

avascular necrosis and post-traumatic arthritis of the right hip. It was his opinion that the petitioner probably had a sacral nerve root injury and described his prognosis as "undetermined" due to a lack of a detailed neurological examination of the left extremities.

4. After nearly a month, the petitioner was discharged on pain medications to a nursing home where he began physical therapy to restore his physical abilities, prophylactic radiation to prevent heterotopic bone formation, and treatment to avoid infection and hemorrhage of the wound sites.

5. Notes from the nursing home show that the petitioner consistently complained of burning pain in his left leg and was treated with increasingly large doses of pain medication. Although it was often noted that the petitioner only appeared to be in mild or no distress, it was also noted three weeks after his admission that he was in "significant pain consistent with his injuries" even when lying still in his bed. At one point, nearly seven weeks after his admission, his medication was changed due to state policies and his pain increased.

6. The petitioner had a neurological examination during his nursing home stay which was inconclusive. He was

given another medication for neuropathy and burning in his feet.

7. In September of 2004 while he was still in the nursing home and in a wheelchair, the petitioner applied for Medicaid. On November 11, 2004, the petitioner was denied Medicaid because, in the words of the Disability Determination Service (DDS), he was "expected to significantly improve" over the next year although he could no longer do his former work and would then be limited to sedentary work. The review noted that he was currently in significant pain and that he was not currently able to do weight bearing activities. It also noted that he was still at risk for avascular necrosis, degenerative joint disease and would likely need total hip arthroplasty in the future. The review noted there was no treating or examination source statements in the file.

8. Eventually the petitioner's fractures healed, he was able to sit up in a wheelchair and gained strength and range of motion in his legs. He was discharged from the nursing home and continued physical therapy until he was able to bear weight on his legs although he needed an "assistive device" such as a cane if he tried to walk any distance.

9. Although the petitioner had regained some of his ability to use his legs, his physician's notes show that he continued to be treated for chronic pain which was not relieved by medications. While his physician did note on occasion that he did not appear to be in distress and that he had times when the pain was not too bad, she also noted that the petitioner frequently complained of severe pain radiating out through his right hip and continued to treat the pain through increased use of narcotic medications. Concern emerged that the petitioner was becoming addicted to these medications and a plan was made to wean him from them.

10. After treating the petitioner for five months and seeing him at least nine times, the petitioner's treating physician filled out a report dated July 20, 2005 regarding the petitioner's physical abilities. At that time, some twelve months after the initial injury, she described the petitioner as a man in chronic pain with physical limitations which made him unable to fulfill an eight hour day including a limping gait which caused him to use an assistive device when he was overly active. It was her opinion that the petitioner could occasionally lift ten pounds, frequently lift ten pounds, stand or walk less than two hours in an eight hour day, sit only for two hours in an eight hour work

day due to pain with a need to stand and sit alternatively to relieve pain and discomfort and was limited with regard to pushing and pulling in the lower extremities due to lower back and hip pain. It was also her opinion that the petitioner could only occasionally climb stairs or crawl, that he could never climb a ladder or rope and could only occasionally stoop or kneel due to pain and popping in his hip. He could not be exposed to extreme cold, wetness or humidity because it exacerbated his pain. After reviewing DDS' report she remarked that the doctor who wrote it may not have fully examined the petitioner and may not have known the patient well. She also stated that the full extent of the petitioner's injuries may not have been known when the review was done in November.

11. In September 2005, the petitioner was referred to a pain clinic for management without narcotics. The pain clinic noted that the petitioner complained of lumbosacral pain and pain which radiated into the left lower extremity which was intense and constant. Although the examining physician noted that the petitioner appeared to be in no acute distress at that time, he did not indicate in any way that he doubted the petitioner's complaints of pain. The negative findings at that time were tenderness to palpation

in the lumbosacral area, pain upon extension of the lower limbs, decreased muscular tone in the left lower extremity and the absence of a reflex due to parasthesia in the left lower extremities. He noted that the petitioner needed an MRI and that an epidural steroid injection, continuing physical therapy and surgery were possible strategies for dealing with his chronic pain. Any further treatment with opioids were depending upon the opinion of an addictionologist who would see the petitioner.

12. DDS' doctor reviewed the treating physician's notes and opinion but rejected the findings therein. Although this doctor never met with the petitioner, it was her opinion that the petitioner could lift up to twenty pounds and could sit normally for six hours out of eight with no need to alternate sitting and standing for pain. She largely based this opinion on scattered statements found in the record that the petitioner was in no apparent distress at particular times, the lack of "objective" evidence regarding a neurodeficit, the fact that some range of motion and strength tests were normal and the fact that he only needed an assistive device when he "overdoes it" although that term has never been defined. She concluded that the petitioner could do a full range of sedentary activities.

