THE STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC **SUPERIOR COURT**

(FILED: JANUARY 18, 2012)

CARLOS RODRIQUEZ,	:	
Plaintiff	:	
	:	**CA No. 09-5190**
V.	:	
	:	
RHODE ISLAND DEPARTMENT OF	:	
HUMAN SERVICES,	:	
Defendant	:	

DECISION

TAFT-CARTER, J. Appellant Carlos Rodriquez (Appellant) appeals a denial of medical assistance (MA) benefits based on disability issued by the Rhode Island Department of Human Services (DHS) on August 7, 2009. Appellant timely filed this appeal on September 3, 2009. This Court has jurisdiction pursuant to R.I. Gen. Laws. 1956 § 42-35-15.

I.

Facts and Travel

On February 16, 2009, Appellant filed his initial application for MA based on complications arising from the use of a prosthetic leg due to the amputation of his right leg above the knee, osteoarthritis in his left knee, and carpal tunnel syndrome (CTS). (Administrative Hearing Decision at 3.); (MA-63, March 9, 2009 at 1.) Appellant is currently 35 years old with a ninth grade education and limited work experience. (Administrative hearing Decision at 3; Tr. at 20.) Appellant is able to speak English; he can only read and write in Spanish. (AP-70, March 9, 2009 at 2.) Other than employment

as a cashier for six months, the Appellant has been unemployed. (Tr. at 20.); (AP-70, March 9, 2009).

Appellant testified he was receiving MA from DHS before he filed his initial application on February 16, 2009. He qualified for this assistance because he was receiving federal Supplemental Security Income (SSI). Appellant's federal benefits case was closed and his benefits terminated due to excess income. Therefore, Appellant filed the initial application for benefits with DHS. (Def.'s Resp. Br. in Supp. of Agency Decision at 9.)

In support of his MA application, Appellant submitted an MA-63 physician's evaluation form, an AP-70 Information for Determination of Disability form, and medical records from Rhode Island Hospital and Capitol Hill Health Center.

Appellant's MA-63 form was prepared and signed by his primary care physician Jorge Gonzalez, MD on March 9, 2009. (MA-63, March 9, 2009 at 1.) The MA-63 form establishes that Appellant suffered a gunshot wound to his right leg on March 25, 1993 when he was seventeen years old. Appellant's right leg was amputated above the knee as a result of this injury and he has used a prosthetic leg to walk ever since. Id. at 2. His prosthetic device was malfunctioning at the time of his application for MA, causing increased pain and a progressively worsening condition. Id. Appellant was suffering from a vascular lesion and infection in his right leg, and Dr. Gonzalez recommended reconstructive surgery and implantation of a new prosthesis. Id.

The MA-63 form states that Appellant also suffers from back pain and CTS. Dr. Gonzalez reported that the back pain was caused by the deformity present in Appellant's legs. Id. The record demonstrates that Dr. Gonzalez referred Appellant to the Rhode

Island Hospital Orthopedic Clinic. Dr. Gonzalez also stated that Appellant was suffering from CTS with "severe bilateral hand and upper extremity pain and numbness." Id. Dr. Gonzalez prescribed a variety of pain medication for pain management. Id. at 3. All of the prescribed pain medications cause drowsiness and dizziness. Id.

Dr. Gonzalez noted that Appellant could walk or stand for less than 2 hours out of an 8 hour workday and that he could reach or bend occasionally. Appellant is able to sit for 4 out of 8 hours, lift 5 to 50 pounds and stoop and push or pull objects occasionally. Id. Dr. Gonzalez further noted that Appellant has moderately limited mental activities in all categories listed on the MA-63 form. Id.

Appellant's AP-70 form states he suffers from back pain as well as in his left leg due to the amputation of his right leg. (AP-70, March 9, 2009 at 1.) Appellant reports that he is able to engage in routine household activities such as cooking, washing dishes, and cleaning for short periods of time. He occasionally requires assistance. Id. at 3. Appellant reports that he does not require assistance when traveling outside of his home and that he either drives or takes a bus to get around. Id.

The medical records submitted by Rhode Island Hospital and Capitol Hill Health Center establish Appellant is suffering from severe tri-compartmental osteoarthritis in his left leg. An MRI of his left knee performed on April 21, 2008 shows that there have been multiple degenerative changes in the left knee and that multiple loose bodies are present in the knee. (Pl.'s Br. in Supp. of Reversal, at 3; MRI Left Knee without Contrast, April 21, 2008.) The problems with his left leg were likely caused by Appellant compensating for the failing prosthesis in his right leg by putting most of his weight on his left leg. (Pl.'s Br. in Supp. of Reversal, at 3; Administrative Hearing Decision at 4.)

During an examination at the Rhode Island Hospital orthopedic clinic, it was noted that Appellant had "significant pain and crepitus" throughout his left knee. The examining physician noted that the pain Appellant experienced was reproduced by testing maneuvers, namely the flexion pinch and the McMurray Circumduction Test,[1] and through range of motion testing. (Rhode Island Hospital Clinic Note, October 30, 2008, at 1.) Following this examination, the clinic physicians recommended arthroscopic surgery to remove the loose bodies from Appellant's left knee. Id. at 2. Appellant delayed the arthroscopic surgery in order to obtain cardiac clearance. Clearance was obtained, however, Appellant never rescheduled the surgery because he did not have medical insurance and could not afford it. (Administrative Hearing Decision at 4-5; Pl.'s Br. in Supp. of Reversal, at 3-4.)

The medical records also demonstrate that Dr. Gonzalez ordered an EMG of Appellant's right arm in February 2009 to evaluate whether he was suffering from CTS. The results of the EMG establish Appellant had a "right distal medial neuropathy consistent with carpal tunnel syndrome." (RI Hospital Preliminary EMG Results, February 25, 2009.)

The Medical Assistance Review Team (MART)[2] reviewed the forms and medical records submitted by Appellant in support of his application. (Administrative Hearing

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[1] The McMurray Circumduction Test requires an examining physician to rotate a patient's "tibia on the femur to determine injury to the meniscal structures." MEDICAL ECONOMICS, PDR MEDICAL DICTIONARY 1780 (Marjory Spraycar et al. eds., 1st ed. 1995). The flexion pinch involves a flexing of the patient's knee to assess pain. See id. at 663 (defining the term "flexion.").

