

STATE OF VERMONT

HUMAN SERVICES BOARD

In re) Fair Hearing No. B-02/15-130
)
Appeal of)

INTRODUCTION

Petitioner appeals a denial of Medicaid eligibility by the Vermont Department for Children and Families ("Department"). The issue is whether petitioner is eligible for Medicaid for Working People with Disabilities. The following facts are adduced from a hearing, records submitted by the parties, and representations made by the parties during several status conferences.

PROCEDURAL HISTORY

This appeal was filed approximately one year ago. Petitioner requested a continuance of the initial hearing and the matter was rescheduled to the month of May, 2015. Following the initial hearing, several status conferences were scheduled, principally to allow for petitioner to provide additional medical information and, in that event, for the Department to review any new information. On several occasions petitioner was offered the opportunity to have her case submitted to the Board based on the then-existing

record; on each occasion petitioner chose to leave the record open and submit additional evidence.

During the last status conference on November 30, 2015, petitioner was given until December 7 to contact the Board as to whether she wished to proceed with her appeal, as opposed to submitting an entirely new Medicaid application after gathering additional information. During the status conference, the hearing officer advised petitioner that if she wished to proceed with the appeal, this was her final opportunity to submit additional information, and after that the record would be closed. Petitioner contacted the Board on December 7 indicating that she wanted to proceed with the appeal and suggesting that she had additional information to provide, but did not provide any new information.

Since that time, the Board has received no additional information from petitioner. That being the case, the appeal as it stands is now being submitted to the Board for review, with no prejudice to petitioner if she wishes to file a new application in the future.

FINDINGS OF FACT

1. Petitioner is forty-eight years old and works for a caregiver agency for elders in their homes. Over the last year, she has reported working between 40 and 60 hours per week, providing direct care. Recently, she has been limited to around 40 hours per week, apparently due to changes in the state and federal policy on overtime for long-term care workers.

2. Petitioner has been diagnosed with several conditions. This includes bipolar disorder (due to a single manic episode) in full remission, post-traumatic stress disorder, and carpal tunnel syndrome. Petitioner has experienced at least three automobile accidents in the past five years, most recently in August of 2015, leading to treatment for orthopedic injuries. Petitioner also describes suffering from what she describes as significant memory and concentration difficulties.

3. Petitioner is in treatment with a therapist for depression and anxiety stemming from her post-traumatic stress disorder.

4. The Department's review of her application for Medicaid included an independent psychological evaluation as well as a review of records from numerous treatment

providers. The independent psychological evaluation concluded that petitioner's bi-polar disorder is in remission but she continues to suffer from post-traumatic stress disorder. The evaluator also concluded that petitioner suffers from no cognitive impairment, scoring 30 (on a scale from 0-30) on a Mini-Mental Status Exam, which tests areas such as orientation to time and place, immediate and delayed recall, and attention.

5. Petitioner is able to lift between 20-25 pounds on a regular basis in her current job. While tiring for her, she stands and sits for several hours per day and is able to handle or grab large and small objects. Petitioner exercises regularly and has normal muscle strength, range of movement, and reflexes. She has mild limitations squatting and kneeling.

6. The Department produced hundreds of pages of records from and relating to petitioner's medical file. These records documented petitioner's medications, orthopedic treatments, and pain management.

7. Applications for Medicaid for Working People with Disabilities are first considered by the Department's Disability Determination Unit ("DDU"), as to whether the applicant is "disabled" under Social Security Administration

("SSA") rules. The DDU determined that petitioner is not disabled because she is "capable of performing a wide variety of simple, low stress jobs that do not require heavy lifting." The DDU found that there was insufficient evidence to determine whether petitioner could perform "past relevant work" but that was not material to their decision, as she could do other relevant work as described above. Examples of such work given were in the electrical (wire worker), clerical, and hotel and restaurant industry.

8. The determination further concluded that petitioner "can understand, remember and carry out simple instructions, can sustain concentration, can persist to complete a normal work week, can make simple work-related decisions and can respond appropriately to supervisors, co-workers, and change in a work setting at the level required by a wide range of unskilled work."

