

STATE OF VERMONT

HUMAN SERVICES BOARD

In re) Fair Hearing No. 12,238

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Appeal of)

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INTRODUCTION

The petitioner appeals the decision by the Department of Social Welfare denying her 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-seven-year-old woman with a high school diploma. She has worked primarily as a cashier. She last worked October 9, 1992.
2. The petitioner injured her right upper arm in November of 1991, but continued to work with limitations for about another year. (Her employer put her on as a "door checker" which required her to lift no weight but did require standing on her feet for long periods.) Standing for long periods caused her fatigue and swelling in her shoulder. She is currently (due either to cervical radiculopathy or myofascial syndrome) unable to use that arm to carry any substantial weight. She experiences shoulder pain and neck pain when she uses her arms for repeated or prolonged activities or stands for long periods of time. She has been treated with physical therapy, medication, heating pads and a TENS unit with little relief.
3. The petitioner's treating physician stated in August of 1993, that due to her pain and depression
 "...she would be rapidly fatigued by any activity. She would have difficulty concentrating and attending to tasks, conversations, instructions, etc. As a result of this lack of attention, she could have difficulty understanding and remembering. She might well have difficulty relating to supervisors and co-workers. She would definitely have difficulty coping with work pressures, even very mild ones on a limited basis. When I saw her [in June] she was having difficulty coping with the limited employment that she had at that time, not to mention difficulty attending to and completing tasks of daily living."

This treating physician opinion is adopted as a finding of fact and given great weight.

4. The petitioner, according to a consulting psychologist's report dated March 2, 1994, suffers from dysthymia, a low-level constant depressive affect and an anxiety disorder which he felt was most likely post traumatic stress disorder as a result of childhood abuse. She has a poor self-image, lacks self-confidence and has periods of extreme self-doubt. She was described as struggling to get through these problems with great difficulty and as being in need of psychotherapy. However, her memory was found to be good at the time of the test and her effort and concentration were also good. The psychologist felt, however, that episodes of depression may compromise her ability and cause inconsistencies in those areas. That report did not otherwise evaluate the petitioner's ability to function mentally. This report is found to be consistent with the treating physician's and is also adopted as fact.

5. The petitioner has recently become a client of Vocational Rehabilitation and with their help obtained a full-time job as a cashier. She attempted that job for three weeks but could not keep up the full-time pace due to fatigue and pain. She cut back to eighteen hours per week at the cashier's job hoping to build up her stamina. She does no lifting on this job as the employer has someone else perform those tasks. She works at present in three hour shifts, alternating with three hour rest periods, three days per week and earns about \$324 per month. Working longer than three hours at a time causes her arm to swell. The swelling is due to prolonged standing, not to the keypunching she does as a cashier. Her part-time job is helping to improve her spirits.

6. Based on the above evidence, it is found that the petitioner, since at least October of 1992 through the present, due to right arm pain, fatigue and depression is unable to work more than three hours at a time, or more than eighteen hours per week. The work she is doing, though productive and gainful, is not substantial as she is severely limited by her medical impairments with regard to the number of hours she can sustain activity.

ORDER

The decision of the Department is reversed.

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.

The petitioner is attempting to get back into the work force and has taken considerable steps to pull

herself out of the depression and fatigue which accompanies her physical limitations and pain. However, for at least the past year (and now almost two years) the petitioner has not been able to work to an extent which can be described as "substantial" under the Medicaid regulations. (She earns less than the regulatory amount set for "substantial" earnings at 20 C.F.R. § 416 et seq.) Therefore, the fact that she is currently working does not bar a finding that she is disabled. The petitioner has demonstrated a combination of impairments, primarily loss of arm function, pain and fatigue, which together are of a level of severity equal to that described for soft tissue injuries of an upper or lower extremity at 20 C.F.R. § 404, Subpart P, Appendix I, Part A, Rule 1.13. Therefore, it must be concluded that the petitioner is disabled. 20 C.F.R. § 416.920(d). It is very likely, though, that with both physical and psychological therapy, the petitioner may eventually improve her work capacity and she is encouraged (and seems motivated) to undertake such activities.

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