[2] The primary responsibility of MART is to "analyze the complete medical data, social findings, and other evidence of disability submitted by or on behalf of the applicant" and "issue a decision on whether the applicant meets the criteria for disability based on the

Decision at 2.) After considering all of this evidence, the MART concluded Appellant was not disabled for purposes of MA. The MART noted that Appellant had several severe impairments; notwithstanding, he was able to perform light work and could be employed as a cashier despite the impairments. Id. MART issued a written denial of MA on May 5, 2009 and Appellant filed a timely appeal on May 14, 2009. Id. at 3.

A full hearing was held before DHS Appeals Officer Carol J. Ouellette (Ouellette) on July 30, 2009. Appellant was present at the hearing and spoke through a Spanish interpreter. He presented one witness, Maria Hernandez. Id. at 1. Sandra Brohan (Brohan) appeared on behalf of DHS. Id.

Ouellette commenced the hearing by reading Appellant's statement from the request for hearing form he filed with DHS on May 14, 2009. (Tr. at 4-9.) Brohan testified that MART treated Appellant's case as an initial determination situation because DHS had never made a disability determination regarding his case.[3] Id. at 9. Brohan then testified regarding the requirements for MA eligibility based on disability. Id. at 14. Brohan explained that to obtain MA, an applicant must "be aged over 65, blind or disabled." Id. In Appellant's case, since he was not over 65 or blind, proof that he had "a medically determinable impairment. . . severe enough to render him incapable of any type of work, not necessarily his past work" was required. (Administrative Hearing Decision at 2; Tr. at 15.)

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evidence submitted." Rhode Island Department of Human Services Manual § 0352.15.20.

[3] DHS did not make a disability determination for Appellant prior to 2009 despite his receipt of MA benefits. He only received benefits in the past because he was eligible for SSI, which he lost prior to filing his initial application in 2009.

Brohan explained that MART uses the same five step sequential evaluation process as SSI in the case of a disability determination.[4] (Tr. at 15.) She then asked Appellant whether he was currently unemployed and he replied affirmatively. Id. Brohan testified that MART reviewed the MA-63 and AP-70 forms submitted by Appellant in rendering its decision. Id. The Rhode Island Hospital and Capitol Hill Health Center records were received "post decision" and reviewed in preparation for the July 30th hearing. Id. Brohan gave the following summary of the evidence,

> "The MA-63 submitted with this application indicated a problem with malfunctioning right leg prosthesis. The Capitol Hill Health records documented issues with complaints of left knee and low back pain. An MRI done 4/21/08 on [Appellant's] left knee showed evidence of osteoarthritis, degeneration changes some meniscus tearing and loose bodies in the left kne[e]." Id. at 16-17.

Brohan noted that Appellant was referred to the orthopedic clinic at Rhode Island Hospital where plans were made to arthroscopically operate on his left knee. She discussed how the surgery was delayed while the surgeons awaited the requisite cardiac clearance and how Appellant eventually decided to delay surgery until he had insurance. Id. at 18.

MART found that "[t]he medical records documented evidence of a severe impairment and [they] proceeded to Step 3." Id. Step 3 requires MART to determine whether the applicant's severe impairment meets or equals the Social Security listings (SSI listings). Id. Brohan testified that MART considered listings under 1.0, and concluded that Appellant's impairment did not meet them. Id. at 19. MART then proceeded to Step 4 and conducted a residual functional capacity (RFC) assessment. Id. Based on the evidence presented, MART concluded that Appellant had a functional

[4] The five-step SSI inquiry will be outlined later in this opinion.

restriction, but that he was still able to do light work. Id. Since his work as a cashier involved light work, MART concluded he could return to his past relevant work. Id.

Appellant testified that he was unemployed at the time of the hearing with a limited employment history, and that he no longer qualified for SSI because he had purchased a house, which he later lost. (Administrative Hearing Decision at 3; Tr. at 11, 15, 20.) He testified that he had reapplied for SSI and his application had been denied. The matter has been appealed. (Tr. at 22-23.)

Appellant testified he could not sit for extended periods of time and that he had to constantly change position because of his back pain. (Administrative Hearing Decision at 3; Tr. at 27.) He explained that x-rays were taken of his back, but that he was not under medical treatment for a spinal disorder at the time of the hearing. (Administrative Hearing Decision at 3; Tr. 27-28.) Appellant reported that he can go about his daily life with minimal assistance and that he had applied for community free care, but had not received a response. (Administrative Hearing Decision at 3; Tr. at 30-33.)

After reviewing the evidence submitted by Appellant and hearing the testimony outlined above, Ouellette made the following findings of fact:

> "[1.] The appellant filed an application for [MA] on February 16, 2009.
> [2.] The Agency issued a written notice of denial of MA dated May 5, 2009.
> [3.] The appellant filed a timely request for hearing received by the Agency on May 14, 2009.
> [4.] The appellant is not engaging in substantial gainful activity.
> [5.] At the time of this decision, the appellant had the following severe impairments: right lower extremity amputation, left knee osteoarthritis, and carpal tunnel [syndrome].
> [6.] At the time of this decision, 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.
> [7.] The appellant was born on May 8, 1976 and is 33 years old, which is defined as a younger individual. (20 CFR 416.963)

> [8.] The appellant has a ninth grade education and is able to communicate in Spanish. (20 CFR 416.964)
> [9.] Transferability of job skills is not an issue in this case. (20 CFR 416.968)
> [10.] Based on the appellant's residual functioning, he retains the ability to perform sedentary work.
> [11.] The appellant is not disabled as defined in the Social Security Act.
> [12.] The appellant is not disabled for purpose of the [MA] Program." (Administrative Hearing Decision at 3-4.)

Ouellette sustained MART's determination that Appellant was not eligible for MA benefits because he was not disabled in a written decision dated August 7, 2009. She found him not disabled at Step 5 based on his RFC for sedentary work. Id. at 9. Appellant timely appealed Ouellette's decision to this Court on September 3, 2009. Id. at 1; (Compl. at. 3.) He seeks reversal of Ouellette's decision or alternatively remand to DHS. (Pl.'s Br. in Supp. of Reversal, at 20.)

II.