9. Petitioner has worked in her current position as a caregiver since 2009. Her previous employment experience includes working as a customer service representative for about two years, a supervisor and food service manager for about a year, and a para-educator for about two years. She has a college degree.

10. As part of the hearing process, petitioner submitted three letters of support. One letter was from her vocational rehabilitation counselor, asserting that petitioner has difficulty with "concentration, organization, short-term memory, multi-tasking and time management" and "difficulty with money management, organization of her apartment, decision making and time management" as well as "tangential thought process." The letter also cites petitioner's anxiety and stress resulting from an event of physical violence when she was seventeen. The letter acknowledges petitioner's steady employment as a caregiver, but cites the employer's accommodations as necessary to petitioner's retention of that work.

11. While the vocational rehabilitation counselor's letter is accepted as the opinion of the counselor, it is not admitted as a medical opinion.

12. Petitioner's second letter she submitted is from her mental health counselor. The counselor cites petitioner's history of sexual trauma leading to PTSD, depression, and anxiety, and as a result she "has needed to find employment that is flexible and where she feels in control at her job" and that her current job "allows her to

be successful while dealing with her symptoms at the same time."

13. Petitioner's third letter is from her employer. This letter cites petitioner's "excellent" work as a caregiver and as "extremely caring, patient, observant, and a good communicator when it comes to the health, safety, and well-being of the clients." However, petitioner's employer also states that she has several "challenges," such as being late to shifts, forgetting to clock-in, missing shifts, and failing to report her hours worked. Her employer has taken steps to assist her by providing her with schedule reminders. As well, the implementation of new scheduling software at the company has proven beneficial to petitioner.

14. It is clear that petitioner is viewed as a valuable and competent employee by her employer. At the same time, her employer has accommodated her in some ways in order to support her work.

15. During the course of this appeal, petitioner was involved in an automobile accident which led to physical therapy for post-concussive symptoms and a neck strain. This accident did not affect petitioner's ability to maintain her normal work schedule on a long-term basis. The physical therapy notes she submitted covering the fall of 2015

indicated she was making improvements and expected to continue improving.

16. Petitioner requested that the Department review the information from her physical therapy treatment to determine if that would change the initial decision. The Department reviewed this information and determined that it was "insufficient to show any change in her overall functioning as compared to her ability to function pre-MVA [motor vehicle accident]."

17. Petitioner subsequently requested that the record be held open for her to submit additional information related to an MRI as well as information from her counselor. Petitioner communicated with the Board in December that she would be getting her MRI results back. The Board has not received any additional information from petitioner since then.

18. While petitioner has submitted medical evidence establishing that she has mental health and orthopedic conditions, none of the evidence establishes a substantially limiting impact on her ability to perform activities of daily living or to engage in normal social relationships. It is noted that when questioned by the hearing officer regarding her counselor's and vocational rehabilitation worker's

description of her challenges in employment and medical issues, petitioner maintained that she had lost previous jobs because of poor luck and circumstances of the employment - including issues with male co-workers and supervisors - not necessarily for the strictly medical or vocational reasons outlined in her letters of support. Petitioner furthermore believes that she was denied Medicaid because she appears to do well despite her medical conditions.

ORDER

The Department's decision is affirmed.

REASONS

Review of the Department's determination is de novo. As this concerns an initial denial, the petitioner has the burden of establishing her eligibility for Medicaid by a preponderance of the evidence. Fair Hearing Rule 1000.3.0.4.

Petitioner seeks eligibility for Medicaid based on the Medicaid for Working People with Disabilities ("MWPDP") category. To be MWPDP-eligible, an individual must be disabled and meet the other eligibility criteria found at Health Benefits Eligibility and Enrollment ("HBEE") Rules § 8.05(d). If found to meet the definition of disabled, an applicant may qualify if they have income below 250 percent

of the Federal Poverty Level ("FPL") - which is above the normal income threshold for Medicaid eligibility. In this respect the MWPD program supports, to a point, people with disabilities in maintaining employment.

