

STATE OF VERMONT
HUMAN SERVICES BOARD

In re) Fair Hearing No. 11,094
)
Appeal of)

INTRODUCTION

The petitioner appeals a decision by the Department of Social Welfare denying his application for Medicaid benefits.

The issue is whether the petitioner is disabled as that term is defined in the Medicaid regulations.

FINDINGS OF FACT

1. The petitioner is a fifty-year-old man who has completed the twelfth grade and who has a work history as a roofer and carpenter. His employment required him to work at heights, to lift forty to fifty pounds regularly and to stand or walk at all times.

2. The petitioner has had some back pain all of his life but it was exacerbated by a car accident in 1986. That accident resulted in multiple injuries (a pulmonary contusion, open fracture of the left elbow, a fracture of the left clavicle, left scapula and multiple rib fractures in the back left side) most of which have healed but which have left him with some residual pain and a decreased ability to lift and bend. Although he did not fracture his neck or spine, X-rays taken at that time revealed that he had some slight degenerative changes and mild scoliosis in his

spine and considerable degenerative changes in his neck. 3.

After his accident, the petitioner continued to work at his trade doing both finish and rough carpentry work. His lower back continued to bother him and he was treated by a chiropractor in October of 1986 and March of 1987 for pain and stiffness in the lower spine. The chiropractor noted at that time that the petitioner had a restricted range of motion in his lower back due to stiffness and pain, especially with regard to forward bending maneuvers.

4. In July of 1987, a tree fell on the petitioner's neck. He again sought treatment from his chiropractor who noted that the range of motion in his neck was severely restricted at that time due to pain and swelling. The petitioner continued to complain of pain in his neck and back and in March of 1988, the chiropractor obtained X-rays of those areas which showed that the petitioner had some spondylosis and scoliosis of the lumbar spine and spondylosis and some degenerative arthritis of the cervical spine. The petitioner was treated through spinal manipulation, moist heat therapy, intermittent lumbar disc traction and electrotherapy through June of 1989.

5. The petitioner's pain continued to increase until by September of 1990, he felt he could no longer work because he felt "sick to his stomach" and was stumbling around. He returned for chiropractic treatment (with a different chiropractor) in November of 1990 and was treated three more

times until March of 1991 for back and neck pain. Thereafter, the petitioner received no further treatment because he had no money to pay for it.

6. The petitioner applied for Medicaid in August of 1991. His application was supported by a letter from his first chiropractor, dated October 8, 1991 which concluded:

It is my opinion that this patient will continue to suffer from his pain and symptom complex due to his chronic musculi-skeletal conditions involving both his cervical and L/S spines. Although, it has been two years since his last office visit, I would expect some further degenerative changes have made his situation worse and less physically able to continue as a roofer. I would also suspect that he would have difficulty sitting/standing for long periods of time, and any repetitive lifting and carrying might cause increased pain during a normal working day. If he is to seek any type of employment, I would recommend sedentary to light duties only.

7. On October 22, 1991, the petitioner was examined by a medical doctor at the request of DDS. That physician noted that he had tender sacroiliac joint bilaterally and that he "had a fairly stiffly held lower back, though it had good mobility if he moved slowly." He noted that the petitioner had pain and some restriction of movement across the sacral area on straight leg raising and that his "low back problems limited his ability to bend and to lift, the latter not being tested. He was able to put his shoes on with some difficulty, being careful in turning to his left, especially to put on the shoe on that side." Although the petitioner brought his x-rays from 1986 and 1988 to the examination, the physician stated that he could not interpret or use them as he was a

"non-radiologist." He concluded:

"This 46-year-old (sic) man had multiple injuries in 1986, including a clavicle fracture which, by the way, I didn't mention has apparently not united, scapular fracture, and dislocation of the left elbow, requiring open reduction. This was described by the surgeon as a comminuted lateral epicondylar fracture. He has limited skills for employment, and chronic low back requiring frequent changes of position, too. He has a history of both alcohol and tobacco abuse, both of which he seems to have under better control.

8. Based on the above information, the Disability Determination Service concluded on November 25, 1991, that in spite of some limitations, the petitioner could stand or walk at least six hours per day and was capable of work requiring only light lifting (20 lbs. maximally and 10 lbs. frequently), and occasional bending or crouching. As a "younger individual", with a high school education and unskilled work experience, it was concluded that the petitioner was, therefore, not disabled.

