

**STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS
EXECUTIVE OFFICES OF HEALTH AND HUMAN SERVICES
APPEALS OFFICE**

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Docket # 13-1730
Hearing Date: March 20, 2014

Date: July 15, 2014

ADMINISTRATIVE HEARING DECISION

The Administrative Hearing that you requested has been decided in your favor upon a de novo (new and independent) review of the full record of hearing. During the course of the proceeding, the following issue(s) and Agency policy reference(s) were the matters before the hearing:

**THE DHS POLICY MANUAL: MEDICAL ASSISTANCE
SECTION: 0352.15 ELIGIBILITY BASED ON DISABILITY**

The facts of your case, the Agency policy, and the complete administrative decision made in this matter follow. Your rights to judicial review of this decision are found on the last page.

Copies of this decision have been sent to the following: You (the appellant), Christopher Mulhearn, Esq, and Agency representatives: Julie Hopkins RN, Denise MacCoy, and Judith Malpino Anderson.

Present at the hearing were: You (the appellant), William Sweeney, Donna Phelps, and Jennifer Duhamel, RN (DHS Agency representative).

DHS POLICIES:

Please see the attached APPENDIX for pertinent excerpts from the Rhode Island Department of Human Services Policy Manual.

APPEAL RIGHTS:

Please see attached NOTICE OF APPELLATE RIGHTS at the end of this decision.

ISSUE: Is the appellant disabled for the purposes of the Medical Assistance Program (MA)?

TESTIMONY AT HEARING:

The Agency representative testified:

- In order to be eligible for Medical Assistance (MA) an applicant must be either aged (age 65 years or older), blind, or disabled.
- The Medical Assistance Review Team (MART) determines disability for the MA Program.
- The MART is comprised of public health nurses, a social worker and doctors specializing in internal medicine, surgery, psychology and vocational rehabilitation.
- To be considered disabled for the purposes of the Medical Assistance Program, the appellant must have a medically determinable impairment that is severe enough to render him incapable of any type of work, not necessarily his past work. In addition, the impairment must last, or be expected to last for a continuous period of not less than twelve (12) months.
- The MART follows the same five-step evaluation as SSI for determining whether someone is disabled.
- At the time of application, the MART had received two Agency MA-63 forms (Physician's Examination Report), an Agency AP-70 form (Information for the Determination of Disability), records of Dr Bourguignon, a disability questionnaire, and an authorized representative form for Westerly Hospital.
- Additional records were submitted to the MART on January 24, 2014 including a copy of a Social Security (SSDI) application, medical notes of Dr Hamburger, an out-of-work note dated January 2, 2014, and several duplicate reports.
- Records of Rhode Island Hospital were added on February 10, 2014.
- Consultative examination reports were requested from Disability Determination Services, but no response has been received.

- A review of the available records revealed diagnoses of status post diverticulitis and a colectomy completed in May 2013, status post colostomy, a repair of the spleen, and a history of lumbar disc surgery performed in 2007.
- The AP-70 included a steady work history reporting work activity ranging from light to heavy, that he had performed after the time the lumbar surgery was completed.
- Westerly Hospital records documented an admission in May 2013 for perforated sigmoid diverticulitis, and a splenic rupture which required surgical intervention.
- He experienced significant bleeding and required transfusions while hospitalized, but was stable at release.
- At his two-week post-surgical appointment it was noted that his colostomy was healing well, despite a small rupture at the incision site.
- He expressed interest in having the colostomy reversed in the near future.
- At the July 29, 2013, office visit, it was again noted that the colostomy was functioning well.
- The remainder of the appointment was normal.
- The purpose of the August 26, 2013 appointment was to schedule the colostomy reversal.
- The presence of a colostomy would not indicate the inability to work.
- The physical examination was normal, but there was Medicaid paperwork to straighten out prior to scheduling the surgery.
- One of the MA-63 forms listed a lumbar disc displacement as the sole diagnosis.
- No onset date or supportive evidence related to the disc problem was included.
- The most recent MA-63 form submitted was dated December 6, 2013.
- Examination notes from Dr Hamburger for November 2013-January 2014 included a new issue involving back pain that was not related to the September 2013 denial.