13. The opinion of the treating physician is found to be the most credible description of the petitioner's abilities. This is based on the fact that the physician has seen the petitioner on numerous occasions over more than a half year period, has found his pain complaints credible and has prescribed treatments for that pain. In addition, her opinion is consistent with the prognosis of the orthopedic surgeon who originally treated the petitioner that he was likely to have a chronic pain condition.

14. DDS' physician's opinion is rejected because it is not based on any personal knowledge of the petitioner, ignores assessments by at least three treating physicians that his pain was and continues to be significant with regard to his physical capabilities, and is based upon an erroneous belief that "objective medical findings" are necessary in order to credit complaints of pain.

ORDER

The decision of DCF is reversed and the petitioner should be granted Medicaid benefits based on his September 2004 application.

REASONS

Medicaid Manual Section M211.2 defines disability as follows:

The disability of an individual age 18 or older is defined as the inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment, or combination of impairments, that can be expected to result in death or has lasted or can be expected to last for a continuous period of not fewer than 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.

There is no question in this case that the petitioner was unable to engage in any substantial gainful activity at the time of his application in September of 2004 and, indeed, since July 29, 2004. What is in dispute is whether the petitioner's inability to engage in substantial gainful activity "has lasted or can be expected to last for a continuous period of not fewer than twelve months."

Because this appeal for various reasons lasted well over a year (not the least of which was the petitioner's *pro se* status, his difficulty in understanding and obtaining pertinent medical evidence, and the inordinately long time taken by DDS to review the petitioner's new evidence), it is no longer necessary to speculate as to whether he would be

disabled for a twelve month period. The record contains current reports of his work abilities both by his treating physicians and the DDS reviewers.

The petitioner has shown, without dispute, that he cannot perform his past work as a property manager. The burden thus shifts to DCF to show that there is other work that he can perform in the economy given his age, education, transferable skills and residual functional capacity. Fair Hearing Nos. 8975 and 9631. DCF seeks to meet this burden by relying on a "grid" guideline established in the Social Security disability regulations which dictates that a person of the petitioner's age (a younger individual) and education (high school equivalent) is not disabled if he can perform a full range of sedentary work. 20 C.F.R. § 404, Subpart P, Appendix 2, Rule 201.28.

The problem with DCF's reliance on this "grid" guideline is that it presupposes that the petitioner can perform a full range of sedentary work. Sedentary work is defined in the regulations as work which

. . . involves lifting no more than ten 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. § 404.1567(a)

The petitioner's treating physician has stated that pain severely restricts the amount of time he can sit each day (two hours in an eight hour day). As the person who has spent the most time with the petitioner and has been treating his pain, her opinion is entitled to a good deal of deference with regard to the existence of pain and its effect on his ability to function. See Fair Hearing No. 9536. The treating physician as well as the physician at the pain clinic are obviously satisfied that he continues to suffer significant pain because they have continued to treat him for such pain. In spite of the fact that the petitioner does not present as a distressed person, his original treating physicians as well as his current treating physician have all concluded that his pain is real and interferes with his ability to function. There is no statement by any of his physicians suggesting that he is exaggerating the pain or malingering. In fact, his original treating orthopedic surgeon predicted that the force and severity of his original injury was likely to cause him chronic discomfort.

DDS's physician has decided to discredit the petitioner's pain complaints because there is "no objective evidence" explaining its existence. The Board has remarked in the past that there is "no requirement in regulation or Medicaid caselaw that medical conditions be established by objective medical evidence." Fair Hearing No. 15,918. Pain is often subjective and its etiology is not easy to trace. In this case, though, the pain does have an obvious source in that the petitioner, according to his orthopedic surgeon suffered "high energy unstable pelvic fractures" with a probability of sacral nerve root injury which is consistent with continued complaints of pain.

Since the treating physician's opinion is more credible than that of the reviewer who never saw him, it must be concluded that the petitioner cannot, because of pain, engage in hours long sitting (six hours out of an eight hour day) necessary to be classified as capable of sedentary work. The petitioner is not capable of the full-range of sedentary work. In that case, DCF cannot prove that the petitioner is capable of other work by using the "grid". The Social Security regulations state that a finding of "disabled" may be appropriate for a younger individual who does not have the ability to perform the full range of sedentary work. 20

C.F.R. § 404, Subpart P, Appendix 2, (h)(3). If DCF felt that there was still some other work the petitioner could perform given his restrictions, it would have to prove that assertion through an individualized assessment and the testimony of a vocational expert that there were still jobs available in the economy for the petitioner, even with his deficits. Id. Since DCF relied solely and erroneously on the grid rules to determine that the petitioner is "not disabled", it has failed to meet its burden and the decision must be reversed.

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