Standard of Review

Aggrieved parties may appeal a final decision from an administrative agency like DHS to the Superior Court when all administrative remedies are exhausted pursuant to Sec. 42-35-15(a). When reviewing an action taken by DHS or another administrative agency,

> "The court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. The court may affirm the decision of the agency or remand the case for further proceedings, or it may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:
> (1) In violation of constitutional or statutory provisions;
> (2) In excess of the statutory authority of the agency;
> (3) Made upon unlawful procedure;
> (4) Affected by other error or law;
> (5) Clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or

(6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion." Sec. 42-35-15(g).

The Superior Court's scope of "review is circumscribed and limited to an examination of the certified record to determine if there is any legally competent evidence therein to support the agency's decision. Nickerson v. Reitsma, 853 A.2d 1202, 1205 (R.I. 2004). This restriction applies even when the reviewing court may have been inclined to arrive at different conclusions and inferences from the evidence presented. Johnston Ambulatory Surgical Assocs., Ltd. v. Nolan, 755 A.2d 799, 805 (R.I. 2000) (quoting Rhode Island Pub. Telecomm. Auth. v. Rhode Island State Labor Relations Bd., 650 A.2d 479, 485 (R.I. 1994)); Barrington Sch. Comm. v. Rhode Island State Labor Relations Bd., 608 A.2d 1126, 1138 (R.I. 1992).

Evidence is considered legally competent when "some or any evidence supporting the agency's findings" is present in the record. Auto Body Ass'n. of Rhode Island v. State Dept. of Business Regulations., 996 A.2d 91, 95 (R.I. 2010) (quoting Environmental Scientific v. Durfee, 621 A.2d 200, 208 (R.I. 1993)). The agency is entitled to great deference and the reviewing court cannot substitute its judgment for that of the agency on questions of fact already decided by the agency. Auto Body Ass'n. of Rhode Island, 996 A.2d at 97; Johnston Ambulatory, 755 A.2d at 805 (quoting Rhode Island Pub. Telecomm. Auth., 650 A.2d at 485). Despite the high level of deference afforded the agency, the Superior Court will review all questions of law de novo. Iselin v. Retirement Bd. of Employee's Retirement Sys. of R.I., 943 A.2d 1045, 1049 (R.I. 2008) (citations omitted).

III.

The Role of DHS

DHS is an agency within the Executive Branch tasked with managing federal and state funded public assistance programs, including the provision of MA to those who qualify for benefits under G.L. 1956 § 40-8-3, § 42-12-4 (stating DHS "shall have supervision and management of . . . [a]ll forms of public assistance under the control of the state."); sec. 40-8-3 (outlining eligibility requirements for MA); see G.L. 1956 § 40-8-1 (declaration of policy). Federal law requires that DHS "establish income and resource rules, regulations, and limits in accordance with Title XIX of the federal Social Security Act, 42 U.S.C. § 1396, et seq.," governing eligibility for MA in order to receive federal funding. § 40-8-3; 42 U.S.C. § 1396 (mandating the payment of federal funds to states who have had plans for MA approved by the Secretary of Health and Human Services); see sec. 40-8-13 (empowering the DHS Director to create rules and regulations in conformity with federal law.). Therefore, DHS must abide by the federal definitions and guidelines when defining the term "disabled" and creating eligibility requirements. § 1396 et seq.; 20 C.F.R. § 416.901-998.

The policy regarding eligibility for MA is outlined in the DHS Manual and closely follows the federal provisions. The manual states:

> "To be eligible for [MA] because of permanent or total disability, a person must have a permanent physical or mental impairment, disease or loss, other than blindness, that substantially precludes engagement in useful occupations . . . .
>
> A physical or mental impairment is an impairment which results from anatomical, physiological, or psychological abnormalities which are demonstrable by medically acceptable, clinical and laboratory diagnostic techniques." DHS Manual § 0352.15.

To qualify as disabled, an individual must be "unable to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death, or which has lasted, or can be expected to last for a continuous period of not less than twelve (12) months . . . ." DHS Manual § 0352.15; see 42 U.S.C. § 1382c (a)(3). DHS is required to determine whether an individual's impairment meets the definition in § 0352.15 by looking at all of the facts of the case, while giving primary consideration to the severity of the impairment and taking into account the individual's age, education, and work experience. DHS Manual §§ 0352.15; 0352.15.05.

DHS uses the same five-step sequential inquiry set forth in 20 C.F.R. § 416.920 to determine whether an applicant is disabled for the purposes of MA. Compare 20 C.F.R § 416.920 with DHS Manual §§ 0352.15; 0352.15.05; 0352.15.15; 0352.15.20. This sequential inquiry requires the hearing officer to:

1. Ask whether the claimant is engaged in a substantially gainful activity;
2. If applicant is not engaged in such an activity, ask whether the impairment is severe;
3. If the impairment is severe, the hearing officer must determine whether it meets one of the SSI listings. If it does, the applicant is disabled and the inquiry ends;
4. If the impairment does not meet a listing, the hearing officer must determine whether the impairment prevents the applicant from returning to past relevant work based on the applicant's RFC; and
5. Determine whether the applicant's RFC when combined with applicant's age, education, and work experience will allow the applicant to adjust to other work in the national economy.

See 20 C.F.R. § 416.920. With the exception of Step 3, a negative finding at any step will bar a determination that an applicant is disabled. McDaniel v. Bowen, 800 F.2d 1026, 1030 (11th Cir. 1986). The applicant bears the burden of proof for the first four steps and the burden shifts DHS at the fifth. Pope v. Shalala, 998 F.2d 473, 477 (7th Cir.

1993) (discussing the burden of proof in the five-step inquiry). A hearing officer may rely on the Medical-Vocational Guidelines (the Grid) or testimony of a vocational expert (VE) when determining whether an applicant can perform other work.[5] Tacket v. Apfel, 180 F.3d 1094, 1100-01 (9th Cir. 1999).

Ouellette followed this five-step inquiry in her August 7, 2009 decision and as discussed above she denied Appellant MA at step five. (Administrative Hearing Decision at 6-9.) Ouellette found that Appellant was not engaging in substantially gainful activity at the time of his application and had no work experience.[6] Id. at 6. Ouellette also found that the failing prosthesis along with the left knee and back pain demonstrated Appellant was suffering from a severe impairment that would last for more than twelve months.[7] Id. at 7. However, Ouellette did not find that Appellant's ailments met or equaled any of the SSI listings and she continued to the last two steps. Id. at 7. At Step 4, Ouellette determined that Appellant had an RFC for "sedentary work with some postural and environmental restrictions." Id. at 8. Ouellette proceeded to Step five because the Appellant had no past relevant work experience. Then using the Grid, along with the Appellant's age, education, work history, and RFC, concluded that the Appellant was not disabled. Id. at 9.