9. The petitioner appealed the above decision which was promptly set for hearing but was repeatedly postponed by agreement of the parties until November 9, 1993. At that time, the petitioner presented an additional consultative report with an orthopaedist in April of 1993 which he obtained through DDS. That orthopaedist noted some decrease from normal in the range of motion of his cervical spine and a slightly restricted range of motion of his left shoulder. His review of some newly taken X-rays indicated to him that the petitioner experienced degenerative disc disease of his spine.

He concluded as follows:

There was no specific neurologic deficit detected. I do feel he should be able to do a job which does not involve lifting overhead with his left arm. He should probably be able to lift and carry 15 to 20 lbs. without difficulty. Because of his complaints of low back pain, he should not have to do frequent squatting or crawling. He should be allowed to occasionally sit and stand.

10. The petitioner testified at his hearing in November of 1993, that he had mild to moderate pain in his neck, back and left shoulder all of the time no matter what he does. He does not take prescription pain medications because those he took in 1986 and 1987 made him sick to his stomach and did not help him much. He does take Tylenol daily for pain. The pain becomes more intense on the average of once per week. The pain makes him tired and gives him problems with sleeping. On particularly bad days, he must stay in bed or take naps. He is able to keep up with preparing simple meals and doing light housework at his own pace. In addition to his former work, he has felt compelled to abandon his former hobbies of fishing and hunting due to his inability to stand for long periods of time. He believes he can sit or stand for about twenty minutes at a time before he needs to change positions. After an hour and a half of activity, he usually needs to lie down for a while. He also has difficulty raising his arms over his

head. The petitioner doubts that he could carry fifteen to twenty pounds at a time but offered no proof of what amount he feels he can lift.

11. Based on the above medical reports which were mainly consistent with each other and the petitioner's testimony, which was generally credible and consistent with the medical reports, it is found that the petitioner currently, at age fifty, is unable to stand or walk for more than twenty minutes at a time and unable to sit for long periods of time without changing positions; is unable to regularly bend, crouch, stoop or raise his left arm above his head; and is unable to repeatedly lift and carry or to lift more than twenty pounds at a time. (The petitioner's denial of the latter is rejected based upon consistent medical opinion to the contrary and the petitioner's inability to provide more specific evidence in this regard.)

ORDER

The decision of the Department is affirmed as to the period of time before the petitioner's fiftieth birthday on March 3, 1993, and reversed for the time period thereafter.

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 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 evidence unequivocally shows that the petitioner cannot return to his former heavy work in construction and roofing. The burden then shifts to the Department to show that there is other work which the petitioner can do in the economy. Prior to the petitioner's fiftieth birthday when this decision was first made, the Department relied on the Rule 202.20 of the Medical Vocational Guidelines, 20 C.F.R. § 416, Subpart P, Appendix 2 to determine that the petitioner was not disabled. That rule was used based on a DDS finding that the petitioner was a "younger individual" (18-49 years of age), with a high school education, and an unskilled employment background who, despite his impairments, could perform a full-range of light work. "Light work" is defined in the regulations as follows:

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 to do substantially all of these activities. If someone can do light work, we determine that he or she can also do sedentary work, unless there are additional limiting

factors such as loss of fine dexterity or inability to sit for long periods of time.

20 C.F.R. § 416.967(a)

The medical evidence shows that at least as of this year, the petitioner was unable to do a good deal of walking standing or prolonged sitting (without some relief) and was limited with regard to his ability to repeatedly lift and to raise his left arm. Given these facts, the petitioner cannot be found able to do "light work" as that term is defined above. At best, the petitioner is capable of "sedentary work" defined as follows:

Sedentary work involves lifting no more than 10 pounds at a time and occasionally lifting or carrying articles like docket files, ledgers, and small tools. Although a sedentary job is defined as one which involves sitting, a certain amount of walking and standing is often necessary in carrying out job duties. Jobs are sedentary if walking and standing are required occasionally and other sedentary criteria are met.

20 C.F.R. § 416.967(a)

If the petitioner has the capacity to do only sedentary work, his lack of a skilled job background dictates that when he turns fifty, he must be found disabled, even if he has a high school education. See Rule 201.12, 20 C.F.R. § 416, Subpart P, Appendix 2. In this matter, then, once the petitioner turned fifty in March of 1993, he should have been found to be disabled. Before the age of fifty, his restriction to sedentary work still would not have disabled

him because his "youth" is a positive factor at that point under the guidelines. See Rule 201.18, id. The petitioner initially argued that he could not even perform "sedentary" work before his fiftieth birthday but finally conceded that the point was moot as he has no outstanding past medical bills for which he seeks coverage before his fiftieth birthday. Therefore, the Department's decision before the fiftieth birthday is not contested and should be allowed to stand as it appears to be supported on grounds other than those originally put forth in DDS's decision.

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