Vs.

[REDACTED]

FLORIDA DEPARTMENT
OF CHILDREN AND FAMILIES
CIRCUIT: 11 Dade
UNIT: 88677

RESPONDENT.

_____ /

FINAL ORDER

Pursuant to notice, the undersigned convened an administrative hearing in the above-referenced matter on November 18, 2015, at 1:00 p.m., in [REDACTED]

APPEARANCES

For the Petitioner:

[REDACTED]

For the Respondent: Leslie Hinds, District Legal Counsel, Department of Children and Families (DCF).

STATEMENT OF ISSUE

At issue is the Department's action in denying the petitioner's application for SSI-Related Medicaid benefits on the basis he did not meet the disability requirements of the program. The petitioner carries the burden of proof.

PRELIMINARY STATEMENT

Present as the supervising attorney for the petitioner's representative was

[REDACTED]

[REDACTED]

Present as witnesses for the respondent were Joseph Austry, Operations Management Consultant 1, and Oilda Guerra, Economic Self Sufficiency Specialist, both from DCF. Also present via telephone as a witness for the Respondent was Lauren Coe Program, Operations Administrator, with the Department of Health's Division of Disability Determinations.

Present as an interpreter via telephone was [REDACTED] employee of Propio Language Services, and later in the hearing, [REDACTED] also from Propio Language Services.

The record was left open for fourteen additional days in order for both parties to submit proposed orders. The petitioner submitted a proposed order.

The respondent submitted into evidence Respondent Exhibit 1 through 3.

The petitioner submitted into evidence Petitioner Exhibits 1,2,3,4,5,6,7,8,10,11, 12, and 13.

FINDINGS OF FACT

Based upon the oral and documentary evidence presented at the final hearing and on the entire proceeding, the following Findings of Fact are made:

1. The petitioner filed an application for Medicaid benefits with the Department on March 23, 2015. An individual must be disabled, blind, or aged (65 years or older) to be eligible for SSI- Related Medicaid. As the petitioner has not turned sixty-five years of

age and is forty-nine years of age, his application was forwarded to DDD (Division of Disability Determination) for disability consideration.

2. The petitioner applied for social security benefits and was denied in February 2013. He has a pending hearing before an Administrative Law Judge with the Social Security Administration. DDD made an independent decision for this case.

3. DDD relies on the same rules and regulations that apply to the Social Security Administration (SSA) when making its determination. DDD considered the petitioner not disabled using the code N-32. N-32 code means "capacity for substantial gainful activity-other work." DDD denied the petitioner at step five of the five-steps of sequential evaluation. The Department denied the petitioner's application for Medicaid benefits on May 26, 2015 based on not being considered disabled.

4. The petitioner is currently not employed. He was previously employed as a delivery man, musician, composer and sound engineer. He does not speak English.

5. The petitioner has been diagnosed with a [REDACTED] specifically

[REDACTED] per

December 2012 MRI of the [REDACTED] Additionally, he has been diagnosed with

[REDACTED]

[REDACTED]

6. Discharge summary records, dated May 2015 from Jackson Health System, show normal range of motion in the [REDACTED]

[REDACTED] and [REDACTED] (not followed

up surgically). Discharge summary records, dated September of 2014 from [REDACTED]

[REDACTED] show a history of [REDACTED]

[REDACTED] and history of [REDACTED] A medical report submitted as part of Petitioner Exhibit 5, dated December 2012 and signed by Dr. Sidani, states: “The level of degenerative changes [REDACTED]

7. DDD completed a Physical Residual Functional Capacity Assessment (RFC) for the petitioner. For the “Exertional Limitations” part of this assessment, it notes the petitioner can occasionally lift and/or carry 20 pounds. It notes the petitioner can frequently lift and/or carry 10 pounds. It notes the petitioner can stand and/or walk about 6 hours in an 8 hour workday. It notes the petitioner can sit with normal breaks about 6 hours in an 8 hour workday. It notes the petitioner can push and/or pull unlimited and is not limited in his upper extremities. It notes the petitioner is limited in his lower extremities with the explanation: “Patient symptomatic with significant limitations of flexion, extension and pain radiating to feet.”

8. For postural limitations, the assessment notes the petitioner has limitations climbing ramp/stairs and a ladder/rope/or scaffold. It notes the petitioner has limitations balancing. It notes the petitioner has occasional limitations with stooping, kneeling, crouching, and crawling.

9. For manipulative limitations, the assessment notes none established.

10. For visual limitations, the assessment notes none established.

11. For communicative limitations, the assessment notes none established.

12. For environmental limitations, the assessment notes none established except for hazards such as machinery and heights where he would have to avoid even moderate exposure.

13. Based on the above information, DDD determined the petitioner has the residual functional capacity to do "light" work. Also, DDD determined the petitioner was capable of doing such jobs as a Lens Inserter, Nuts Sorter, and a Surveillance System Monitor.

14. DDD completed a Psychiatric Review Technique assessment. This assessment; however, noted no medically determinable impairment. The respondent's DDD witness indicated based on this, DDD did not consider the petitioner's alleged mental condition as a severe impairment.

15. The petitioner submitted into evidence Petitioner Exhibit 6 through 8, which contains information regarding the petitioner's "mental disorder". The information submitted was not contained in the respondent's exhibits.

16. Petitioner Exhibit 6 is a copy of a Physical Residual Functional Capacity Questionnaire. It was completed and signed by the petitioner's treating physician, Dr. Rafatiah on June 19, 2013. This questionnaire is not the same as the above noted respondent Physical Residual Functional Capacity Assessment. The questionnaire indicates diagnoses of [REDACTED]

[REDACTED] The questionnaire indicates petitioner is able to sit, stand, and walk less than one hour in an eight-hour working day and unable to carry objects weighing more than five pounds. Further, the questionnaire states petitioner is constantly incapable of even low stress jobs.