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[5] The Grid "is a chart which classifies a claimant as disabled or not disabled, based on the claimant's physical capacity, age, education, and work experience." Walker v. Bowen, 834 F.2d 635, 640 (7th Cir. 1987).

[6] It appears that Ouellette concluded Appellant's cashier position did not last long enough to become substantially gainful activity as required by 20 C.F.R. §§ 416.960(b); 416.965.

[7] To be eligible for MA, an applicant's impairment must be expected to result in death or to last for more than twelve months. 20 C.F.R. § 416.909. This is referred to as the durational requirement. It appears that Ouellette considered this requirement met here.

IV

Analysis

Appellant contends that Ouellette's decision is arbitrary, capricious, and without due process; is contrary to state and federal law; lacks adequate findings of fact and conclusions of law; is clearly erroneous; and made upon unlawful procedure or other error of law. (Compl. at 2.) Specifically, it is argued that; (1) Ouellette did not apply the controlling federal standard when determining the weight due to Dr. Gonzalez' medical opinions; (2) Ouellette erred by not considering Appellant's pain at any step; (3) Ouellette suggested Appellant was non-compliant with treatment without making sufficient findings of fact; (4) Ouellette erred in not considering Appellant's CTS; (5) Ouellette failed to properly apply the SSI listings at Step 3; and (6) the findings regarding Appellant's RFC are based on error of law and unsupported by substantial evidence. Id.

DHS contends that Ouellette exercised her appropriate legal authority under the Rhode Island Administrative Procedures Act (APA) in rendering her decision. (Def.'s Resp. Br. in Supp. of Agency Decision at 10.) They argue that Ouellette's findings are supported by "competent, reliable and substantial evidence in the record," and the correct legal standards were applied to the evidence. Id.

A.

Application of the SSI Listings at Step 3

Appellant contends that Ouellette erred by not finding him disabled under the SSI listings at Step 3. His position is that he is by definition disabled under 20 C.F.R. Pt. 404, Subpt. P, App. 1, Listing 1.00B.2.b2 and 1.05 because he walks with a prosthesis and two crutches, which he argues demonstrates that he is unable to "ambulate effectively." (Pl.'s

Br. in Supp. of Reversal, at 14.) He further argues that the arthritic condition in his left knee meets or equals listing 1.02. Id. at 15. It is error, appellant argues, that Ouellette did not consider his impairments as a whole, and that she did not consider CTS. Id. Appellant also contends that Ouellette failed to sufficiently cite to the record in support of her findings, and that she violated 20 C.F.R. § 416.930 in basing her conclusion that the Appellant was not disabled upon his noncompliance with treatment. Id. at 15-16.

DHS argues that Ouellette's findings are based on the "whole evidence of the record," not on Appellant's non-compliance with treatment. (Def.'s Resp. Br. in Supp. of Agency Decision at 18-19.) DHS points to page 7 of the Administrative Hearing Decision in support of their argument that Ouellette provided a thorough discussion of the medical evidence of record and Appellant's impairments. Id. at 18. DHS contends that Ouellette's discussion of the record and Appellant's impairments demonstrates her finding of not disabled at Step 3 was not clear error. Id. at 19.

SSI provides a list of impairments for each major body system that will be considered disabling without regard to an individual's age, education, or work experience. 20 C.F.R. § 416.925. Irrespective of whether an individual's impairments meet one of the listings, an impairment can be found medically equivalent to one. Sec. 416.925. In order for an impairment to be medically equivalent, it must be "at least equal in severity and duration to the criteria of any listed impairment." 20 C.F.R. § 416.926. A DHS hearing officer must thoroughly develop the record and explain his or her reasoning when concluding whether an applicant's condition meets or medically equals a listing. See Kershaw v. R.I. Dep't of Human Services, No. Civ.A. 05-0632, 2005 WL 3369661, at *5 (R.I. Super. Dec. 6, 2005).

In this case, the following two listings are relevant, Listing 1.02 addressing a major dysfunction of one or more of applicant's joints and Listing 1.05 addressing amputation. 20 C.F.R. Pt. 404, Subpt. P, App. 1. Listing 1.02 defines a major dysfunction of a joint as,

> "[A condition c]haracterized by gross anatomical deformity (e.g., subluxation, contracture, bony or fibrous ankylosis, instability) and chronic joint pain and stiffness with signs of limitation of motion or other abnormal motion of the affected joint(s), and findings on appropriate medically acceptable imaging of joint space narrowing, bony destruction, or ankylosis of the affected joint(s). With:
>
> A. Involvement of one major peripheral weight-bearing joint (i.e., hip, knee, or ankle), resulting in inability to ambulate effectively, as defined in 1.00B2b . . . . " 20 C.F.R. Pt. 404, Subpt. P, App. 1, Listing 1.02.

Listing 1.05 provides that amputation of "[o]ne or both lower extremities at or above the tarsal region with stump complications resulting in medical inability to ambulate effectively . . . , which have lasted or are expected to last for at least 12 months" will be disabling. 20 C.F.R. Pt. 404, Subpt. P, App. 1, Listing 1.05. The inability to ambulate effectively is defined as,

> "[A]n extreme limitation of the ability to walk; i.e., an impairment(s) that interferes very seriously with the individual's ability to independently initiate, sustain, or complete activities. Ineffective ambulation is defined generally as having insufficient lower extremity functioning to permit independent ambulation without the use of a hand-held assistive device(s) that limits the functioning of both upper extremities.
>
> (2) To ambulate effectively, individuals must be capable of sustaining a reasonable walking pace over a sufficient distance to be able to carry out activities of daily living. They must have the ability to travel without companion assistance to and from a place of employment or school. Therefore, examples of ineffective ambulation include, but are not limited to, the inability to walk without the use of a walker, two crutches or two canes . . . The ability to walk independently about one's home without the use of assistive devices does not, in and of itself, constitute effective ambulation." 20 C.F.R. Pt. 404, Subpt. P, App. 1, 1.00B2b(1)-(2).