- He had been started on steroid medication, muscle relaxants, and was using a cane for ambulation in December 2013.
- His colostomy continued to function well.
- An MRI report of December 13, 2013 revealed disc degenerative changes of the lumbar spine with a herniation at L3-L4.
- Dr Hamburger's notes of January 2014 reported that he had had a recent lumbar discectomy which resulted in a significant improvement in his pain symptoms as well as his ability to function.
- Dr Hamburger wrote a note excusing him from work for January 2, 2014 through June 2, 2015.
- No records from the neurosurgeon that performed the surgery had been submitted.
- The back surgery was not the reason he had applied for MA in January 2013, and there was no evidence that he had reapplied since the denial was issued.
- In February, Rhode Island Hospital records with post-operative notes from the neurosurgeon were received.
- Lumbar laminectomy and discectomy took place in December 2013 in order to repair the disc herniation at a previous fusion site.
- A January 9, 2014 examination note indicated that he had about a 50% improvement since the surgery, the wound was well healed, and pain medications were being reduced.
- It was too early to establish whether or not post-surgical limitations would remain.
- At the time of the decision, he had not been scheduled for colostomy reversal.
- The reversal surgery would require some recovery time, but would not be expected to result in limitations of extended duration.
- The evidence did not support that a medically determinable impairment existed that would limit functioning, meet the durational requirements, or have residual deficits when following prescribed treatment.
- He was not disabled for the purpose of the Medical Assistance program.

The appellant, assisted by his witness, testified:

- He is currently unemployed.
- He has likely met the definition of permanent and total disability throughout his entire life, and certainly met that criterion after May 2013.
- He is currently 46 years old.
- The MA-63 provided by Dr Bourguignon did not include a full and accurate assessment of his mental condition.
- He has been impacted by symptoms of Asperger's syndrome which went undiagnosed for many years.
- He has also been diagnosed with anxiety disorder and anger management issues as well.
- His mental impairment prevented him from sustaining regular and continuous work activity.
- He wished to submit an updated MA-63 completed by Dr Adrian Hamburger which indicates that his mental impairment results in marked limitations to his ability to engage in useful occupations.
- In 2007, he sought treatment for a degenerative spinal condition which required surgery including fusion of the vertebrae.
- He had not had regular medical insurance throughout those years, and consequently there was not a lot of follow-up after his surgeries.
- The 2007 surgery did result in some physical impairment in addition to the mental impairment he already experienced.
- Since 2007 his health had deteriorated, and has further declined within the past year.
- He requested to submit a discharge summary from Westerly Hospital.
- He was diagnosed with diverticulitis, a perforated colon, and sepsis before he underwent a procedure to remove a section of his colon.
- He still has the colostomy today
- After surgery he suffered serious complications including shock, and cardiac arrest.

- He nearly died while still in the hospital.
- He had to be resuscitated and experienced liver shock.
- His spleen had been nicked during the surgery and he had a hematoma.
- Luckily, they were able to stop the bleeding and he was stabilized.
- He was in the hospital for two weeks recovering from the surgical procedures and the complications resulting.
- The surgery and complications that occurred in May 2013 aggravated the existing spinal condition creating neuropathy.
- He currently has nerve damage throughout the right side of this body.
- Rhode Island Hospital records of the neurology clinic document neuropathy symptoms following the May 2013 surgery.
- Pain throughout the right side of his body interferes with his ability to push, pull and lift.
- He is significantly limited physically in addition to his mental impairment,
- He has medication for his pain, and had another surgery in December 2013.
- None of the treatments have resolved his condition satisfactorily.
- He is expected to require more surgeries for his spine condition.
- The diagnosis of Asperger's with anxiety and anger management issues coupled with the physical impairment which has increased in severity since May 2013 should support the fact that he is disabled.
- He requested to submit additional evidence including a discharge summary from Westerly Hospital, two letters from Dr Adrian Hamburger indicating exacerbation of symptoms and opining that he cannot work a physical capacity evaluation, a pain questionnaire, and an updated MA-63.
- The most recent form indicates a poor prognosis.
- Limitations to physical and mental activities have worsened and are detailed on the MA-63.