17. The questionnaire indicates the petitioner could never, twist, bend, squat, crawl, climb ladders or climb stairs. When it comes to right and left hand function, the questionnaire indicates: "Due to pain, pushing and pulling may be unable to be performed. Due to concentration with the pain, simple grasps and manipulations would be difficult at times.

18. Petitioner Exhibit 11 shows a mental status exam, dated October 1, 2015, which states diagnoses of [REDACTED]

[REDACTED] The exam indicates petitioner overall feels slightly better but still with some anxiety. Energy and motivations is improved. Concentration is still poor. He is awake, alert, and oriented to person, place, and time. Thought process is organized and linear. No auditory or visual hallucinations elicited. No paranoia or delusions elicited. No suicidal ideations or homicidal ideations. Plan is to continue [REDACTED] continue [REDACTED] for [REDACTED] discontinue [REDACTED] and start [REDACTED]

19. The petitioner has been prescribed the following medications: [REDACTED]

[REDACTED] He indicated that he does get some relief of his conditions by the use of these medications but they have many side effects. He indicated that most of the time the medications do not work for him, especially [REDACTED] He indicated he is in constant pain.

20. The petitioner indicated that he has memory loss, due to his mental condition and due to the side effects of the medication. He indicated that based on the memory

loss, he is unable to adequately play any musical instrument or function as a composer or sound engineer.

CONCLUSIONS OF LAW

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

22. This proceeding is a de novo proceeding pursuant to Fla. Admin. Code R. 65-2.056.

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

24. Federal Regulations at 42 C.F.R. § 435.541 sets standards regarding when it is appropriate for the state Medicaid agency to make a disability determination. 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.

25. The Department's Florida Program Policy Manual, section 1440.1204 Blindness/Disability Determinations (MSSI, SFP), states "[i]f 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."

26. 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.

27. Federal Regulations at 42 C.F.R. § 435.541 indicate the state 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.

28. Federal Regulations at 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).)

29. Federal Regulations at 20 C.F.R. § 416.967 sets forth physical exertion requirements. The regulation states in part:

(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 substantially all of these activities.

30. In evaluating the first step, the petitioner is not engaging in substantial gainful activity. Therefore, the first step is met.

31. In evaluating the second step, the impairments must last or be expected to last for a continuous period of at least 12 months to meet durational requirements. The petitioner has a diagnosis of [REDACTED] [REDACTED] which could be considered severe. The second step is met.

32. 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 listing:

1.04 Disorders of the spine (e.g., herniated nucleus pulposus, spinal arachnoiditis, spinal stenosis, osteoarthritis, degenerative disc disease, facet arthritis, vertebral fracture), resulting in compromise of a nerve root (including the cauda equina) or the spinal cord. With:

A. Evidence of nerve root compression characterized by neuro-anatomic distribution of pain, limitation of motion of the spine, motor loss (**atrophy** with associated muscle weakness or muscle weakness) accompanied by

sensory or reflex loss and, if there is involvement of the lower back, positive straight-leg raising test (sitting and supine);

OR

B. Spinal arachnoiditis, confirmed by an operative note or pathology report of tissue biopsy, or by appropriate medically acceptable imaging, manifested by severe burning or painful dysesthesia, resulting in the need for changes in position or posture more than once every 2 hours;

or

C. Lumbar spinal stenosis resulting in **pseudoclaudication**, established by findings on appropriate medically acceptable imaging, manifested by chronic nonradicular pain and weakness, and resulting in inability to ambulate effectively, as defined in 1.00B2b.

The petitioner has not met the listing above based on the medical records provided.

33. The petitioner was also evaluated under listing:

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 distractibility; 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 not met the listing above based on the medical records provided.

34. The fourth step is to determine whether or not the individual's impairment(s) prevents him/her from doing past relevant work. DDD has agreed the petitioner cannot return to his former work, thus the petitioner will be evaluated under the fifth step.

35. The fifth step is to determine if the petitioner can do other work in the national economy which requires considering petitioner's Physical Residual Functional

Capacity Assessment, age, education, work experience, combination of conditions, inability to speak English and the effect of medications both positive and negative.

36. The respondent's position is that the petitioner is able to do certain jobs in the national economy such as a Lens Inserter, Nuts Sorter or a Surveillance System Monitor. All of these jobs are considered are considered as "light duty work".

37. For the case at hand, although the DDD adjudicator determined the petitioner's affective disorder was not a medically determinable impairment, the evidence presented shows to the contrary. The evidence shows diagnoses of [REDACTED] The October 2015 mental status exam submitted by the petitioner, however, indicates continued improvement in his mental condition with current medication management.

38. Although the evidence shows petitioner does suffer from [REDACTED] the stringent criteria necessary to meet Listing of Impairment 1.04 was not met. Further, the petitioner's medical source opinion, per the treating source's RFC, is not supported by the objective medical evidence. For example, the evidence failed to support statements which limited fine manipulation, grasp, and upper extremity strength. Therefore, the treating source's RFC is afforded little weight.

39. The hearing officer agrees with the respondent overall conclusion for the petitioner that he can do other work in the national economy. Based on all of the above, the hearing officer concludes the petitioner does not meet the disability criteria of Title XVI of the Social Security Act appearing in 20 C.F.R. § 416.905 and is 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 and the Department's action is affirmed.

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 20 day of January, 2016,

in Tallahassee, Florida.



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