STATE OF VERMONT

HUMAN SERVICES BOARD

In re) Fair Hearing No. 14,021

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Appeal of)

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

1. The petitioner is a thirty-eight-year old man who has completed high school. He worked for twenty years in the construction trade, fourteen of those for the same employer, and was always required to do heavy labor. When he last worked in August of 1994, it was as a construction project manager in which job he was required to do anything necessary to see construction jobs through to their completion. He made about $36,000 per year at that job.

2. The petitioner has suffered from some degree of back pain his entire adult life. In 1990, the pain worsened following a carrying injury. However, his most severe problems date from December of 1993 when he was a passenger in a car involved in a motor vehicle accident, after which he developed severe back pain. He was diagnosed as having spondylolisthesis and was treated with pain-killers for pain in his back and left leg. He continued to work on a light duty and part-time basis following the accident but by August of 1994, he was unable to do any work due to pain in his back.

3. On August 11, 1994, the petitioner had a spinal fusion operation at the L5 level to relieve his pain. He healed well from the surgery but his pain still continued to a large extent. By 1995, he had become a client of the Vocational Rehabilitation program based on its findings that he has two or more areas of functional loss requiring multiple services over an extended period of time. As part of this program, he attends a community college to get an associate's degree in business administration which the petitioner hopes to use to get a job in the construction trade.

4. The petitioner currently has constant lumbosacral pain radiating into his left leg. It causes him considerable frustration and feelings of depression. His physicians believe that the pain is largely mechanical in nature based on a musculoligamentous strain superimposed on previous surgical scarring. He has been prescribed medical injections into the spine and further physical therapy but he can afford

neither at present.

5. The petitioner is severely restricted by his pain. He moves slowly and with an antalgic gait, tires quickly and often has swelling, stiffness and spasms in his lower back. He must take medication to sleep and typically awakens early after a night of discomfort. In the morning, he goes to school where his classes are paid for by Vocational Rehabilitation. At school he takes classes for a total of sixteen hours per week, in three hour blocks. He must stand at the end of each forty-five minute segment of sitting because of pain. He cannot stand or walk for more than thirty minutes at a time without pain, and his left leg frequently gives out on him causing him to fall. His lifting is restricted to from five to ten pounds at a time. After three hours at school each day, he is exhausted and comes home to take a nap. In the evening he does homework and then goes to bed. He was forced to drop a class last semester due to pain and his grades have started to suffer because of his lack of concentration. He presently takes a steroid based pain reliever every day (although he tries to avoid using it when he can), uses a TENS electrical unit to reduce pain and does physical therapy in a pool (also paid for by VR), with little current relief.

ORDER

The decision of the Department is reversed.

REASONS

Medicaid Manual § M211.2 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 has shown that he cannot return to his former employment. The burden thus shifts to the Department to show that there is other work in the economy which he can perform. The petitioner's restrictions are so severe that he does not even meet the definition of the lowest level of work, "sedentary" employment, as that term is defined in the Social Security regulations because of his inability to sit for significant periods of time without pain and exhaustion.[(1)] As he cannot do a full-range of sedentary work, the Medical-Vocational Guidelines used to assess disability are not probative. See 20 C.F.R. § 404, Subpart P, Appendix II. As the Department has put on no other evidence of the petitioner's ability to work, he must be found to have met his burden of proving disability.

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1. Sedentary work is defined as that which "involves no more than 10 pounds at a time and occasionally lifting or carrying articles like docket files, ledgers, and small tools. Although a sedentary job is defined as one which involves sitting, a certain amount of walking and standing is often necessary in carrying out job duties. Jobs are sedentary if walking and standing are required occasionally and other sedentary criteria are met. 20 C.F.R. § 416,967.