

STATE OF VERMONT  
HUMAN SERVICES BOARD

In re ) Fair Hearing No. 11,950  
 )  
Appeal of )

INTRODUCTION

The petitioner appeals a 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.

FINDINGS OF FACT

1. The petitioner is a twenty-six-year-old man who has a high school diploma and thirty credits at a technical college. He needs forty-five more credits to get a degree. He has worked as a construction laborer and, most recently, as a licensed pest exterminator. During 1986, he worked all year and went to school part-time. Since 1987, the petitioner has worked no more than two months in any year. He did not work at all in 1993 or 1994.

2. During the year between March of 1987, and April of 1988, the petitioner injured his back and his knee. He was treated for these injuries but continued to experience pain. He felt he was no longer able to work due to pain, which he described as of a constant nature and spreading all over his body. Since that time, he has gone from doctor to doctor and, until recently, was unable to establish any cause for his

pain. The records from this era are replete with suggestions that the petitioner was either exaggerating his pain or that it was psychosomatic in origin.

3. In December of 1992 the petitioner applied for Medicaid but was denied in March of 1993. In early 1993, the petitioner became a client of Vocational Rehabilitation and through that Department was evaluated by a physical therapist. That therapist felt the petitioner's claims of pain were somewhat "magnified" but also concluded that he had significant limitations due to pain and fatigue. She made detailed findings as to his physical abilities and opined that the petitioner might be suffering from myofascial pain syndrome (fibromyalgia) and recommended that he be referred to a specialist.

4. In June of 1993, the petitioner was sent to a rheumatologist who did diagnose him as suffering from fibromyalgia marked by generalized pain and by fatigue. He felt that the petitioner might respond to a normalized sleep pattern, medication and a work hardening program. He prescribed Flexeril and physical therapy. That treating specialist agreed with the report prepared by the physical therapist (described in paragraph three) and felt that the petitioner "should be able to do light work, eventually he should be able to do normal work." He noted, however, that complete recovery would be slow taking from six months to one year to complete. The petitioner did enter physical therapy,

but office notes for November and December, 1993, did not show much improvement in his pain, although his strength and range of motion in all parts of the body remained good. The rheumatologist encouraged the petitioner to return to college on a part-time basis. In a medical report supporting the petitioner's claim for Medicaid dated December 29, 1993, that specialist stated that the petitioner could eventually do light work and that the plan was to slowly start him back into the work process with a one to two month trial of light work for from four to six hours per day and then on to a full-day work schedule.

5. In addition to the specialist, the petitioner continued to see his general physician for other problems. That physician provided a medical statement dated October 29, 1993 in which he stated that the petitioner complains of chronic daily pain which seemed more severe than he would expect. Nevertheless, he felt that the petitioner has not been able to sustain work-related activities on a day to day basis since March of 1993, and that the situation would probably continue until at least March of 1994. In a follow-up statement dated December 8, 1993, the generalist stated that he has not seen anyone as disabled as the petitioner from this type of illness but referred the Department to the "expert" rheumatologist for a more definitive explanation of the illness and its effects. This physician felt that "given the amount of pain he describes, he would be too distracted

and uncomfortable to work full-time at even a desk job."

6. In September of 1993, the patient described his pain as severe, constant and unremitting since at least 1988. Neither medication nor physical therapy, in his view, has had any effect. He did sleep better on his current medications, although he still needed to nap for an hour every day. He felt that physical therapy only made him feel worse. He kept a journal of his daily pain to let out his frustrations. He claimed that he could not sit or stand for more than fifteen to twenty minutes without discomfort. Walking tired him after about ten minutes. He could crouch down but could not get up and getting out of bed was problematic for him. He spent his day soaking in hot water and resting, although occasionally he carried water from a spring, went shopping, did laundry or engaged in physical therapy. Evenings were spent watching television although he frequently could not concentrate. He did not believe he could work for even short periods of time.

7. On May 12, 1994, through the assistance of Vocational Rehabilitation, a part-time job was created for the petitioner at an electronics firm as a clerk. The petitioner was able to work four hours per day, four days per week, performing such functions as filing, phone answering, and parts packing. His employer accommodated his need to restrict his lifting to under ten pounds per box. The petitioner was paid \$5.50 per hour for a total of \$378.40 per month. By August 25, 1994, the petitioner, through a gradual increase in

his hours, was able to work 5 days per week for 6.5 hours each, for a monthly total of \$768.62.