- He has difficulty concentrating.
- The link between the spinal condition and the nerve problem is important.
- He was completed a psychological consultative evaluation ordered for his Social Security case.
- Although a diagnosis of Asperger's was noted, he does not feel that the condition significantly limits him.
- Dr Hamburger is the first treating source to acknowledge the Asperger's diagnosis.
- Physicians that were caring for his father suggested that he had similar symptoms.
- Dr Hamburger has encouraged him to follow up with further evaluation and treatment for Asperger's.
- Arranging for that treatment has been difficult due to his other medical issues, and the time he has spent recuperating from several surgeries.
- He is taking Klonopin, which is helping, but does not believe that he needs any other treatment.
- During the period of recovery from GI surgery, Dr Bourguignon noted that he was experiencing back pain, and had difficulty standing.
- Dr Bourguignon made a referral to Dr Hamburger for further evaluation of back pain.
- An updated MRI of the spine had been completed.
- He has been participating in physical therapy at Westerly Hospital.
- He requested to hold the record of hearing open for the submission of additional evidence.

FINDINGS OF FACT:

- The appellant filed an application for Medical Assistance (MA) on July 5, 2013.
- The Agency issued a written notice of denial of MA dated September 16, 2013.
- The appellant filed a timely request for hearing received by the Agency on October 15, 2013.
- Per the appellant's request, the hearing scheduled for January 16, 2014 was rescheduled to February 20, 2014.
- Per the appellant's request, the hearing scheduled for February 20, 2014 was rescheduled to March 20, 2014.
- Additional evidence from Westerly Hospital, Rhode Island Hospital, a work release note, a physical capacity evaluation, and an updated MA-63 form, were submitted by the appellant during the hearing and made part of the evidence record.
- Per the appellant's request, the record of hearing was held open through the close of business on April 17 2014 for the submission of additional evidence.
- Additional evidence from Dr Bourguignon, Rhode Island Hospital, Louis Cerbo, EdD, L&M Physical Therapy, Westerly Hospital and a new MA-63 received by the MART during the held open period was forwarded to the Appeals Office on May 6, 2014 and was added to the record of hearing.
- As of the date of this decision, the MART had not withdrawn the notice under appeal.
- The appellant is not engaging in substantial gainful activity.
- The appellant had severe, medically determinable impairments including degenerative disc disease, and spinal stenosis, s/p laminectomy in 2007 and subsequent disc extrusion repair in 2013, diverticulitis s/p colostomy, and repair of surgical complications, and Asperger's syndrome.
- The appellant did not have an impairment or combination of impairments that met or medically equaled any of the listed impairments in the Social Security listings.

- Based on the appellant's residual functioning, he retains the ability to perform less than sedentary work, as the appellant's disorders of the spine are stand-alone limitations affecting all ranges of work.
- The appellant was born on January 31, 1968 and is 46 years old, which is defined as a younger individual.
- The appellant has a college education and communicates in English.
- Transferability of job skills is not an issue in this case.
- The appellant is disabled as defined in the Social Security Act.
- The appellant is disabled for the purposes of the Medical Assistance Program.

DISCUSSION OF THE MEDICAL EVIDENCE RECORD:

The record of hearing consists of:

- ✓ An Agency MA-63 dated August 20, 2013 and signed by gastroenterologist, Paul Bourguignon, MD.
- ✓ An Agency MA-63 dated December 6, 2013 and signed by pain specialist, Adrian Hamburger, MD.
- ✓ An Agency MA-63 dated March 12, 2014, and signed by Adrian Hamburger, MD.
- ✓ An Agency AP-70 form dated July 4, 2013 and signed by the appellant.
- ✓ An Agency AP-70 form dated March 14, 2014 and signed by the appellant.
- ✓ Records of Paul Bourguignon, MD for May 3, 2013 to August 26, 2013.
- ✓ A copy of a Social Security SSDI application dated June 11, 2013.
- ✓ Records of Westerly Hospital for May 3, 2013 to February 27, 2014.
- ✓ Records of Adrian Hamburger for November 6, 2013 to January 1, 2014.
- ✓ Records of Rhode Island Hospital Neurosurgery Clinic for December 17, 2013 to March 11, 2014.
- ✓ Two work release notes dated January 2, 2014 and February 7, 2014, and signed by Adrian Hamburger, MD.
- ✓ Records of Westerly Medical Center for May 23, 2013.
- ✓ Records of L&M Physical therapy for January 14, 2014 to March 13, 2014.
- ✓ A Physical Capacity Evaluation dated March 7, 2014, and signed by Adrian Hamburger, MD.
- ✓ A consultative examination report dated September 28, 2013 and signed by psychologist, Louis Cerbo, EdD.
- ✓ Hearing testimony.

