

STATE OF VERMONT  
HUMAN SERVICES BOARD

In re ) Fair Hearing No. 11,238  
 )  
Appeal of )

INTRODUCTION

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

FINDINGS OF FACT

1. The petitioner is a fifty-two-year-old woman with a high school education who has completed several courses towards an associate's degree in human services. For many years she ran a day care center in her home and for approximately five years, worked as a data processor in the insurance industry. Most recently she has worked as a supervisor of a mentally disabled adult in a job placement for a community mental health agency.

2. In March of 1990, when the petitioner was working full-time as a supervisor in a home for adults with mental disabilities, she was diagnosed as having cervical squamous cell cancer. She could not be treated surgically, but instead underwent a series of irradiation treatments which were successful. She was expected to return to work in about two months but experienced complications from the surgery including a small bowel obstruction and various infections

which resulted in her actually being unable to work for about seven months. During this time, she received private disability benefits and was finally cleared for work in December of 1990.

3. When the petitioner returned to work, her employer could not offer her her former job, but instead offered her a part-time job training a disabled individual in a work placement. That job paid \$7.00 per hour for twenty-seven and a half hours per week of work. The petitioner was required to help the individual sort and place pints of ice cream on trays which involved some light lifting. The petitioner was told that she would be considered for the next full-time position similar to her old job (supervising at a group home) which became available.

4. In the Spring of 1991, the petitioner experienced several episodes of recurrent pelvic pain and from May through June the petitioner underwent several diagnostic tests which revealed no problem. She was treated with antibiotics and pain relievers which solved the immediate problem and the petitioner, after a short period of sick leave, returned to work.

5. In June of 1991, the petitioner's hours were increased to 30 per week. However, she felt that she still was not making sufficient income, and applied for supplemental unemployment compensation benefits which she began to receive in June and continued to receive until December of 1991. In

July of 1991, she applied for Medicaid benefits because she no longer received health insurance as a part-time worker. Those benefits were denied because she was working.

6. The petitioner continued to work for several more months, but her hours were cut back due to a lack of work. By September of 1991, the petitioner averaged about 20 hours per week and earned \$588.00 in that month in addition to unemployment compensation. In October of 1991 and November of 1991, she again averaged about 20 hours per week and earned \$595.00 and \$626.50, respectively.

7. The medical records do not show that the petitioner sought any medical treatment from August through November of 1991 although she was self-medicating with enemas and stool softeners. The petitioner's own credible testimony was that she continued to experience intermittent pelvic pain throughout this period and felt very tired and a need to rest after work even on days when little was required of her. (Sometimes, when no pints were coming through, she and the person she supervised would just sit for long periods of time and do nothing.) However, in spite of her physical discomforts, the petitioner did not miss any work or ask for any accommodations, and, in fact, continued to request more hours from her employer. After failing to get anywhere with her requests, the petitioner wrote a letter of resignation on November 20, 1991, saying, "due to the fact I have not been put in full time work as promised, it is necessary for me to

look elsewhere for full-time employment". Her resignation was effective December 5, 1991.

8. On December 17, 1991, just a couple of weeks after she quit her job, the petitioner was hospitalized with severe and constant pain in her left lower quadrant. For the next six months, the petitioner went in and out of the hospital and had numerous tests all of which were inconclusive as to the source of her pain. At one point, her treating physician suggested that her pain was psychological and that she should seek psychiatric help. Her physician refused to give her any more pain-killers.

9. In January of 1992, the petitioner applied for Medicaid, but was turned down in March due to her prior work history. The petitioner briefly looked for work, but because of her constant and severe pain decided she could not endure a workday. She sold her home in order to have money to live on and moved in with a daughter who lives in a small trailer with her children. Thereafter, the petitioner survived through the assistance of the GA program and Food Stamps.

10. After getting no relief from her symptoms, the petitioner sought a second opinion from a specialist at a teaching hospital. That physician discovered that the petitioner had a serious bowel obstruction, a rectosigmoid stricture, which was surgically cleared through a colostomy operation on July 16, 1992. It is quite likely that bowel obstruction was started by the original 1990 cancer radiation

treatments. On September 11, 1992, her new treating physician (who performed the surgery) offered the following opinion:

The overall time that [petitioner] has been disabled related to her rectosigmoid stricture can be dated to December 17, 1991, and continued until eight weeks following her most recent surgery. Subsequent to that healing process, she would be expected to return to work. Since the bowel that was involved in this stricture was injured by radiation therapy, in my opinion, reanastomosis is not a possibility. She would require surgery to bring unirradiated bowel down to the anus region, a procedure which would require specialized surgical techniques such as those offered at the Lahey Clinic.

