

petitioner to present the testimony and case records from his VR counselor.

At a hearing on July 6, 2005, the petitioner appeared with a VR representative, who was not his actual caseworker, and who did not have any of the petitioner's VR records with her.¹ The petitioner presented the Department with a large packet of medical records from a hospital in Boston where he had been treated for several years. The matter was continued to allow the petitioner to have his VR counselor submit a letter along with the petitioner's VR records to the Department, and to allow the Department to review the records from Boston.

A hearing was scheduled for this purpose on July 27, 2005. The petitioner's VR counselor did not appear, but sent a letter to the Department dated that same day (see *infra*). The matter was continued to allow the Department to consider this new evidence.

A hearing scheduled for August 9, 2005 was continued at the petitioner's request. At a hearing held on September 7, 2005, the petitioner's VR counselor did not appear, but Department represented that it had recently received another

¹ The hearing officer's records and recollection are not clear whether the VR counselor appeared at this hearing in person or by phone.

voluminous packet of records from Fletcher Allen Hospital in Burlington where the petitioner had also received treatment. The petitioner agreed to another continuance to allow the Department to review those records.

On September 15, 2005, the petitioner's VR counselor sent another letter to the Department (see *infra*). A hearing scheduled for September 21, 2005 was continued until October 19, 2005 by mutual consent based on the Department's representation that it was nearing completion of its review of the case.

On October 5, 2005 the Department notified the hearing officer and the petitioner that it had completed its review and had not changed its decision. The Department enclosed a copy of its complete case file in the matter to the Board.

The petitioner failed to appear at the hearing scheduled for October 19, 2005. Following an inquiry sent to him by the Board regarding his failure to appear, the petitioner called the Board and informed it that he didn't want to reschedule his hearing, and that he just wanted a decision "one way or another".

Upon reviewing the Department's records the hearing officer discovered that except for the brief letters from the petitioner's VR counselor (see *supra*) they did not contain

any assessment of the petitioner's condition more recent than February 2005. The record also indicated that the petitioner had been working part-time throughout the period in question. On October 25, 2005 the hearing officer sent the parties a memorandum offering to solicit an updated assessment of the petitioner's condition from his local treating physician.

On November 10, 2005 the petitioner wrote the following letter to the hearing officer:

I have contacted my neurologist, Dr. Mia MacCollin from Mass General, and she requested that a thorough neurological evaluation be completed. For the last year, I have been unable to keep my appointments in Boston with her and with my oncologist. This evaluation will be an accurate representation of my condition and will be forwarded to you when completed. My primary doctor may not have all of the facts on my case since Dr. Luria has been unable to get any recent evaluations from Boston.

Thank you for the time and effort you've made in assisting with my application for health care.

Based on this letter the hearing officer continued the matter, waiting to hear from the petitioner or his doctors. Hearing nothing from either party for several weeks, on February 6, 2006, the Board sent the parties a notice scheduling the matter for a phone status conference on March 1, 2006. On that date, the petitioner did not answer his phone at the appointed time. However, on March 3, 2006 the petitioner called the Board stating that he had misread the

notice and asking that the matter be reset sometime after May 15, 2006, when he said he had an appointment scheduled with doctors who could provide updated information regarding his condition. Pursuant to this request, the Board scheduled the matter for another phone status conference on May 19, 2006.

On that date (May 19, 2006) the petitioner again failed to answer his phone at the appointed time. On May 25, 2006 the board sent the petitioner a notice advising him that his case would be dismissed if he did not contact the Board within seven days. When the petitioner did not respond to this notice, the Board placed the case on its dismissal list for its next scheduled meeting, which was June 21, 2006.

On June 16, 2006, the petitioner called the Board and stated he did not want any further hearing, and that he just wanted a decision. To date, the Board has received no *medical* evidence from either the petitioner or anyone acting in his behalf with any information about the petitioner's condition that is more recent than February 2005. The following findings of fact are therefore necessarily based solely on that evidence.