This Court's scope of review in this administrative appeal is limited and the agency's factual findings may only be altered if there is a complete lack of support for them in the record. Auto Body Ass'n of Rhode Island, 996 A.2d at 97. Thus, the role of this Court is to determine whether the agency's factual determinations are supported by legally competent evidence. Nickerson, 853 A.2d at 1205. This Court may reverse an agency's factual determinations if they are "[c]learly erroneous in view of the reliable, probative, and substantial evidence on the whole record." Sec. 42-35-15(g)(5). Here, the factual determinations are clearly erroneous based upon the evidence contained in the record.

The medical evidence establishes Appellant's right leg was amputated above the right knee and that he is suffering from severe complications due to a malfunctioning prosthetic device. (MA-63, March 9, 2009, at 2.) At the time of his application, Appellant was suffering from a vascular lesion and infection in his right leg, and his condition was described by Dr. Gonzalez as progressively worsening. Id. The medical record clearly demonstrates these conditions interfere with Appellant's ability to use his prosthetic device.

The failing prosthesis has caused Appellant to alter his gait, resulting in back pain and degenerative changes in his left knee. Id.; (Pl.'s Br. in Supp. of Reversal, at 3; MRI Left Knee without Contrast, April 21, 2008.) The orthopedic doctors at Rhode Island Hospital report that Appellant is suffering from severe tri-compartmental osteoarthritis in his left leg and that multiple loose bodies are present in his knee. (MRI Left Knee without Contrast, April 21, 2008.) The degeneration of Appellant's left knee has resulted in

"significant pain and crepitus" throughout the joint that was reproduced by medical testing. (Rhode Island Hospital Clinic Note, October 30, 2008, at 1.)

Appellant cites Sinin v. R.I. Dep't of Human Services, No. 03-5735, 2005 WL 374224 (R.I. Super. 2005) in support of his argument that he meets the relevant SSI listings in this case. In Sinin, the Superior Court addressed the MA denial of an above the knee amputee who was suffering from recurring infections caused by abscesses and thigh pain because his prosthesis did not fit correctly. 2005 WL 374224 at *1, *5. The medical testimony in Sinin clearly established that the recurring infection and abscesses prevented the MA applicant from using his prosthesis. The applicant also testified that he had a limited ability to wear his prosthesis. Id. at 1, 5.

The evidence presented by the Appellant demonstrates that he meets listings 1.02 and 1.05, and the medical documentation of the degradation of Appellant's left knee establishes he is suffering from chronic joint pain with a limited range of motion. The medical evidence further supports the conclusion that Appellant is suffering from stump complications in his right leg that prevent him from effectively using his prosthesis.

In addition, the Appellant appeared at the appellate hearing using two crutches instead of his prosthesis. Ouellette assumed in her decision that Appellant chose to use the crutches for his own comfort and not out of medical necessity. The Court believes this was an inappropriate conclusion. Regardless of whether he did it out of medical necessity or for his own comfort, it is clear that the prosthetic device is malfunctioning and that Appellant is required to use crutches to ambulate effectively and comfortably.

When viewed as a whole, the medical evidence establishes that Appellant cannot ambulate effectively as defined in 20 C.F.R. Pt. 404, Subpt. P, App. 1, 1.00B2b(1)-(2).

Accordingly, the Court finds that Ouellette's conclusion that Appellant is not disabled at Step 3 is clearly erroneous in light of the reliable, probative, and substantial evidence, on the whole record.

B

Findings of Fact Regarding Appellant's RFC

Appellant asserts that Ouellette did not sufficiently discuss and analyze the objective and subjective evidence presented by his application for MA when determining his RFC. (Pl.'s Br. in Supp. of Reversal, at 17.) More specifically, he is arguing that Ouellette's findings regarding his RFC are merely conclusory and that she relied on generalizations while failing to point to specific medical evidence and consider all of Appellant's symptoms. Id. He contends that Ouellette assessed his RFC based on "her lay reading of the raw medical records." Id. at 18. In response, DHS contends that Ouellette based her RFC determination on a sufficient review of the record and that the record supports her determination that Appellant could perform sedentary work. (Def.'s Resp. Br. in Supp. of Agency Decision at 16-17.)

Having found that Ouellette's conclusion was error based upon the whole record, the Court acknowledges the issues raised by the parties, but declines to address the issue based upon the Court's ruling Appellant should have been found disabled at Step 3.

C

Appellant's Non-Compliance with Treatment

Appellant contends that a failure to comply with a recommended treatment that "might 'improve health'" is not a sufficient ground for denial of an MA application. (Pl.'s Br. in Supp. of Reversal, at 12.) He argues that in his case even if the surgery on

his legs was prescribed, he had good cause, namely a lack of insurance, for not complying with his doctor's prescribed course of treatment. Id. Appellant specifically argues that Ouellette made insufficient findings of fact regarding his recommended and prescribed treatments. Id. at 13. In response, DHS contends that it was proper for Ouellette to consider Appellant's refusal to follow the course of treatment recommended by Dr. Gonzalez and Rhode Island Hospital. (Def.'s Resp. Br. in Supp. of Agency Decision at 15.) DHS further argues that a lack of insurance or an inability to pay for treatment is not good cause for refusing a treatment prescribed by an applicant's physician. Id.

To obtain MA benefits, applicants must follow any medical treatment *prescribed* by their physician if the treatment is likely to restore their ability to engage in substantially gainful activity.[8] 20 C.F.R. § 416.930(a); SSR 82-59. A failure to follow a prescribed treatment by an applicant will result in a denial of benefits in the case of an initial application, or a stoppage of benefits in the case of an individual who is already receiving them. 20 C.F.R. § 416.930(b). Once a hearing officer determines that an applicant has failed to follow a prescribed course of treatment; findings must be made "as to whether the failure to follow prescribed treatment is justifiable." SSR 82-59. This directive requires development of the record and an opportunity for the applicant to explain his or her reasons for not undergoing the treatment. Id.