Her pain was most likely secondary to the developing stricture which would have been difficult to diagnose in December using the barium enema that was obtained. It appears that that type of discomfort has disappeared since the surgery.

As this opinion is credible and uncontroverted by any medical or other substantial evidence, it is found that the petitioner was unable to perform any substantial or gainful activity from December 17, 1991 through September 11, 1992.

11. In October of 1992, in the third month following her surgery, the petitioner began a two week nurses' aid training program which required both on the job clinical training and a written exam. On October 23, 1992, the petitioner began working as a nurses' aide and since that time has averaged about 25 hours per week at a current rate of \$6.00 per hour, or \$645.00 per month. She does not have her former bowel pain but now experiences a dull pain related to her colostomy appliances. She has some difficulty lifting patients in her job, but says that the doctor knows she is doing this kind of work and did not discourage her. She would prefer doing the

lighter work she did as a group home supervisor, but expects to be doing this job full time soon when she will begin getting health care benefits.

ORDER

The Department's decision is affirmed.

REASONS

In order to be eligible for Medicaid, a petitioner must show that she is disabled as that term is defined in the regulations:

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.

M § 211.2

In this case, the petitioner has unquestionably shown that she was unable to engage in substantial and gainful activity for about nine continuous months, from December 17, 1991 to September 11, 1992. However, both shortly before the December onset date and shortly after the September termination date, the petitioner was working. Under the Social Security regulations, a person who is able to engage in "substantial gainful activity" is not disabled. 20 C.F.R. §

416.971. "Substantial gainful activity" is described as follows:

Substantial gainful activity is work activity that is both substantial and gainful:

a) Substantial work activity. Substantial work activity is work activity that involves doing significant physical or mental activities. Your work may be substantial even if it is done on a part-time basis or if you do less, get paid less, or have less responsibility than when you worked before.

(b) Gainful work activity. Gainful work activity is work activity that you do for pay or profit. Work activity is gainful if it is the kind of work usually done for pay or profit, whether or not a profit is realized.

. . .

20 C.F.R. § 416.972

The regulations adopt several guidelines for determining whether work meets the above definition, including the amount of monthly earnings. Under the guidelines, work performed after 1989 which had average earnings of \$500.00 per month is considered substantial and gainful. 20 C.F.R. § 416.974

(b)(2)(vii). Based on these regulations, the petitioner's earnings for the three months prior to December of 1991, and all the months since October of 1992, demonstrate substantial and gainful employment. In any month in which the petitioner was substantially and gainfully employed, she cannot be found to be disabled.

However, as the regulations themselves state, these guidelines can be rebutted if a showing is made that the

amounts were not actually "earned", that is, they were the result of a special or sheltered work environment or some significant accommodations were made which might not generally be available to a worker. See generally 20 C.F.R. § 416.974.

Caselaw in this area has also permitted rebuttal where the work was performed against medical advice only through extraordinary human effort which resulted in considerable pain, exhaustion or exacerbation of the condition. See e.g. Leftwich v. Gardner, 377 F2d 287 (4th Cir, 1967), Harris v. Richardson, 450 F2d 1099 (4th Cir, 1971).

Although the petitioner in this case was working during the fall months of 1991 with an undiscovered bowel obstruction and was experiencing intermittent pain and regular fatigue, there is no evidence that the symptoms at that point were so severe as to have precluded her employment. Of particular note is the fact that the petitioner wanted and was looking for a full-time job during all of this time and was holding herself out as capable of employment for purposes of collecting unemployment compensation. If the petitioner had indeed been disabled by pain at this point, the evidence shows that she had other options (albeit not good ones) to working such as selling her home or living with a relative, which she could have, and subsequently did, pursue in order to financially survive. In addition, there is no evidence that the petitioner took off any time from work or was treated for

any pain flare up all through the fall. Therefore, it cannot be concluded that the petitioner's work occurred under extraordinary conditions, against medical advice, or with unusual accommodations during the Fall of 1991. As such, the petitioner's work during September, October and November of 1991 was substantial and gainful.