FINDINGS OF FACT

1. The petitioner is a fifty-four-year-old single man with a complicated medical history. There is an extensive medical record of his treatment for most of his reported conditions in hospitals in Boston and Burlington.

2. A letter dated February 15, 2005 from his VR counselor briefly summarizes the petitioner's history as follows:

[Petitioner] has been working with Vocational Rehabilitation Services off and on since 1997. His primary difficulty has been a severe learning disability that affects his receptive and expressive language. Since his initial application to VR for services, he has experienced numerous other problems. [Petitioner] continues to work with Massachusetts General Hospital Oncology Department due to the discovery of a tumor and the kidney problems that resulted from the chemotherapy used to treat it. His primary care physician is treating him for depression.

[Petitioner] is currently working a part time position. It is uncertain if he will be able to hold down this position for a long period of time. I do not think that [petitioner] will be able to hold a full time position in the foreseeable future due to the numerous health related issued he has.

3. Other than passing references to "a history of a learning disorder" and "a very real possibility of organic brain disease" contained in two separate otherwise-lengthy psychological assessments of the petitioner performed in April and June 2004, the only actual evidence in the record

regarding a cognitive deficit is the report of a neuropsychological evaluation done in January 2001, which found the petitioner's verbal and learning abilities to be "within normal limits", and which attributed the likely cause of his problems to anxiety and depression.²

4. As noted above, there is an extensive medical record of the petitioner's treatment, in hospitals both in Boston and Burlington, for CNS lymphoma, which was first diagnosed in 2000. Nothing in these records, however, indicates that this problem, or its treatment, in and of itself, rendered the petitioner unable to work at any time. The records also indicate that the petitioner has largely recovered from this problem and that his *physical* health is being adequately maintained in this regard.

5. The record also indicates that the petitioner worked steadily at IBM in Vermont from 1996 through November 2003. Although the petitioner reports that he was forced to work part time during his illness, there is no indication that he

² It was hoped that the petitioner, either through his own efforts or with the help of VR, could have produced some further testing or treatment records on this question. Unfortunately, however, it remains a mystery what evidence, if any, VR based its assessment on (see *infra*).

was ever *physically* precluded from performing this, or any other work, on a substantial and gainful basis.³

6. It is clear from the medical record that the petitioner's primary medical problem as of November 2003 was depression. On a referral from his primary treating physician in Vermont, the petitioner underwent a psychological evaluation in April 2004. This evaluation found "evidence of significant psychiatric disease", and the petitioner began seeing this psychologist on a regular basis from April through July 2004.

7. In June 2004 the petitioner underwent a psychopharmacology evaluation for further treatment of his depression, following which he was prescribed an antidepressant.

8. The record indicates that the petitioner effectively discontinued counseling and pharmacological treatment for his depression sometime after July 2004, although it appears he continued to see his VR counselor on a regular basis. In September 2004 it was reported that his treating physician felt he was "doing well" without medication.

³ The record indicates that the petitioner was skiing actively in the spring of 2003.

9. The record shows that in November 2004 the petitioner began working part time at two separate jobs, as a host at a rest area and as a ski instructor. As of his application for Medicaid in January 2005, he was still employed at these positions.

10. There is no *medical* evidence in the record that the petitioner's employment in the winter of 2004-05 was limited or compromised by any physical or mental problems that he may have been experiencing at that time. The record does indicate that the petitioner resumed seeing his psychologist on a regular basis in January 2005.

11. As noted above, the only evidence submitted by the petitioner in this matter that is more recent than February 2005 is two essentially identical letters from his VR counselor dated July 27 and September 15, 2005. In those letters the VR counselor stated that the petitioner has a "history of generalized anxiety and other psychological distress", and that he also "experiences migraine headaches, nausea, muscular soreness, back pain and general weakness, intrusive thoughts, poor concentration, and difficulty with decision making, interpersonal sensitivities", and "difficulty with decision making with regard to both large and small plans necessary to carry out daily tasks". In the

July 2005 letter the VR counselor stated that due to these problems: "I do not think (the petitioner) is able to work a full time job at this time". In the September 2005 letter she stated that the petitioner "is not able to work at this time".

