

STATE OF VERMONT
HUMAN SERVICES BOARD

In re) Fair Hearing No. 10,740
)
Appeal of)

INTRODUCTION

The petitioner appeals the decision by the Department of Social Welfare denying his application for Medicaid. The issue is whether the petitioner is disabled within the meaning of the pertinent regulations.¹

FINDINGS OF FACT

The petitioner is a forty-two-year-old man with a tenth-grade education. He has worked in factories and as a corrections guard. For the past several years he has sustained himself as a self-employed logger.

The petitioner has a history of many and various physical and psychological complaints, as well as alcohol and drug abuse. The medical record contains several reports of examinations and testing done over the past few years (the petitioner lived in New Hampshire until 1991). Virtually all physical tests, including neurological and orthopedic workups have been negative. Some of the petitioner's doctors have suspected that the petitioner may suffer from chronic-fatigue syndrome, but testing for this has been inconclusive.² The petitioner has also seen several psychiatrists and other mental health counselors. He has been diagnosed as having a

personality disorder and is currently being treated for depression. Most of the mental health providers who have seen him have generally credited most of his physical complaints. However, in November, 1991, a psychiatrist at the county mental health service where the petitioner continues to receive counseling stated that she felt the petitioner's "primary diagnosis is antipersonality disorder and malingering".

In a May, 1992, letter to the petitioner's legal representative, the petitioner's counselor (an M.A.) offered the following summary of the petitioner's status:

This letter is intended to offer my opinion as to whether or not and to what extent [petitioner's] psychological condition affects his ability to generate an income.

I am sure that [petitioner] is a person who experiences genuine pain and discomfort. And that his inability to understand the cause of that pain is a source of distress as is evidenced by his tendency to easily adopt and capriciously change his framework for understanding his pain. According to [petitioner's] self reports, the symptoms he experiences such as fatigue, headaches, nausea, and swelling of his muscles prevent him several times per week from putting in a days work. He also reports that on days when he is able to work, he is often unable to work for more than four or five hours. If there is a physical basis for his various symptoms, it has not been clearly and definitely diagnosed to the best of my knowledge.

He reported several times during sessions having become physically ill (once with nausea and faintness, and once with an ache in his stomach) precipitated by the topic of discussion, which had to do with his relationships to family and to others. He also reported having become ill at social gatherings when they resembled situations within his turbulent relationships. Besides the physical symptoms, [petitioner] reported occasional insomnia, mood swings,

and inexplicable fits of crying in public places.

I am not certain the degree to which these symptoms are psychologically rooted. But it seems clear that they are at least exacerbated by his psychological state. And from his self reports, all these symptoms impede his ability to work to his former capacity. [Petitioner] is also rather resistant to the concept of psychologically rooted physical pain due to a very strong work ethic. To him, such a suggestion is tantamount to being seen as lazy.

At the hearing the petitioner testified that on "good days" he feels fine and can put in a full days work logging.

However, he states that on "bad days" he cannot do anything. According to records the petitioner says he has kept since October, 1991, of his days at work, it appears that the petitioner has averaged four to five days a week of working three to four hours a day. He stated that he reported a "profit" of \$5,000.00 from his logging business in 1991.

Based on the equivocal medical record, determining the petitioner's residual functional capacity is problematic, at best. Another problem is that the petitioner's present work activity is extremely strenuous physically, yet tenuous financially. Despite this, however, it does not appear that the petitioner has ever attempted to obtain lighter work. Even fully crediting his physical complaints the evidence simply does not establish that the petitioner could not perform sedentary or light work on a much more regular and sustained basis than the logging job he now does part-time.

The recent report (supra) from the petitioner's counselor-- who appears to be one of the more supportive of the

petitioner's past and present treating sources--states only that the petitioner's symptoms "impede his ability to work to his former capacity". Although the petitioner was given several months to do so, and had the assistance of legal counsel, he did not produce any clear medical evidence that he would be unable to perform a full range of sedentary and light work on a regular and sustained basis. Neither the petitioner's testimony nor his demeanor was deemed to be convincing enough to overcome this lack of medical evidence.

ORDER

The Department's decision is affirmed.

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.

The federal regulations provide for a five-step "sequential evaluation" in determining whether individuals meet the above definition. 20 C.F.R. § 416.920. The first step is whether the individual is working. In this case, it is arguable at the outset that the petitioner's present work

constitutes "substantial gainful activity" (SGA). See 20 C.F.R. § 416.975. However, due to the medical evidence (supra) that the petitioner cannot perform logging work to the same extent that an unimpaired individual could, it is concluded that the petitioner's present work activity does not constitute SGA Id.

The second step is the de minimus "severe impairment" test. The Department concedes that the petitioner suffers from an impairment that limits his ability to perform some basic work activities.

The third step is whether the impairment meets or equals the "listings" in 20 C.F.R. § 404, Subpart P, Appendix I. The petitioner maintains that he meets the listings under either Somatoform Disorders (Sec. 12.07) or Personality Disorders (Sec 12.08).³

As noted above, the recent medical evidence (the psychiatrists and counselors the petitioner has seen in Vermont since last summer) is inconclusive whether the petitioner even has a severe psychological impairment. Of the recent psychological assessments of the petitioner, an examining psychiatrist believes he is malingering and his regular counselor is "not certain the degree to which these (physical) symptoms are psychologically rooted." As the petitioner points out, the record does contain other psychological evaluations that seem to credit his alleged symptoms and that offer specific psychological diagnoses.