The same analysis holds true for the work performed beginning in October of 1992. The petitioner continues to earn at least \$500.00 per month and, although she continues to experience some pain (of a different origin), there is no evidence that she works with special accommodations, against her doctor's advice, or through superhuman efforts. Therefore, it must be similarly concluded that her post-colostomy work efforts have also been substantial and gainful.

The petitioner argues in the alternative that even if the work she performed in the Fall of 1991 and since October of 1992 was substantial and gainful, it should not be evidence of her lack of disability because this work represented periods of "work attempts" or "trial work" which are excluded from the definition of "substantial and gainful" activity (s.g.a.). The "trial work" period is established by a regulation which allows a person who has already been determined to be disabled under the regulations to engage in "s.g.a." for a period of up to nine months without penalty in order to test that person's ability to work. See 20 C.F.R. § 416.992. That regulation

ordinarily applies only when there is an uncertain expectation about a person's ability to return to full-time work. If a return to full-time work is expected and that occurs, the "trial work" provisions do not apply. 20 C.F.R. § 416.991. A trial work period cannot be commenced before the month in which an application is filed. 20 C.F.R. § 416.992(d).

The petitioner's situation does not fit the "trial work" exception for several reasons. First of all, it is not at all clear in the regulations, and the petitioner has cited no case authority to support this proposition, that the petitioner can establish her initial period of eligibility through the use of the "trial work" period. Though the regulations do not specifically state, they certainly imply that "trial work" is only applicable to persons who have an established disability and that the "trial work" itself may not be used to establish the requisite period of twelve continuous months.

But even if this were not so, there are other problems with using this exception here. Since her trial work period can only go back to January, 1992, her date of application, the only work period which could be considered "trial work" is her current employment as a nurse's aide which began in October of 1992. The petitioner's doctor clearly stated that she was able to return to work on September 11, 1992. He did not limit that work to less than full-time. The petitioner, in fact, did return to work less than a month later. Although

her work is only part-time at present it appears that situation is because of her employer's lack of work rather than her inability to work. Again, the petitioner is looking for and hopes to work full-time for her employer. While she continues to experience some pain from her colostomy, there is no evidence that it is of disabling severity. The petitioner was not expected to be disabled past September 11, 1992 and there is absolutely no evidence that her physician's opinion is not correct. Therefore, there is no need to "test" the petitioner's ability to return to work and the "trial work" period exception is thus inapplicable.

The second exception raised by the petitioner is the "unsuccessful work attempt" (UWA) exception which is slightly different from "trial work" in that it disregards relatively brief work attempts that do not demonstrate sustained s.g.a. The regulations state that Social Security "will generally consider work that you are forced to stop after a short time because of your impairment as an unsuccessful work attempt and your earnings from that work will not show that you are able to do substantial gainful activity". 20 C.F.R. § 416.974(a)(1). Social Security Ruling S.S.R. 84-25 sets out various criteria adopted by the agency to determine when work performed between zero to six months can be considered an "unsuccessful work attempt". Under the agency ruling, "s.g.a.-level work lasting more than six months cannot be a

UWA regardless of why it ended or was reduced to the non-s.g.a. level." Although the petitioner relies on this ruling in her argument, neither of her work periods either before December of 1991 nor after September of 1992 lasted less than six months. Her work period before December of 1991 lasted almost one year (December of 1990 through November of 1991) without a thirty day break (a period set up in the ruling to demarcate the beginning and end of a work attempt). Similarly, her "work attempt" since September of 1992, has, as of this writing, already lasted six months with no indication that it is about to end. Neither work period, then, can be discounted as a brief or unsuccessful work attempt.

There is no question in this case that the petitioner's problems all relate back to the original cancer therapy in the Spring on 1990. While the patient's complications were undoubtedly growing, sometimes silently, sometimes not so silently, her symptoms were simply not disabling for a continuous period of twelve months. While her work activity was broken for significant periods twice--first for seven months following the initial surgery, and second for nine months starting in December of 1991--between those breaks was a significant period of work activity lasting without serious interruption for over one year. Nothing in this recommendation is meant to discredit the difficulty the petitioner experienced during these years nor to ignore the considerable medical expenses she must have accrued when she

lost her medical insurance (ironically, as a direct result of her illness). Her facts simply don't fit into the Medicaid definitions which include only a very specific group of persons and exclude many people who, like the petitioner, indisputably are or have been sick and in need of medical coverage.

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