12. All of the above problems cited by the VR counselor are documented to some degree in the petitioner's medical records. The issue in this case, however, has been to assess whether the petitioner's problems, either singly or in any combination, rendered him "unable to work" *within the meaning of the regulations* (see *infra*). The letters from the VR counselor do not address the *duration* of the petitioner's disability nor whether the part time work he was doing could be considered "substantial". More problematic, however, is the fact that the VR counselor does not bring any *medical* expertise to her opinion. The evidentiary problem in this case has been to square VR's opinion with the fact that the petitioner was, in fact, working during the period in question. This could well have been accomplished by an opinion from VR that the petitioner's part time jobs entailed a significant accommodation of his medical problems by his employers (in terms of either hours and/or job duties) and a brief statement from one or more of his doctors that he was

working despite what could reasonably be expected of him considering his medical problems.⁴ It is frustrating and perplexing that the petitioner, neither on his own nor with the apparent help of VR (and spurning the offer of assistance from the hearing officer in this regard [see *supra*]), has been able to provide any updated *medical* report or opinion whatsoever regarding his level of functioning between February 2005 and the present.⁵

13. In light of the above, it cannot be found that the medical evidence in this matter establishes that the petitioner was unable to perform substantial and gainful work at the time of his application for Medicaid or for any consecutive twelve-month period either before or after that application.

⁴ The hearing officer believes that this burden of proof was explained clearly and repeatedly to the petitioner (and at least once to his VR counselor) during the course of these proceedings.

⁵ The hearing officer's disquiet with this case is mitigated by the fact that the petitioner has been eligible for and has been receiving VHAP coverage during this time. It appears that the only service that would be covered by Medicaid that is not currently available to the petitioner under VHAP is for his transportation costs in traveling to Boston for his continuing cancer treatment. (The *treatment* he receives in Boston is covered by VHAP.) At at least one of the several meetings with the petitioner in this case, the hearing officer advised him of his right to apply for general assistance (GA) if he could show that such assistance is required to avail himself of medically necessary treatment he cannot receive in Vermont.

ORDER

The Department's decision is affirmed.

REASONS

To be eligible for Medicaid a person between the ages of 18 and 65 without minor dependants must establish that he is "disabled". W.A.M. § M211. The regulations define "disability" as follows:

M 211.2 Definition of Disability

Individuals age 18 or older are considered disabled if they are unable to engage in any substantial gainful activity because 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, individuals must have a severe impairment, which makes them unable to do their previous work or any other substantial gainful activity which exists in the national economy. To determine whether individuals are able to do any other work, the disability determination unit considers their residual functional capacity, age, education, and work experience. . . .

M211.21 Substantial Gainful Activity

Substantial gainful activity is work activity that is both substantial and gainful. Substantial work activity involves doing significant physical or mental activities. Work may be substantial even if it is done on a part-time basis or if individuals do less, get paid less or have less responsibility than when they worked before.

Gainful work activity is the kind of work done for pay or profit whether or not a profit is realized.

Individuals who are working with disabilities shall be exempt from the substantial gainful activity (SGA) step of the sequential evaluation of the disability determination if they otherwise meet the requirements set forth in M200.24(b) for the categorically needy working disabled.

As noted above, the petitioner in this matter was working part time at two different jobs when he applied for Medicaid in January 2005. Despite being allowed over a year and a half to do so, he has not presented sufficient evidence to establish either that this work was not substantial and gainful, that he was performing this work despite a disability, or that any disability he may have been under had lasted or could have been expected to last at least twelve consecutive months.⁶ Thus, it must be concluded that the petitioner does not meet the above definition, and the Department's decision must, therefore, be affirmed. 3 V.S.A. § 3091(d), Fair Hearing Rule No. 17.

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⁶ If and when he can obtain such evidence the petitioner is free to reapply for Medicaid, and to appeal any future adverse decision. He is also free to show this decision to his doctors and/or VR to assist them in any information they might provide in the petitioner's behalf regarding any future application for disability-based benefits.