Medical and other evidence of an individual's impairment is treated consistent with (20 CFR 416.913).

All medical opinion evidence is evaluated in accordance with the factors set forth at (20 CFR 416.927). The appellant has submitted records of treatment sources including four months of surgical and follow-up information of gastroenterologist and surgeon, Paul Bourguignon, MD, four months of pain treatment records from pain specialist, Adrian Hamburger, MD, three months of neurosurgery clinic notes, Westerly Hospital surgical admissions, two months of physical therapy progress records, one consultative examination report completed by psychologist, Louis Cerbo, EdD., and various forms summarizing symptoms, and effects of treatments. None of the treating sources have a longitudinal relationship with the appellant. However, as Dr Hamburger is a specialist, and has treated him for pain resulting from disorders of the spine, as well as multiple abdominal surgeries, and has considered the effects of pain on both his physical and mental functioning; great weight is given to the opinions of the treating pain specialist.

The MART is considered a non-examining source when expressing opinions regarding an individual's condition. At the time of application, the medical information provided to the agency focused primarily on gastrointestinal (GI) system issues. After successful surgical procedures were completed, and evidence documented a good recovery, the MART had reason to believe that limitations to functioning would not continue to restrict his activity well into the future. Although they knew he had required back surgery in 2007, neurosurgery of the spine had restored his ability to perform work requiring significant exertion as he had reported within his application forms. They were unaware of any back pain at the time of their denial. Later in the process they were informed of the return of pain symptoms, and the need for additional surgical intervention. Shortly after completion of the most recent procedure, information seemed to indicate that he was healing well, experiencing less pain, and on schedule to regain functional capabilities. They stopped at step two believing that the duration of symptoms would not be expected to exceed the twelve month requirement.

Additional evidence was submitted during the hearing and after the hearing. The MART has not been compelled by the new information to reverse the denial as of the date of this decision. The final rationale for their determination has not been communicated to this Appeals Officer.

The appellant has alleged that post laminectomy syndrome, disc extrusion, radiculopathy, diverticulitis status post surgical intervention with complications, colostomy, chronic lower back pain, cervical spine stenosis, abdominal pain, and Asperger's syndrome impair him.

In addition to a series of physical conditions requiring surgical repair, the appellant has been diagnosed with Asperger's syndrome characterized by anxiousness and poor anger management. He has indicated that he has a family

history of mental disorders. During evaluation of his mental condition, Dr Cerbo indicated that he was mildly anxious, had difficulty maintaining eye contact, and described compulsive tendencies, eccentric interests, and odd behaviors. The appellant also reported poor sleep patterns and difficulty relating to others.

A mental status examination completed in September 2013 revealed that he was polite, attentive, and verbally articulate. His speech was normal for rate, volume and tone. Thought process was linear and goal directed, there was no evidence of delusions, paranoia, or harmful ideations. These characteristics were also apparent during his hearing testimony. Neurobehavioral assessment completed on that same date resulted in findings that attention, concentration, recall of salient information, and associated learning skills were all intact.

To his credit, he completed high school and 2 ½ years of college courses. He has reported a positive work history within the past fifteen years. Included in the work history provided were various jobs ranging in duration from 1 year and 6 months to 4 years and 4 months. His ability to sustain employment in occupations requiring semi-skilled to skilled activities as reported demonstrates that he would have had time to acquire proficiency, and not that he was repeatedly making unsuccessful work attempts as suggested during testimony. He left his last job when it ended seasonally. However, he did not return to work after that time due to periods of recovery required for physical illnesses and surgery, not necessarily mental restrictions. Despite a diagnosis of Asperger's syndrome, there is very little evidence that mental symptoms have actually prevented him from working. He testified that he does not believe that mental functioning has a significant impact on his current capabilities, that his symptoms are currently well managed with medication maintenance, and that he does not feel the need to seek any further treatment for that condition.

The consultative examination resulted in affirmation of the diagnosis of and Autism spectrum disorder, most likely Asperger's syndrome, and personality disorder with obsessive compulsive tendencies. He was able to clean, shop, cook, and drive when not limited by his physical stamina. He was able to understand and follow directions adequately, and had sufficient ability to concentrate on the tasks presented. His persistence was at times shortened by his tendency to become frustrated easily, which was accompanied by angry or irritable responses. He also exhibited some difficulty with interpreting social cues accurately. Overall, his global assessment of functioning (GAF) score in September 2013 was 55 which was indicative of moderate symptoms.

