STATE OF VERMONT

HUMAN SERVICES BOARD

In re	)	Fair Hearing No. 9301
	)	
Appeal of	)	

INTRODUCTION

The petitioner appeals the decision by the Department of Social Welfare denying her application for Medicaid benefits. The issue is whether the petitioner is disabled within the meaning of the pertinent regulations.

FINDINGS OF FACT

The petitioner has been the subject of a series of HSB decisions dating back to October 1985, when she first applied for Medicaid. See Fair Hearing Nos. 7248 and 8951. In an Order dated February 24, 1987, the board found that the petitioner's past work was "medium".[1] Id., No. 7248, p 1. In a decision dated October 14, 1987, the board affirmed the hearing officer's finding (contained in a Recommendation dated May 19, 1987) that the petitioner, based solely on her physical impairment, was not capable of performing "medium work."[2] Id. p 4. In that decision the board concluded that the petitioner met the definition of disability and it reversed the department's decision that had denied her Medicaid on that basis. Id. pp 4-8.

Unfortunately, however, this did not end the matter--far from it. In Fair Hearing No. 8951 (decided April 5,

1989) the board found that at about the same time as its final (October 14, 1987) decision in Fair Hearing No. 7248 the petitioner had gone to work full time. The board found that the petitioner continued to work until December, 1988, at which time she was laid off and began receiving unemployment compensation benefits. On this basis, the board affirmed the department's decision terminating the petitioner's Medicaid. Id. The petitioner did not appeal this decision, but shortly thereafter she filed a new application for Medicaid. When the department denied this application, the instant appeal ensued.[3]

The parties do not dispute that following her last period of employment the petitioner received unemployment compensation until May 19, 1989. The parties have stipulated that the instant decision by the board shall confine itself to the issue of the petitioner's eligibility for Medicaid as of that date. The parties will separately argue, and the board may later consider, whether the petitioner could have been eligible for Medicaid prior to May 19, 1989--at the same time she was receiving unemployment compensation.[4]

The department concedes that it has no medical evidence that the petitioner's condition has improved since the board issued its final findings and decision in Fair Hearing No. 7248 (on October 14, 1987). The petitioner has also submitted a recent (April 22, 1989) report from her treating physician indicating, among other things, that she is

limited to "sedentary work".[5] In light of this, her recent work notwithstanding (see below), it must be found that the petitioner is not capable of performing a full range of even "light work".[6] As was the case in Fair Hearing No. 7248, this finding considers only the petitioner's physical impairments. There is no reason to believe, however, that the petitioner's mental impairments have improved since the time of the evidence in this regard that was considered in Fair Hearing No. 7248.

The petitioner is now 62 years old. Her recent work stint at a job that entailed a significant degree of standing and lifting appears to have been performed despite her impairments. There is no medical basis upon which to conclude that the job constituted "evidence"--contradicting the opinion of her treating physician--that she cannot perform a full range of "medium work" as defined by the regulations--i.e., lifting 25 pounds frequently and 50 pounds occasionally, and being on one's feet all day.

In view of the regulations (see below), the above findings are deemed sufficient to establish that the petitioner is disabled.

ORDER

The department's decision is reversed.

REASONS

Medicaid Manual Section M211.2 defines disability as follows:

> Disability is the inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment, or combination of impairments, which can be expected to result in death or has lasted or can be expected to last for a continuous period of not fewer than twelve (12) months. To meet this definition, the applicant must have a severe impairment, which makes him/her unable to do his/her previous work or any other substantial gainful activity which exists in the national economy. To determine whether the client is able to do any other work, the client's residual functional capacity, age, education, and work experience is considered.

In addition to the above, the regulations provide that an individual over age 60 who cannot perform her past work, and who does not have the residual functional capacity to perform "medium work", is considered disabled unless it is shown that she has skills that are "highly marketable". 20 C.F.R. э 416.963(d). The department does not maintain that the petitioner has such skills.

In Fair Hearing No. 8951, the board noted that the mere fact that an individual is presently working is sufficient under the regulations to preclude a finding of disability--regardless of the evidence as to one's medical condition. See 20 C.F.R. э 416.920(b). This does not mean, however, that having worked in the recent past despite what-medical-evidence-establishes-is an inability to perform this work precludes a finding of disability. See 20 C.F.R. э 416.908.

As noted above, uncontroverted medical evidence establishes that the petitioner cannot perform a full range of medium work. Her recent work stint cannot reasonably be

viewed as evidence contradicting this assessment. At most, it establishes that the petitioner (perhaps valiantly, and no doubt out of severe financial necessity) continued to work despite her impairments.[7] By law, however, she was not (and is not) expected to do so.

For the above reasons, it is concluded that at least as of May 19, 1989 (the earliest onset date that is the subject of this opinion) the petitioner was disabled within the meaning of the pertinent regulations (see above). Therefore, the department's decision is reversed.

FOOTNOTES

[1]See 20 C.F.R. э 416.967(c).

[2]Id.

[3]Fortunately for the petitioner, and mercifully for the board, the petitioner is now represented by Vermont Legal Aid, Inc.

[4]The board's decision in Fair Hearing No. 8951 included the following language:

> "Absent evidence that her medical condition has deteriorated and as long as the petitioner continues to declare herself eligible for unemployment compensation (i.e., that she is able to and available for work) it must be concluded that she is not disabled within the meaning of the . . . regulation."

In separate arguments the parties will, at a later time, submit the question to the board of whether the petitioner could be considered to have been disabled for Medicaid purposes during the same time she received unemployment compensation benefits.

[5]See 20 C.F.R. э 416.967(a).

[6]Id. э 416.967(b).

[7]Had the petitioner been competently advised in the past she might have filed for and been awarded Social Security and/or SSI disability benefits--thus obviating the financial need for her to continue working despite her impairments.

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