A list of acceptable reasons for not following a prescribed course of treatment appears in Sec. 416.930(c). Although not listed as an acceptable excuse, inability to

[8] Only treatments that are "clearly expected to restore capacity to engage in any SGA (or gainful activity, as appropriate) [and] prescribed by a treating source" will be considered prescribed for the purposes of this rule. SSR 82-59.

afford a prescribed treatment is considered a valid excuse for not following a treatment plan by the Social Security Administration. SSR 82-59. Furthermore, the majority of federal circuit courts have held that an applicant "cannot be denied benefits for failing to obtain medical treatment that would ameliorate his condition if he cannot afford that treatment." Gamble v. Chater, 68 F.3d 319, 320-21 (9th Cir. 1995) (compiling cases). To justify a failure to follow a prescribed treatment plan, an applicant must show that he or she is willing to accept the treatment and that free community resources are either unavailable or they have been exhausted.[9] SSR 82-59.

The requirements discussed above do not apply in the case of a *recommended* treatment. MA Applicants do not have a duty to "undergo any and all surgical procedures suggested by (his or) her physician lest (he or) she is barred from disability benefits." Schena v. Sec'y of Health & Human Servs., 635 F.2d 15, 19 (1st Cir. 1980) (citing McCarty v. Richardson, 459 F.2d 3, 4 (5th Cir. 1972)). An applicant's refusal to undergo a suggested course of treatment because of its inherent risks or when a treating physician considers his or her refusal reasonable cannot be viewed as a willful refusal to undergo treatment. Id. (citing Ratliff v. Celebrezze, 338 F.2d 978 (6th Cir. 1964).

Ouellette committed a clear error of law when she considered Appellant's non-compliance with the course of treatment suggested by Dr. Gonzalez and the orthopedic clinic at Rhode Island Hospital. It is not clear from her decision whether Ouellette considered the suggested course of treatment to be prescribed or merely recommended. Notwithstanding, this difference is irrelevant. If Ouellette considered the suggested

[9] The applicant is required to provide documentation of his or her contacts with all possible free resources. Furthermore, the applicant must explore all available resources, such as clinics as well as charitable and public assistance agencies. SSR-82-59.

course of treatment recommended, Appellant did not have a duty to undergo the treatment to be eligible for benefits. It was error for her to consider the failure to undergo treatment. In the event she considered it prescribed, Ouellette erred by her failure to consider whether there was good cause for not following the suggested course of treatment.

The directive of the Social Security Administration regarding an applicant's inability to afford treatment is clear. It is a valid excuse for not following a prescribed treatment when one is willing to accept it, and free community resources are unavailable or have been exhausted. SSR 82-59. Therefore, before Ouellette could consider Appellant's non-compliance with treatment pejoratively, she was required to develop the record and make findings of fact on his ability to afford the treatment.

The weight of the evidence establishes that Appellant is willing to undergo the treatment, but that he is unable to afford it. This is a valid reason for not undergoing a prescribed treatment, and therefore Ouellette's decision is contrary to the evidence of the whole record and is clearly erroneous.

D

Weight Assigned to Dr. Gonzalez' Medical Opinion

Appellant contends Ouellette impermissibly rejected the medical opinion of Dr. Gonzalez without sufficiently articulating the elements set forth in 20 C.F.R. § 416.972. Appellant argues that Ouellette did not afford Dr. Gonzalez' opinion controlling weight, and it was an error for her to rule that Appellant was not limited in his ability to sit or stand for less than two hours. (Pl.'s Br. in Supp. of Reversal, at 7.) DHS argues that

Appellant's arguments are not supported by the record. (Def.'s Resp. Br. in Supp. of Agency Decision at 10.)

The rules governing the evaluation of medical opinion submitted in support of an MA application are found in 20 C.F.R. § 416.972. This section defines medical opinion as "statements from physicians and psychologists or other acceptable medical sources that reflect judgments about the nature and severity of [an applicant's] impairments, including . . . symptoms, diagnosis and prognosis, what [an applicant] can still do despite impairment(s), and [the applicant's] physical or mental restrictions." Sec. 416.972(2). When determining whether an applicant is disabled, the hearing officer must consider all medical opinions submitted along with the rest of the relevant evidence in the record. Sec. 416.972(2)(b).

Hearing officers must evaluate all of the medical opinions presented to them and afford each opinion an appropriate weight in the decision-making process. Sec. 416.927(d). If a medical opinion is rendered by a treating source, that opinion will be entitled to controlling weight if it is supported by "medically acceptable clinical and laboratory diagnostic techniques," and consistent with the rest of the evidence. Sec. 416.927(d)(2). A treating source is defined as an applicant's "own physician, psychologist, or other acceptable medical source who provides [the applicant], or has provided [the applicant], with medical treatment or evaluation and who has, or has had, an ongoing treatment relationship with [the applicant]." 20 C.F.R. § 404.1502. The medical opinion of a treating source will not always be dispositive. 20 C.F.R. § 404.1527(d)(2). A physician will not be considered a treating source if his or her

relationship with an applicant is based on the need to obtain a report in support of the applicant's disability claim rather than a need for treatment. 3 Soc. Sec. LP § 37:77.

If a hearing officer finds a treating physician's opinion is not entitled to controlling weight, the officer should give good reasons in the decision for the weight afforded. 20 C.F.R. § 416.927(d). The explanation of the hearing officer's reasoning "must be sufficiently specific to make clear to any subsequent reviewers the weight the adjudicator gave to the treating source's medical opinion and the reasons for that weight." SSR 96-29. The hearing officer does not have to mention every piece of evidence presented or explain his or her reasoning regarding the weight afforded to each evidentiary item. The factors the hearing officer should consider include:

> (1) The "[l]ength of the treatment relationship and the frequency of examination," as well as the "[t]he nature and extent of the treatment relationship;"
> (2) The amount of medical evidence presented in support of the medical expert's opinion;
> (3) The consistency of the medical opinion with the rest of the record;
> (4) Whether the medical opinion was given by a specialist in his or her field of expertise; and
> (5) Any factors an applicant brings to the hearing officer's attention. 20 C.F.R. § 416.927.

If a single source provides multiple medical opinions, it is permissible for a hearing officer to address each of these opinions separately. SSR 96-2p ("Adjudicators must use judgment based on the facts of each case in determining whether, and the extent to which, it is necessary to address separately each medical opinion from a single source.").