Dr Hamburger, the appellant's pain specialist opined about the impact of his conditions on mental functioning. Although Dr Bourguignon, his gastroenterologist and surgeon did not observe any mental restrictions, commenting that he found "no limitations" in any categories, it could be reasonably expected that Dr Hamburger's December 2013 observations of marked impairment to attention, concentration, and work pace would be

attributed to episodes of pain during exacerbations of gastrointestinal and musculoskeletal conditions, and post-surgical recovery periods. However, Dr Hamburger, who is not a mental health treating source, does not provide any clinical evidence of how he would establish moderate deficits to ability to remember instructions, or even slight limitations to management of basic work-related changes, and social interaction. Furthermore, in March 2014, after the appellant had had additional time to recover from his surgeries, Dr Hamburger changed his opinion and increased the severity of restrictions to mental activities on a new MA-63 form, without providing any supportive evidence to explain that significant decline in functioning.

Clearly the appellant had a history of back surgery prior to his application for MA. Although he had recuperated from his lumbar spine procedures which had been completed in 2007, references to chronic back pain appear throughout the time frame represented by the available records. It is reasonable to expect, that the prior lumbar surgery would have created some degree of reduced exertional capabilities even without considering subsequent changes that required further surgical intervention. Furthermore, procedures necessary to address complaints of back pain were delayed due to the urgency of corrections of gastrointestinal disorders, and surgical complications.

The December 13, 2013 discharge summary notes that increased back pain and radiculopathy had been present for 6 months. A Rhode Island Hospital neurology clinic evaluation suggested that his musculoskeletal conditions had been exacerbated during the abdominal surgeries earlier that year. An MRI had revealed an L3 disc extrusion on the right side, suspected of creating radicular pain to the lower extremity. Dr Hamburger had diagnosed post laminectomy syndrome with disc displacement above the fusion site, had prescribed treatment for pain, and completed his most recent assessments in November 2013. The pain specialist then had referred the appellant to Rhode Island Hospital for additional surgery. The evidence supports the fact, that disorders of the spine could appropriately be considered in combination with his other conditions alleged at the time of application, contrary to what the agency believed based on review of limited records.

Subsequently, Dr Hamburger noted that the appellant had reported severe cervical spine pain and burning with an onset of June 2013, and ordered an MRI to be completed to rule out fracture. Imaging revealed mild to severe central and right neural foraminal stenosis varying at several levels. Degenerative changes were most significant at C7. Physical therapy notes as recent at March 2014 indicated that marked deficits to range of motion in the cervical spine impacted neck and arm functioning.

Pain symptoms are evaluated in accordance with the standards set forth at (20 CFR 416.929). In this matter, the appellant has a significant history of disorders of the spine status post fusion of lumbar vertebrae, and subsequent disc

displacement above the fusion site supported by MRI report. Additionally he has demonstrated with diagnostic MRI evidence that his impairment extends to the cervical spine. His disorders of the spine could reasonably be expected to result in pain. He has testified that the pain he experiences daily is constant, and severe in intensity. Pain significantly interferes with sustaining concentration and productivity. Radiation of lumbar pain to the right lower extremity has been indicated, and radiation of cervical pain into the upper extremities bilaterally is noted as well. His treatment has included two surgical interventions within the past six years, rehabilitation with physical therapy, and pain medication. Dr Hamburger's assessment of pain was based on diagnostic imaging, response to prescribed treatment, neurosurgery clinic evaluations, surgical records and physical therapy progress reports. Range of motion continues to be limited, and his gait has been significantly altered. He ambulates with a cane as recommended, and reports that he needs help with bathing and dressing. Pain also interferes with sleep duration and quality per his report.

Although Dr Bourguignon had established that the appellant would be significantly limited for walking and standing in August 2013 after abdominal surgeries were completed, he anticipated that activities such as sitting, lifting, and carrying would not be substantially limited. At that time, however, the gastroenterologist appeared to be responding based on his opinion of restrictions that could be associated with abdominal conditions, which had been repaired and were healing as expected. He did not necessarily factor additional impairments or associated pain into his determination.