8. Based on the above evidence it is found that the petitioner is significantly limited by pain and fatigue and can no longer perform his former full-time jobs as a construction laborer or a pest exterminator. However, he does have residual functional capacities which were best described by the physical therapist's report of March 1993, which report is attached hereto as Exhibit One and is incorporated by reference as factually accurate at least through May of 1994.

That report is relied on because it was adopted as accurate by the petitioner's treating specialist and because it contains considerable detail. To the extent statements made by the petitioner or his doctors are inconsistent with this report they are rejected as lacking the accuracy of this report and because they are not supported by the most reliable evidence. The petitioner's statements that he was unable to sustain any activities due to pain and fatigue are expressly rejected because they are not supported by the opinions of either of his treating physicians or of his physical therapist.

9. Based on the rheumatologist's opinion, it is found that the petitioner's restrictions as set for in the physical therapy report are the result of a medical condition which is expected to last or has lasted at least twelve months. The petitioner has met his burden of showing that at least from

December of 1992 through May of 1994, he could not do his former jobs or indeed any jobs on a full-time (more than four hour per day) basis.

10. The Department presented expert evidence that a significant number of four hour per day jobs exist in both the national and local economy for which the petitioner was vocationally suited and that those jobs would pay in a range of \$5.50 to \$9.50 per hour to start. However, no testimony was offered as to whether there were a significant number of jobs which paid above the \$5.50, per hour amount in the lower part of the range. Give that lapse in the evidence, it cannot be found that there were a significant number of jobs which the petitioner could perform which paid more than \$5.50 per hour, the salary which the petitioner actually received when he became employed.

11. It must be concluded that the combination of the vocational market and the petitioner's physical ability restricted him to earning no more than \$5.50 per hour (the most realistic figure since that is what he was actually paid), at a rate of twenty hours per week, for a total monthly (4.3 weeks) salary of \$473.00, at least through May of 1994.

ORDER

The decision of the Department is reversed and the petitioner should be granted a closed period of eligibility

from December of 1992 through May of 1994.

REASONS

Medicaid Manual section M 211.2 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.

As the medical evidence shows that the petitioner can no longer do his former occupations and has the residual capacity to function for part of each day, the burden falls on the Department to show that the petitioner can do other work which exists in significant numbers in the nation's economy. 20 C.F.R. § 416, 960 (b)(3). This must be accomplished through the use of an expert witness since the Medical Vocational Guidelines are not applicable where the person cannot perform the functions for a significant amount of time (6-8 hours) each day. 20 C.F.R. §§ 416.966(e) and 416.969, 20 C.F.R. § 404, Subpart P, Appendix 2, Rule 200.

The expert established that there were significant jobs restricted to four hours per day which paid in a range of from \$5.50 and \$9.50 per hour. However, no evidence established

whether there were a significant number of jobs available paying more than \$5.50 per hour. Therefore, it cannot be concluded that there are a significant number of jobs paying any more than \$5.50 per hour. As it turns out, that figure is consistent with the amount actually earned by the petitioner.

Under the Social Security regulations, work which earns more than \$500.00 per month is ordinarily considered substantial and gainful. 20 C.F.R. 416.974 (b) (2). Work that earns less than that but more than \$300.00 per month may show the ability to earn a substantial and gainful amount if, for example, more hours could be added at that rate of pay or there is the capacity to earn a greater salary doing the same work. See 20 C.F.R. § 416.974 (5) and (6). In this case, the petitioner's ability to earn between \$300.00 and \$500.00 per month does not indicate an ability to work more hours or earn more money. The petitioner was working the maximum number of hours he was able, earning the maximum income he could in a job which was created for him through the efforts of Vocational Rehabilitation in which the employer provided him with considerable accommodations. It was not until he was able to earn over \$500.00 per month (sometime in June of 1994) that the petitioner can be found to have been capable of substantial and gainful activity. Therefore, he meets the definition of disability under M211.2

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