In the case before this Court, the medical opinion evidence includes Dr. Gonzalez' statements on the MA-63 form, the diagnosis of osteoarthritis in Appellant's left knee, and CTS in his right arm as found in the medical records submitted by Appellant. The MA-63 form offers Dr. Gonzalez' opinion regarding applicant's

impairments and the severity of those impairments. (MA-63, March 9, 2009 at 2.) He also opined on the limitations these impairments imposed on Appellant. Id. at 3. Dr. Gonzalez' reports that Appellant is suffering from complications due to his above the knee amputation on his right leg (namely a failing prosthesis), back pain from the deformity caused by his failing prosthesis, and CTS in his right arm. Id. at 2.

Dr. Gonzalez reports that Appellant has moderately limited mental abilities and that he has limitations on his physical abilities. Id. at 3. According to Dr. Gonzalez' medical opinion Appellant can walk or stand for less than two hours out of an eight-hour day, sit for four out of eight hours and reach, bend, or lift between 5-50 pounds occasionally. Id. Appellant can also bend or stoop, and push and pull occasionally. Id.

The medical records from Capitol Hill Health Center and Rhode Island Hospital establish that Appellant is suffering from severe impairments in his knee and that he likely has CTS in his right arm. None of these records contain opinions regarding the functional limitations these impairments cause. Therefore, the only expert opinion present in this case regarding Appellant's functional limitations lies in the statements of Dr. Gonzalez on the MA-63 form.

The record establishes that Dr. Gonzalez is Appellant's primary doctor and that he has had an ongoing treatment relationship with Appellant. Dr. Gonzalez provided Appellant extensive medical treatment and evaluation. Based upon the record, the Court finds that Dr. Gonzalez is Appellant's treating source as defined under the federal standards.

Ouellette applied an incorrect legal standard when she considered Dr. Gonzalez' medical opinion. As a treating source, Dr. Gonzalez' medical opinion was entitled to

controlling weight if it met the standard set forth in 20 C.F.R. § 416.927(d)(2). This standard requires hearing officers to consider whether the opinion "is well supported by medically acceptable clinical and laboratory diagnostic techniques and is not inconsistent with the other substantial evidence in [an appliant's] case record." Sec. 416.927 (d)(2). Ouellette devoted one paragraph of her decision to Dr. Gonzalez' opinion:

> "In order to be eligible for benefits, an individual must follow physician recommended treatment if that treatment can restore the ability to work. Dr. Gonzalez, *is the treating source who has expressed medical opinion regarding the impact of the appellant's conditions on functioning*. He does not significantly limit lifting, carrying, reaching, bending, stooping or pushing and pulling with the upper extremities. Although walking and standing are restricted to less than 2 hours, the physician is not specific about the actual amount of time. The record, however, demonstrates that although it may be somewhat less than two hours, it is not significantly less, as he is able to perform ADLs with some proficiency. There is no support in the medical evidence that would definitively limit sitting." (Administrative Hearing Decision at 5.) (Emphasis added).

Ouellette's discussion fails to apply the standard set forth in § 416.927(d)(2). Ouellette notes that Dr. Gonzalez is the treating source and discusses the limitations reported by the doctor. Ouellette then considers the issue of supportability. Although supportability is a consideration set forth in § 416.927(d)(3), it does not become relevant until after the hearing officer concludes that controlling weight will not be afforded to a physician's medical opinion. Before Ouellette should have considered this issue, she first had to assess whether Dr. Gonzalez' opinion was supported by medically acceptable evidence. This requirement was not met.

The record contains sufficient evidence supporting the doctor's opinion relative to Appellant's limitations in both standing and sitting. This evidence is based on medically acceptable laboratory and diagnostic techniques. Based upon the evidence presented, Ouellette's failure to afford Dr. Gonzalez' opinion controlling weight was an error of

law. In addition, she committed a clear legal error by applying the wrong standard under the federal guidelines.

E

Consideration of Appellant's Pain

Appellant contends that Ouellette erred by failing to articulate the standards set forth in 20 C.F.R. § 419.929 governing the assessment of an MA applicant's symptoms, including pain. (Pl.'s Br. in Supp. of Reversal, at 10-11.) Specifically, Appellant contends that she did not make findings of fact on all of the evidence regarding his pain symptoms or "determine whether the severity of [his pain] was reasonably consistent with the evidence." Id. at 11. He further alleges that Ouellette did not make the requisite credibility determination regarding his subjective statements of pain and that she erred by considering his ability to do household activities in making her decision. Id. He also contends that she erred by not considering his pain symptoms in her analysis at steps 2-5. Id. at 12. In response, DHS contends that Ouellette considered Appellant's statements and evaluated them in light of all the medical evidence presented as required by the relevant federal standards. (Def.'s Resp. Br. in Supp. of Agency Decision at 17.)

When making a disability determination, hearing officers must consider all of an applicant's symptoms "including pain, and the extent to which [the applicant's] symptoms can reasonably be accepted as consistent with the objective medical evidence, and other evidence." 20 C.F.R. § 416.929(a). Hearing officers will consider an applicant's subjective description of pain symptoms and the impact they have on his or her daily functioning or ability to work. Sec. 416.929(a). Descriptions of pain symptoms

and their impact from an applicant's healthcare provider will also be considered. Sec. 416.929(a). However, these statements alone are insufficient:

> "[S]tatements about your pain or other symptoms will not alone establish that you are disabled; there must be medical signs and laboratory findings which show that you have a medical impairment(s) which could reasonably be expected to produce the pain or other symptoms alleged and which, when considered with *all of the other evidence (including statements about the intensity and persistence of your pain or other symptoms which may reasonably be accepted as consistent with the medical signs and laboratory findings*), would lead to a conclusion that you are disabled. In evaluating the intensity and persistence of your symptoms, including pain, we will consider *all of the available evidence,* including your medical history, the medical signs and laboratory findings and statements about how your symptoms affect you." Sec. 416.929(a) (emphasis supplied).

An applicant's symptoms, including pain, "will not be found to affect [his or her] ability to do basic work activities unless medical signs or laboratory findings show that a medically determinable impairment is present." Sec. 416.929(b). Again, "all of the available evidence, including [an applicant's] medical history, . . . medical signs and laboratory findings, and statements from [the applicant], [the applicant's] treating or examining physician . . . or other persons about how [the applicant's] symptoms affect [him or her]" will be considered. Sec. 416.929(c). Several additional factors will be considered by a hearing officer when making a disability determination. These factors include:

> "(i) [Applicant's] daily activities;
> (ii) The location, duration, frequency, and intensity of your pain or other symptoms;
> (iii) Precipitating and aggravating factors;
> (iv) The type, dosage, effectiveness, and side effects of any medication you take or have taken to alleviate your pain or other symptoms;
> (v) Any measures you use or have used to relieve your pain or other symptoms . . . ; and
> (vii) Other factors concerning your functional limitations and restrictions due to pain or other symptoms." Sec. 416.929(c)(3).

