

STATE OF VERMONT
HUMAN SERVICES BOARD

In re) Fair Hearing No. 11,987
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Appeal of)

INTRODUCTION

The petitioner appeals a decision by the Department of Social Welfare denying her eligibility for Medicaid. The issue is whether the petitioner is disabled as that term is defined in the pertinent regulations.

FINDINGS OF FACT

1. The petitioner is a twenty-three-year-old woman who has a G.E.D. diploma. She has no relevant work history.
2. The petitioner has two significant health problems-- her weight of 250 pounds and a dysfunctional rotator cuff in her right shoulder.
3. The petitioner severely injured her right shoulder rotator cuff in an accident in 1991. Though she was expected to regain significant function in that shoulder, she has not done so despite multiple surgeries and considerable physical therapy. She can use her right arm only for the occasional carrying and lifting of very light objects weighing no more than five pounds. She cannot lift her right arm above shoulder level. She does use her right hand for occasional writing. Her physician has described her right arm as being functionally useless.

4. In addition to her mechanical limitations, the petitioner experiences pain on a more or less constant basis.

She has a constant moderately dull aching in her shoulder and neck in spite of pain-relieving medications and has sharper, more severe pain a couple of times an hour, frequently brought on by the use of her right arm but sometimes occurring in the course of relatively little activity. When the sharp pain occurs, she must stop and practice muscle relaxation techniques for a few minutes until the pain passes. She also finds that sitting in one position for more than two hours can bring on shoulder and neck pain as well. She must frequently change her posture.

5. Because of her shoulder limitations and pain, the petitioner can no longer carry grocery bags or laundry, dance, do small crafts (sewing, knitting, and crocheting) or drive for all but very short distances. She walks about one and a half miles each day for exercise and cleans her apartment with the use of only her left hand, a process which takes much longer than it ordinarily should. She has trouble sleeping through the night because of pain and is easily fatigued by continuous physical activity. She spends most of her time reading, watching television, and attending to her personal needs, such as meals.

6. Expert vocational testimony has established that there are jobs available in the economy which match both the petitioner's educational and job skills and do not require

that she make repetitive use of her right arm, lift her right arm above the shoulder, lift more than five pounds with her right arm or twenty with her left arm, and which can accommodate the petitioner's need to change positions every half hour and to rest for a few minutes as needed.

Descriptions of those jobs are attached hereto as Exhibit One and are incorporated herein by reference. In addition to those descriptions, which are derived from the Dictionary of Occupational Titles, the vocational expert visited job sites in Vermont where persons performed the positions described in Exhibit No. One and further observed and interviewed persons performing those jobs. Based on both her site visits and the descriptions, the vocational expert reached the following additional conclusions with regard to numerosity of the jobs and their specific requirements which are adopted as fact herein:

- a. Maintenance Service Dispatcher jobs are somewhat limited in number, there being only about 290,000 nationally. Locally, out of twenty-four contacts made by the vocational expert, only one had a full-time dispatching position. This kind of a job may require the petitioner to learn some basic computer skills in order to punch in information, but would not require repetitive typing or writing and does not require prior computer skills.

b. Marker jobs are not included in national job availability statistics codes. However, the vocational expert was able to identify, on a random sampling, at least fifteen such jobs in the vicinity of the petitioner's home. Marking jobs are especially prevalent in large department stores and are departmentalized so that one person could be marking small items and would not be required to unpack boxes. Marking is frequently done with a machine which can be operated with one hand.

c. Cashier II jobs exist in very large numbers in the national economy; some 2,633,000 are thought to exist nationally. A brief survey of the petitioner's local job market, turned up thirty-nine such jobs, indicating the probable existence of many times that number. The vocational expert's review indicated that cashiers are usually not required to lift heavy objects and that repetitive movements involved only their fingers and wrists, not shoulders. It is usually possible in these jobs to perform the work sitting on a stool and to rotate to other store jobs every thirty minutes or so to give the arm some relief.

d. About 4,754,000 sales clerk jobs exist in the national economy and a growth rate of about 20-30% is expected by 2005. A brief sampling of the local economy revealed 38 full-time jobs, indicating the existence of

many more such jobs in the area. Although persons are frequently asked to stock shelves in this position, the majority of these jobs, which are primarily in Department stores, require only the lifting of light items, such as stationery and lingerie. Such jobs are ideal for changing positions and taking breaks.

e. There are about 900,000 receptionist jobs in the national economy. The expert's brief sample turned up thirty-one full-time and one part-time in the local economy, indicating the existence of many more such jobs. These jobs have varied duties, none of which requires any lifting of heavy objects or repetitive use of the arm and shoulder. In addition, this job is ideal for a person who needs to change positions or take small breaks during the hour.

7. The vocational expert, who specializes in job placement for persons with injuries, has herself placed persons with limitations similar to the petitioner's (and even more severe) in several of the above positions with considerable success. It is her experience that most employers accommodate persons with disabilities by allowing breaks and position changes and that the Americans with Disabilities Act now requires reluctant employers to do so.

8. Based on the above it must be concluded that there are jobs which exist in significant numbers in the national and regional economy which the petitioner has the residual

functional capacity to perform.

ORDER

The Decision of the Department is affirmed.

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 has the residual capacity to function in some ways and as the petitioner has no relevant work experience, 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. § 216.960(b). Frequently, it is possible to show that capacity through the administratively noticed "grid" regulations. However, that is not possible in this case because the petitioner has special physical limitations which are not described in the grids. Therefore, it became necessary to take the testimony of a vocational expert. See

20 C.F.R. § 416.966(e).

As found above, that vocational expert established that there is considerable work available both in the nation and in the region where the petitioner lives for which she is physically able and vocationally qualified. Therefore, a determination must be made that the petitioner is not disabled. 20 C.F.R. § 416.966(c).

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