By March 2014, however, Dr Hamburger had worked with the appellant on pain treatment for more than three months, after which he concluded that, pain secondary to musculoskeletal impairment reduced his ability to walk or stand to less than 2 hours. He found that the appellant would need to totally avoid working in a seated position. His ability to lift and carry was limited to 5 lbs. Dr Hamburger also opined that the appellant's upper extremities were restricted by pain to prevent repetitive reaching, pushing, pulling, or fine manipulation. He also indicated that use of foot controls with the lower extremities could be ruled out. When considering the combined disorders of the lumbar and cervical regions of the spine and radicular pain, the physician determined that the associated restrictions would render him unable to bend, stoop, push, pull, squat, kneel or crawl. Certain environmental factors such as temperature extremes could also exacerbate his pain.

A finding by a treating source specializing in pain treatment that an individual has an inability to do any stooping is important, as that characteristic is a stand-alone limitation affecting all ranges of work. The Policy Operations Manual (POMS) (DI25020.005A9) directs the evaluator to use less than sedentary residual physical functioning capability as a framework when proceeding through the sequential evaluation process.

CONCLUSION:

In order to be eligible for Medical Assistance (MA) benefits, an individual must be either aged (65 years or older), blind, or disabled. When the individual is clearly not aged or blind and the claim of disability has been made, the Agency reviews the evidence in order to determine the presence of a characteristic of eligibility for the Medical Assistance Program based upon disability. Disability 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 that has lasted or can be expected to last for a continuous period of not less than twelve (12) months.

Under the authority of the Social Security Act, the Social Security Administration has established a **five-step** sequential evaluation process for determining whether or not an individual is disabled (20 CFR 416.920). DHS policy directs that disability determination for the purposes of the MA program shall be determined according to the Social Security sequential evaluation process. The individual claimant bears the burden of meeting steps one through four, while the burden shifts to DHS to meet step five. The steps must be followed in sequence. If it is determined that the individual is disabled or is not disabled at a step of the evaluation process, the evaluation will not go on to the next step. If it cannot be determined that the individual is disabled or not disabled at a step, the evaluation continues to the next step.

Step one: A determination is made if the individual is engaging in substantial gainful activity (20 CFR 416.920(b)). Substantial gainful activity (SGA) is defined as work activity that is both substantial and gainful. Substantial work activity is work that involves doing significant physical or mental activities (20 CFR 416.972(a)). Gainful work activity is work that is usually done for pay or profit, whether or not a profit is realized (20 CFR 416.972(b)). Generally, if an individual has earnings from employment or self-employment above a specific level set out in the regulations, it is presumed that he/she has demonstrated the ability to engage in SGA (20 CFR 416.974 and 416.975). If an individual is actually engaging in SGA, he/she will not be found disabled, regardless of how severe his/her physical or mental impairments are, and regardless of his/her age, education and work experience. If the individual is not engaging in SGA, the analysis proceeds to the second step.

The appellant has testified that he is not currently working. As there is no evidence that the appellant is engaging in SGA, the evaluation continues to step two.

Step two: A determination is made whether the individual has a medically determinable impairment that is severe, or a combination of impairments that is severe (20 CFR 416.920(c)) and whether the impairment has lasted or is expected to last for a continuous period of at least twelve months (20 CFR 416.909). If the durational standard is not met, he/she is not disabled. An impairment or combination of impairments is not severe within the meaning of the regulations if it does not significantly limit an individual's physical or mental ability to perform basic work activities. Examples of basic work activities are listed at (20 CFR 416.921(b)). A physical or mental impairment must be established by medical evidence consisting of signs, symptoms, and laboratory findings, not only by the individual's statement of symptoms. Symptoms, signs and laboratory findings are defined as set forth in (20 CFR 416.928). In determining severity, consideration is given to the combined effect of all of the individual's impairments without regard to whether any single impairment, if considered separately, would be of sufficient severity (20 CFR 416.923). If a medically severe combination of impairments is found, the combined impact of the impairments will be considered throughout the disability determination process. If the individual does not have a severe medically determinable impairment or combination of impairments, he/she will not be found disabled. Factors including age, education and work experience are not considered at step two. Step two is a *de minimis* standard. Thus, in any case where an impairment (or multiple impairments considered in combination) has more than a minimal effect on an individual's ability to perform one or more basic work activities, adjudication must continue beyond step two in the sequential evaluation process.