A hearing officer will also "consider whether there are any inconsistencies in the evidence and the extent to which there are any conflicts between [an applicant's] statements and the rest of the evidence . . . . " Sec. 416.929(c)(4).

The credibility determinations of a hearing officer when examining an applicant's subjective statements of pain or other symptoms in light of the medical evidence are entitled to great deference by a reviewing court. Tyra v. Sec'y of Health and Human Servs., 896 F.2d 1024, 1030 (6th Cir. 1990) ("[T]he reviewing court should show deference to the decision of the administrative law judge in assessing credibility."); Martinez v. Shalala, 911 F. Supp. 37, 42 (D. Mass. 1996); Pratt v. R.I. Dept. of Human Servs., No. 96-5490, 1998 WL 64190, at *9 (R.I. Super. Feb. 10, 1998). A hearing officer's credibility determinations will generally not be disturbed unless they are "patently wrong in view of the cold record." Pope v. Shalala, 998 F.2d 473, 487 (7th Cir. 1993) (quoting Imani v. Heckler, 797 F.2d 508, 512 (7th Cir. 1986)). Therefore, if a reviewing court finds substantial support on the record for a hearing officer's credibility determination, it must be upheld. Id.; Pratt, 1998 WL 64190, at *9-10.

After reviewing the record present in this case, the Court finds that Ouellette failed to sufficiently develop the administrative record on the issue of pain. Ouellette did address the first requirement of the § 416.929 analysis by finding that Appellant had a medically determinable impairment that could reasonably be expected to cause pain. (Administrative Hearing Decision at 5.) She failed to assess the credibility of Appellant's subjective statements of pain found in his AP-70 form, in the Rhode Island Hospital and Capitol Hill Health Center records, and in his testimony during the administrative hearing on July 30, 2009.

The federal standards mandate that hearing officers evaluate the credibility of an applicant's subjective statements of pain and evaluate the described symptoms in light of all of the evidence on record and in light of the factors found in § 416.929(c)(4). In this instance, Ouellette did not abide by these standards. Rather, she dismissed Appellant's complaints of pain as being "not well documented." Id. In addition, she failed to discuss Appellant's pain symptoms during steps 2-5 of the five step inquiry as required by the federal standards.

Appellant's medical records from the Capitol Hill Health Center and Rhode Island Hospital, the MA-63 form, and the AP-70 form all contain descriptions of Appellant's pain symptoms. These records establish that Appellant is taking a variety of pain medications to control his pain and that his pain imposes significant limitations on his ability to complete daily activities. The Court cannot discern any evidence in the record to support Ouellette's rejection of Appellant's statements of pain. Therefore, the Court finds Ouellette committed a clear error or law in failing to develop the record on this issue. The weight of the evidence clearly demonstrates that Appellant made credible reports of pain and that the pain he experiences impacts him severely.

F

Consideration of CTS

Appellant argues that Ouellette erred by not considering the combined effects of his CTS with the impairments in his legs during all five steps of the sequential inquiry. (Pl.'s Br. in Supp. of Reversal, at 13.) He contends that the EMG testing ordered by Dr. Gonzalez in February 2009 establishes the existence of CTS and that this diagnosis was not refuted by the evidence or another physician. Id. at 13-14. DHS responds by arguing

that Ouellette did consider CTS, but that she properly concluded the evidence supporting its effects on Appellant was insufficient. (Def.'s Resp. Br. in Supp. of Agency Decision at 18.)

When an MA applicant alleges multiple impairments as a basis for his or her application, the hearing officer must consider the combined effect of all of the impairments regardless of whether the individual impairments would alone be sufficient to render the applicant disabled. 20 C.F.R. § 416.923; Jamison v. Bowen, 814 F.2d 585, 588 (11th Cir. 1987); Hudson v. Heckler, 755 F.2d 781, 785 (11th Cir. 1985). If a "medically severe combination of impairments" is found, the combined impact of the impairments will be considered throughout the analysis. Sec. 416.923. A medical diagnosis of an impairment without any additional evidence is insufficient to establish that an impairment is severe. Choquette v. Comm'r of Social Security, 695 F. Supp. 2d 1311, 1326 (M.D. Fl. 2011). Applicants bear the burden of establishing through substantial evidence that an impairment "has more than a minimal effect on [the applicant's] ability to perform basic work activities." Id.

In this case, the only evidence Appellant produced regarding CTS is the EMG of his right arm taken in February 2009 and Dr. Gonzalez' statements on the MA-63 form. (RI Hospital Preliminary EMG Results, February 25, 2009; MA-63, March 9, 2009 at 1.) Although the EMG report establishes that Appellant had a "right distal medial neuropathy consistent with carpal tunnel syndrome," this alone is not enough to establish that Appellant's CTS was a severe impairment. (RI Hospital Preliminary EMG Results, February 25, 2009.) Appellant had the burden of producing substantial evidence proving

his CTS had a significant impact on his ability to work. Choquette, 695 F. Supp. 2d at 1326. Here, the Appellant failed to meet his burden on this issue.

Ouellette considered all of the evidence Appellant produced regarding CTS and noted that Appellant was likely suffering from the condition. (Administrative Hearing Decision at 5.) However, she went on to note that Appellant did not produce any evidence establishing what restrictions his CTS caused or what the duration of the symptoms was expected to be. Id.

The Court finds that Ouellette did not err by refusing to consider Appellant's CTS. Her dismissal of CTS as a contributing factor to Appellant's condition was based on substantial and competent evidence in the record, namely that Appellant failed to meet his burden of proof. Therefore, Ouellette's decision not to consider CTS along with Appellant's other impairments will not be disturbed.

Conclusion

After a review of the entire record, this Court finds Ouellette's decision was clearly erroneous in light of the reliable, probative, and substantial evidence. Ouellette's legal errors in this case have resulted in substantial prejudice to the rights of Appellant. Accordingly, the decision of DHS to deny Appellant MA benefits is REVERSED. Counsel shall prepare an appropriate order for entry.