The issue is whether petitioner meets the definition of disability:

An individual age 18 and older is considered "disabled" if they are unable to engage in any substantial gainful activity because of any medically determinable physical or mental impairment, or combination of impairments, that can be expected to result in death, or has lasted or can be expected to last for a continuous period of not fewer than 12 months. To meet this definition, individuals must have a severe impairment, which makes them unable to do previous work or any other substantial activity which exists in the national economy. To determine whether individuals are able to do any other work, AHS considers their residual functional capacity, age, education, and work experience.

HBEE Rules § 3.00.

The Department makes disability determinations consistent with the requirements of the Social Security Administration. HBEE Rules § 804(a). The Social Security Administration uses a five step sequential outline to determine disability:

1. Is the applicant working and performing substantial gainful activity?
2. If not, does the applicant have a severe impairment or combination of impairments?

3. If so, does the applicant's impairment(s) meet or equal a listed impairment?

4. If so, the claimant is disabled. If not, does the impairment(s) prevent him or her from performing past relevant work based on his or her residual functional capacity?

5. If not, then there is no disability. If yes, is the claimant prevented from doing other work based on his or her medical condition taking into account the claimant's residual functional capacity, age, education and work experience?

See 20 C.F.R. § 416.920.

Individuals who are considered for MWPD eligibility are exempt from the "substantial gainful activity" step of the above sequential process. HBEE Rules § 3.00. The Department's determination in this case presumes that petitioner has a "severe" impairment or combination of impairments. The Department did not find that petitioner's impairment, while severe, meets or equals a listed impairment, and thus the Department focused on steps four and five of the above sequential process.

The determination of whether a condition "meets or equals a listed impairment" is generally covered under *Appendix 1 to Subpart P of Part 404—Listing of Impairments* ("Appendix 1") contained in the Code of Federal Regulations. Appendix 1 lists 15 categories of impairment - including, among others, the "Musculoskeletal System" and "Mental

Disorders.” Most listed impairments must meet certain diagnostic criteria and symptomology, as well as have marked or severe impacts on functioning. For example, someone with an affective disorder (including *active* bi-polar illness), must also have two of the following impacts: marked restrictions in activities of daily living; marked difficulties in social functioning; marked difficulties in concentration; or repeated episodes of decompensation; OR, a “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. . . .” Appendix 1, § 12.04.

Petitioner has presented no medical evidence, even assuming the basic diagnostic criteria or symptomology are met for a particular impairment, which demonstrates that she suffers from a significant impairment in her functioning as delineated above. There is no question that she has challenges in her functioning, but in many respects it is her functioning that is the strongest element of her circumstances. She has maintained employment for several years, has positive social relationships, and persistently maintains her basic health and well being. The evidence is not sufficient to establish petitioner meets a listed

impairment or, for the same reasons, has an impairment that "medically equals" a listed impairment. See SSA Program Operations Manual System DI 22001.020 (in order to "equal" a listed impairment, it "must be at least equal in severity and duration to the criteria of any listed impairment. . .").

Thus, the Department correctly moved on to consider steps four and five of the sequential process, relating to her ability to do past relevant work or, if not, any other relevant and appropriate work. The Department assumes without finding that petitioner is unable to do past relevant work, and focuses on the final step - her ability to perform any other relevant work. The Social Security Administration guidance provides that, at this 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." 42 C.F.R. § 416.920(a)(4)(v). "Residual functional capacity" is generally defined as "the most you can still do despite your limitations." 42 C.F.R. § 416.945(a).

As described in the facts, the Department determined that petitioner "can understand, remember and carry out simple instructions, can sustain concentration, can persist to complete a normal work week, can make simple work-related

decisions and can respond appropriately to supervisors, co-workers, and change in a work setting at the level required by a wide range of unskilled work." This is consistent with the medical evidence reviewed by the Department and with a finding that she is able to do light, lower-skilled work. *See Appendix 2 to Subpart P of Part 404-Medical-Vocational Guidelines* §§ 202.00(b) and 202.20. Moreover, none of the medical evidence submitted by petitioner establishes that her functional capacity precludes such work. *See id.*, § 200.00(a).

As such, the Department's decision is consistent with the applicable rules and must be affirmed. 3 V.S.A. § 3091(d), Human Services Board Rule 1000.4(D).

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