However, the most recent of these evaluations were done at least a year ago and stand in significant contrast to the more timely evidence. The hearing officer allowed the petitioner many months to obtain specific medical opinions from a current or recent treating source to support his allegations. The best the petitioner could offer was the equivocal report from his counselor, cited above. On the basis of the recent medical evidence it is, therefore, concluded that the petitioner does not meet the above listings.

The fourth step of the evaluation process is whether an individual is precluded from performing his past work. In this case, the Department concedes that the petitioner's physical symptoms preclude him from doing his past job as a logger.⁴

This leads to the fifth, and final, step in the evaluation process--whether the individual can perform other jobs considering his impairments and his age, education, and work experience. At this point the burden of proof shifts to the Department to demonstrate the existence of other jobs the individual could do. However, before the Department undertakes this burden it is up to the fact finder to determine the individual's residual functional capacity in light of the medical and any other evidence.

As noted above, the recent medical evidence indicates either that the petitioner is malingering or that the majority of his symptoms are more likely physical than

psychological in origin. It is therefore, concluded that the petitioner has few, if any, significant psychological limitations on his ability to perform unskilled work.

As for his physical limitations, the petitioner is presently working part-time as a logger--an extremely strenuous job. Moreover, he admits that his physical symptoms are exacerbated by the strenuousness of this work.

Nothing in the recent medical evidence establishes that the petitioner's symptoms, whatever their cause, would preclude the full-time performance of most, if not all, unskilled "light" or "sedentary" jobs. See 20 C.F.R. § 416.967.

Once it is determined that the petitioner has the residual functional capacity to perform a full range of such work, the Department's burden of proving that such jobs are available to the petitioner (in light of his age, education, and work experience) is met by reference to the appropriate "grid regulations"--20 C.F.R. § 404, Subpart P, Appendix II, Rules 201.24 and 202.17.

On the medical evidence, this was an extremely close and difficult case. Frequently in cases such as this, a lack of specific medical evidence or a conflict in the evidence can be resolved in the petitioner's favor based on the overall credibility of the petitioner's subjective complaints and demeanor.⁵ Unfortunately for the petitioner herein, this was not deemed to be such a case. For all the above reasons, the Department's decision should be affirmed.

FOOTNOTES

¹The hearing officer in this matter concurs fully in the board's findings of fact and conclusions of law.

²Apparently, a conclusive test for chronic fatigue syndrome does not yet exist.

³**12.07 SOMATOFORM DISORDERS:**

Physical symptoms for which there are no demonstrable organic findings or known physiological mechanisms.

The required level of severity for these disorders is met when the requirements in both A and B are satisfied.

A. Medically documented by evidence of one of the following:

1. A history of multiple physical symptoms of several years duration, beginning before age 30, that have caused the individual to take medicine frequently, see a physician often and alter life patterns significantly; or

2. Persistent nonorganic disturbance of one of the following:

a. Vision; or

b. Speech; or

c. Hearing; or

d. Use of a limb; or

e. Movement and its control (e.g., coordination disturbance, psychogenic seizures, akinesia, dyskinesia; or

f. Sensation (e.g., diminished or heightened).

3. Unrealistic interpretation of physical signs or sensations associated with the preoccupation or belief that one has a serious disease or injury;

AND

B. Resulting in three of the following.

1. Marked restriction of activities of daily living; or

2. Marked difficulties in maintaining social functioning or

3. Deficiencies of concentration, persistence or pace resulting in frequent failure to

- complete tasks in a timely manner (in work settings or elsewhere); or
4. Repeated episodes of deterioration or decompensation in work or work-like settings which cause the individual to withdraw from that situation or to experience exacerbation of signs and symptoms (which may include deterioration of adaptive behavior).

12.08 PERSONALITY DISORDERS:

A personality disorder exists when personality traits are inflexible and maladaptive and cause either significant impairment in social or occupational functioning or subjective distress. Characteristic features are typical of the individual's long-term functioning and are not limited to discrete episodes of illness.

The required level of severity for these disorders is met when the requirements in both A and B are satisfied.

A. Deeply ingrained, maladaptive patterns of behavior associated with one of the following:

1. Seclusiveness or autistic thinking; or
2. Pathologically inappropriate suspiciousness or hostility; or
3. Oddities of thought, perception, speech and behavior; or
4. Persistent disturbances of mood or affect; or
5. Pathological dependence, passivity, or aggressivity; or
6. Intense and unstable interpersonal relationships and impulsive and damaging behavior;

AND

B. Resulting in three of the following:

1. Marked restriction of activities of daily living; or
2. Marked difficulties in maintaining social functioning; or
3. Deficiencies of concentration, persistence or pace resulting in frequent failure to compete tasks in a timely manner (in work settings or elsewhere); or
4. Repeated episodes of deterioration or decompensation in work or work-like settings which cause the individual to withdraw from that situation or to experience exacerbation

of signs and symptoms (which may include deterioration of adaptive behaviors).

⁴Although the Department concedes that the petitioner cannot do heavy work, the hearing officer deemed the petitioner's testimony and demeanor less than convincing in assessing the degree even to which the petitioner's present work activity is limited by actual medical considerations, as opposed to other factors such as weather and lifestyle choices made by the petitioner.

⁵See, e.g., Fair Hearing Nos. 10,924, 10,834, 10,555, 10,264, and 10,018.

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