

STATE OF VERMONT

HUMAN SERVICES BOARD

In re) Fair Hearing No. 13,139

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Appeal of)

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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 sixty-two-year-old man with a high school education. He worked as a self-employed carpenter most of his life, but it appears that he has not worked at all in several years.

The medical record shows that the petitioner was hospitalized in November, 1992, for chest pain and shortness of breath and underwent surgical draining of his lungs. He was again hospitalized in October, 1993, for the same problem. At that time he also had an air leak in his lungs that had to be surgically repaired. When he was released from the hospital his surgeon advised him to abstain from driving and "heavy lifting" until he received medical clearance.

The problem in this case is that the petitioner apparently ceased contacts with any medical sources shortly following his surgery. He applied for medicaid in January, 1994, with the help of a lay "advocate" retained by the hospital where the petitioner had had his surgery.

The record shows that the petitioner failed to attend scheduled consultative medical appointments in May, 1994; and in July, 1994, the Department (DDS) denied his application for medicaid. DDS based its decision on the available medical evidence, which consisted solely of the records of the petitioner's 1992 and 1993 hospital treatment. Because those records showed that the petitioner had recovered from both surgeries and was advised to avoid only "heavy lifting" (see supra), DDS determined that the petitioner could perform "medium work" (see infra), which under the regulations indicated a finding that he was not disabled.

Through his advocate the petitioner appealed this decision in October, 1994. Fair Hearings were scheduled on November 7 and December 8, 1994, and on January 11, February 10, and March 10, 1995. At each of these hearings the petitioner's advocate requested a continuance to obtain further medical evidence in the petitioner's behalf. At the March 10, 1995, hearing, the parties informed the hearing officer that the petitioner had requested, and DDS had agreed, to reschedule the petitioner for consultative medical evaluations.

In May, 1995, the Department informed the Board that the petitioner had failed to attend these rescheduled appointments and that the matter should be set for hearing. At a hearing scheduled on June 19, 1995, the petitioner failed to appear. The petitioner's advocate informed the hearing officer that she had been unable to contact the petitioner.⁽¹⁾ The hearing officer told the petitioner's advocate that he would set the matter for hearing on August 11, 1995, but that if the petitioner failed to appear, the matter would be dismissed.

On August 11, the petitioner again failed to appear. His advocate requested, and the hearing officer granted, an extension of one more week for her to attempt to solicit reports from the doctors who had treated the petitioner during his hospital stays in 1992 and 1993.

On a "Physical Capacities Evaluation" form dated August 17, 1995, the doctor who had performed the October, 1993, surgery on the petitioner indicated that the petitioner was unable to work from October, 1993, until January, 1994; but the doctor stated that because he had not seen the petitioner before or after that time, he could not comment further.

The petitioner's advocate argues that it should be inferred from the petitioner's 1992 and 1993 hospital records that the petitioner was disabled, at least from all but sedentary or light work, as of the date of his first surgery in November, 1992. Considering the petitioner's age, and a notation in the 1993 hospital records that the petitioner had had "chronic" shortness of breath since his 1992 hospitalization, this is not an unreasonable argument.

Weighing heavily against the petitioner, however, is his repeated failure to attend scheduled hearings and consultative medical examinations, and the inability of his advocate, in more than a year and a half since this application was filed, to obtain a definitive report from any physician who treated the petitioner in the past. Although one might have reasonably expected that either a treating physician statement or a consultative examination, or even the petitioner's own appearance and testimony, would have at least established that the petitioner was limited to sedentary or light work (which under the regulations is the extent of the petitioner's burden of proof--see *infra*), inexplicably none of the above potential evidence ever materialized.⁽²⁾

Based on the limited medical evidence that is in the record, which indicates only that the petitioner was precluded from "heavy lifting", the hearing officer can only infer from these absences that the petitioner was not precluded from performing anything other than "heavy work" for any continuous twelve month period relevant to this appeal. Unfortunately, this is not sufficient under the regulations to establish that the petitioner was or is disabled.

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 regulations (20 C.F.R. § 404, Subpart P, Appendix II, Rule 203.06) provide further that an individual of the petitioner's age, education, and work experience is not disabled if he has the residual functional capacity to perform "medium work", which is defined as the ability to frequently lift up to 25 pounds and occasionally lift up to 50 pounds. 20 C.F.R. § 416.967. As noted above, despite the petitioner having been granted extraordinary leeway in terms of time and pardons, there is no direct evidence in this matter that establishes that the petitioner has been unable to perform medium work for any consecutive twelve month period.⁽³⁾ The Department's decision is, therefore, affirmed.

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1. The Board has mailed notices of all the hearings to the petitioner as well as to his advocate.
2. There is no evidence or indication, whatsoever, that the petitioner suffers from a mental impairment that renders him unable to cooperate in the prosecution of his appeal.
3. If the petitioner should decide or be prevailed upon in the future to cooperate in the prosecution of his claim he is, of course, free to reapply for benefits.