The appellant in this matter has reported a recent diagnosis of Asperger's syndrome. He has a positive educational background and work history despite the possibility that any limitations secondary to autism existed. He is currently treated with medication maintenance, and has testified, that he does not find impairment associated with that disorder to be significant. Specific characteristics of his mental functioning have been evaluated by a psychologist, and symptoms have been identified as moderate in severity.

Records support the occurrence of diverticulitis requiring colostomy surgery, followed by surgical intervention to correct bleeding from damage to the spleen and other complications. A third surgery for proposed colostomy reversal is pending. Although the gastrointestinal repair has been extensive, and has required several months of healing time, reports of follow-up examinations indicate normal healing and function as a result. He has alleged that he has experienced significant discomfort, and that the procedures completed in early 2013 had exacerbated existing musculoskeletal conditions.

The primary impairment impacting the appellant's physical functioning as required to perform basic work activities appears to be associated with disorders of the spine. In 2007 and 2013, he had required surgical intervention to perform a fusion of the lumbar spine, and correct a disc extrusion above the fusion site.

Additionally, for the past year, he has been coping with the reduced range of motion and associated pain of cervical stenosis with radiation to the upper extremities. Addressing the abnormalities associated with musculoskeletal conditions had been postponed to allow for recuperation time following urgent abdominal surgeries. In the current year, his musculoskeletal deficiencies have been treated with physical therapy, which has somewhat reduced impairment, although his status report on the last available date indicated that 40%-59% impairment remains.

According to the available evidence and testimony, the appellant has severe impairments relative to disorders of the spine, gastrointestinal system, and Asperger's syndrome. His conditions impact functioning required to perform basic work activities, and meet the durational requirements.

Step three: A determination is made whether the individual's impairment or combination of impairments meet or medically equal the criteria of an impairment listed in the Social Security Administration's Listings of Impairments (20 CFR Part 404, Subpart P, Appendix 1). If the individual's impairment or combination of impairments meets or medically equals the criteria of a listing and also meets the duration requirement (20 CFR 416.909), the individual is disabled. If it does not, the analysis proceeds to the next step.

In this matter, a review of listings 1.04 (Disorders of the spine), and (12.10 Autistic disorders) is completed, and considered along with the 5.00 criteria for evaluating disorders of the digestive system. Evidence has not established that digestive system disorders have resulted in marked interference with nutrition, or excessive weight loss. Surgical diversion of the digestive tract including colostomy does not represent an impairment which would preclude all work activity if the individual is able to maintain adequate nutrition and function of the stoma. Mental health issues secondary to autistic disorder have not been proven to result in marked level restrictions to activities of daily living, social functioning, concentration, persistence, or pace, and no episodes of decompensation have been indicated. Although disorders of the spine in this matter include spinal stenosis, degenerative disc disease and compromise of nerve roots with some distribution of pain, there is no evidence of sensory or reflex loss, or positive straight leg raising tests taken post surgical repair. Neither spinal arachnoiditis, nor lumbar spinal stenosis has been documented, although cervical stenosis was recently verified. Conditions of the spine have not resulted in pseudoclaudication, manifested by non-radicular pain and weakness resulting in inability to ambulate effectively as defined in 1.00B2b. The medical evidence record does not support the existence of an impairment that rises to the level of the listings.

Step four: A determination is made as to the individual's residual functional capacity (RFC) and whether, given the RFC, he/she can perform his/her past relevant work. (20 CFR 416.920(e)). An individual's functional capacity is his/her ability to do physical and mental work activities on a sustained basis despite limitations from his/her impairments. In making this finding, all of the individual's impairments, including impairments that are not severe must be considered. The individual's RFC will be assessed in accordance with (20 CFR 416.945) and based on all relevant medical and other evidence including evidence regarding his/her symptoms (such as pain) as outlined in (20 CFR 416.929). Next, it must be established whether the individual has the RFC to perform the requirements of his/her past relevant work either as he/she had actually performed it or as it is generally performed in the national economy. Using the guidelines in (20 CFR 416.960 (a)-(b)(3)), the RFC assessment is considered together with the information about the individual's vocational background to make a disability decision. If the individual has the RFC to do his/her past relevant work, the individual is not disabled. If the individual is unable to do any past relevant work, the analysis proceeds to the fifth and final step in the process.

