STATE OF VERMONT

HUMAN SERVICES BOARD

In re) Fair Hearing No. 12,531 &

) 12,838

INTRODUCTION

The petitioner appeals the 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

The petitioner is a thirty-year-old man with a high school education. He was employed by the U.S. Army doing "site support", which consisted of construction-type duties, until some time in 1993. After that he worked several months part time as a dishwasher.

The petitioner injured his back in February, 1993, while doing some heavy lifting at his job with the Army. The medical record shows that he sought emergency room treatment on March 11, 1993, at which time x-rays and a CAT scan showed a slight central disc herniation. Although the petitioner continued to experience back pain he worked part-time as a dishwasher for several months in the fall of 1993.

The petitioner's present treating physician first saw him in August, 1993, at which time he noted that the petitioner's disc bulge was "minimal". In September, 1993, the treating physician recommended a corset type support when the petitioner had to do heavy lifting. Office notes from November, 1993, indicate that the petitioner thought his back was "stable" and agreed with his physician's continued recommendations for conservative treatment.

Over the next month, however, the petitioner's condition worsened and his physician recommended surgery to remove the herniated disc. This surgery was performed in January, 1994. In February, 1994, the physician noted that the petitioner could probably return to physical employment sometime after his next six-week checkup. In an August 9, 1994, response to interrogatories posed by the hearing officer the petitioner's treating physician checked that the petitioner had "no physical impairment".

The petitioner alleges that he was totally disabled from February, 1993, when he was injured at work, until several months following his surgery in January, 1994. The matter was continued several months to allow the petitioner to provide a statement to that effect from his treating physician, which the petitioner was unable to obtain.

The petitioner also alleged that his dishwashing job in summer and fall of 1993 should not be considered evidence of his ability to work during that time because he was working for his fiancee who tolerated his limited abilities. However, after he was unable to obtain further medical evidence the petitioner notified the Department that he did not wish to appear in person at his hearing and that a decision should be made on the basis of the written record.

Based on that record it cannot be concluded that the petitioner was disabled from all work activity between February, 1993, and January, 1994. The petitioner worked as a dishwasher during this time, and although he was seeing a doctor regularly there is no mention in the medical reports during those months that the petitioner was, or should have been, unable to work.

The medical evidence does establish that sometime after November, 1993, the petitioner's condition worsened. From that time, and continuing for several months after his surgery (in January, 1994) it appears that the petitioner was totally disabled. However, it also appears he recovered at least the ability to do light and sedentary work sometime well before August, 1994, when his doctor pronounced him to have no physical impairment. Based on the above it cannot be found that for any continuous twelve month period the petitioner was precluded from performing all work activity.

ORDER

The Department's decision 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.

The medical evidence in this case does not establish that the petitioner was precluded from all work activity for any consecutive twelve month period. Although the record indicates that the petitioner suffered from back pain from February, 1993, until he recovered from his surgery that was performed in January, 1994, it also shows that the petitioner worked during much of this time, and that his doctors placed no significant limitations on his activity until sometime after November, 1993. The medical evidence also indicates that at least as of August, 1994, the petitioner had no physical impairment.

Inasmuch as the Department's decision in this matter is consistent with the medical evidence and in accord with the pertinent regulations it must be affirmed. 3 V.S.A. 3091(d) and Fair Hearing No. 19.

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