Physical RFC

Exertional: Dr Hamburger has opined that the appellant is limited to lift and carry only 5 lbs. He could be expected to walk or stand for less than 2 hours throughout an 8-hour workday, and would need to totally avoid working in a seated position. Radicular pain would limit use of foot controls.

Postural: The musculoskeletal conditions would limit postural changes required for climbing, balancing, stooping, kneeling, crouching, or crawling. Furthermore, the specialist's total restriction relative to the appellant's inability to perform *any stooping* is a stand-alone limitation affecting all ranges of work. The policy operations manual instructs use of less than sedentary level of exertional functioning, which is consistent with the actual exertional restrictions above.

Manipulative: Diagnostic imaging of the cervical spine supports the existence of spinal stenosis and radicular pain affecting the upper extremities bilaterally. He should avoid frequent overhead reaching, extended reaching, and repetitive handling.

Visual: Evidence has not established existence of any deficits to near acuity, far acuity, depth perception, accommodation, color vision, or field of vision.

Communicative: Abilities for hearing and speaking are intact.

Environmental: Due to pain symptoms, he should avoid concentrated exposure to extreme cold, heat, wetness, humidity, and hazards such as heights or use of certain types of machinery.

As the evidence has established that the appellant has a stand-alone limitation affecting all ranges of work, and requiring evaluation within the framework of less than sedentary activity according to the policy manual; it is possible to preclude all past work activity. He is unable to return to any of his past relevant activity, as he would be required to perform at least light exertional activities which his pain specialist has excused him from for at least 18 months.

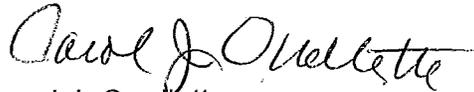
Step five: At the last step of the sequential evaluation process, consideration is given to the assessment of the individual's RFC together with his/her age, education and work experience to determine if he/she can make an adjustment to other work in the national economy (20 CFR 416.920(g)). If the individual is able to make an adjustment to other work, he/she is not disabled. If the individual is not able to do other work and meets the duration requirement, he/she is disabled. At step five, it may be determined if the individual is disabled by applying certain medical-vocational guidelines (20 CFR Part 404, Subpart P, Appendix 2). The medical-vocational tables determine disability based on the individual's maximum level of exertion, age, education, and prior work experience. In some cases, the vocational tables cannot be used, because the individual's situation does not fit squarely into the particular categories or because his/her RFC includes significant nonexertional limitations, such as postural, manipulative, visual, or communicative; or environmental restrictions on his/her work capacity. If the individual can perform all or substantially all of the exertional demands at a given level, the medical-vocational rules direct a conclusion that the individual is either disabled or not disabled depending upon the individual's specific vocational profile (SVP). When the individual cannot perform substantially all of the exertional demands or work at a given level of exertion and/or has non-exertional limitations, the medical-vocational rules are used as a framework for decision-making unless that directs a conclusion that the individual is disabled without considering the additional exertional and/or non-exertional limitations. If the individual has solely non-exertional limitations, section 204.00 in the medical-vocational guidelines provides a framework for decision-making (SSR 85-15).

The appellant is a 46-year-old male with a high school education and a positive work history. He is currently impaired by disorders of the lumbar and cervical regions of the spine. He has had two surgeries to repair abnormalities of the lumbosacral spine, and anticipates additional surgical repair will be needed to correct cervical spine stenosis. Radicular pain has resulted in deficits to functioning in all extremities. Physical therapy notes had indicated a reduction in pain following the last surgery in December 2013. However, as of March 2014, significant reduction to range of motion, functional mobility, endurance and use of the extremities continued to impair his ability to sustain basic exertional and postural activities. As physical residual functioning is less than sedentary, no further evaluation is required.

Based on the appellant's age of 46 (younger individual), education (high school or more), work history (semi-skilled, light to heavy, not transferable), and RFC (less than sedentary exertion with postural, manipulative and environmental restrictions); the factors direct a finding of "disabled" according to the Social Security regulations.

After careful and considerate review of the Agency's policies as well as the evidence and testimony submitted, this Appeals Officer concludes that the appellant is disabled as defined in the Social Security Act, and for the purpose of the Medical Assistance Program.

Pursuant to DHS Policy General Provisions section 0110.60.05, action required by this decision, if any, completed by the Agency representative must be confirmed in writing to this Hearing Officer.



Carol J. Ouellette
Appeals Officer