

**BEFORE THE ALASKA OFFICE OF ADMINISTRATIVE HEARINGS
ON REFERRAL BY THE COMMISSIONER OF HEALTH AND SOCIAL SERVICES**

In the Matter of:)
)
 B Q) OAH No. 14-0001-MDE
) DPA Case No.

DECISION

I. Introduction

The issue in this case is whether B Q is disabled for purposes of Alaska's Adult Public Assistance (APA) and Working Disabled Medicaid programs. Ironically, the applicable law is such that a person applying for or receiving Working Disabled Medicaid (to obtain medical treatment in order to *continue working*) must *first* prove that he or she is disabled (and thus *unable to work*) based on state and federal disability criteria.

The Division of Public Assistance (DPA or Division) terminated Mr. Q's Medicaid based on its finding that Mr. Q is no longer disabled according to the applicable criteria. This decision finds, based on the testimony and medical records presented, that Mr. Q has medically severe impairments which have lasted for a continuous period of at least 12 months. Mr. Q's impairments do not satisfy the specific criteria of any of the Social Security Administration's applicable impairment listings. However, the preponderance of the evidence indicates that Mr. Q cannot perform the full range of sedentary work, and the Division did not introduce evidence of particular jobs, existing in the national economy, which Mr. Q can perform. Accordingly, Mr. Q satisfies the disability criteria necessary to continue receiving Working Disabled Medicaid benefits under 7 AAC 100.426, 7 AAC 100.002, and 7 AAC 40.170(c). The Division's decision terminating Mr. Q's Working Disabled Medicaid is therefore reversed.

II. Facts

A. Mr. Q's Physical Impairments

Mr. Q is 28 years old.¹ He was born with hydrocephalus and an Arnold-Chiari brain malformation.² His doctors installed shunts in his head to relieve intracranial pressure; he

¹ Ex. 1.

² Exs. 32.3, 32.221. Hydrocephalus, also known as "water on the brain", is a medical condition in which there is an abnormal accumulation of cerebrospinal fluid in the ventricles, or cavities, of the brain. *See* the Gale Encyclopedia of Medicine (2008), retrieved March 05, 2014 from <http://medical-dictionary.thefreedictionary.com/hydrocephalus>. Although it does occur in older adults, it is more common in infants. *Id.* Hydrocephalus may cause increased intracranial pressure inside the skull and progressive enlargement of the head, convulsion, tunnel vision, mental

currently has a total of four shunts, two of which are currently working.³ To date Mr. Q has undergone eight different shunt revision surgeries.⁴ Mr. Q also suffers from kyphosis, scoliosis, chronic low back pain, hip pain, and ornithine transcarbamylase deficiency, an inherited disorder that causes ammonia to accumulate in the blood.⁵ Mr. Q also has a history of migraine headaches, hypokalemic seizures (due to a vitamin D deficiency), stomach problems (probably due to his shunts),⁶ and pseudohypothyroidism.⁷

Mr. Q fractured his right arm in 1998.⁸ This old fracture still causes pain in Mr. Q's right elbow.⁹ However, diagnostic imaging performed on June 26, 2013 indicated that the bones, joints and soft tissues of the elbow were normal and that there were no arthritic, degenerative, or post-traumatic abnormalities.¹⁰

In August 2008 Mr. Q was found unconscious on the floor at work and was taken to a hospital emergency room; he was treated and released, but doctors were unable to determine the cause of the problem.¹¹

On November 15, 2010 Mr. Q's pelvis and right hip were x-rayed.¹² No acute abnormalities were seen. On July 25, 2012 Mr. Q's back and hips were x-rayed.¹³ His hip x-rays were normal. His lumbar spine x-rays showed normal vertebral body height, normal intervertebral disk spaces, and normal alignment. A report by Kenneth R. Pervier, M.D. dated July 31, 2012 summarized Mr. Q's then-current condition as follows:¹⁴

The patient's history is consistent with successfully treated idiopathic congenital hydrocephalus His low back pain is chronic and recurrent and is secondary to degenerative disk disease at L4-5 with facet disease at L4-5. He also has thoracic kyphosis The main problem he has with his back is when he stands too long or sits too long [H]e would need to get up and move around every 20-30 minutes or so [M]oving about might cause difficulties as well. He may also be limited in his ability to lift moderately heavy objects repetitively....

disability, and even death. *Id.* If hydrocephalus becomes progressive, a shunt is surgically placed to reduce pressure by conducting fluid away from the brain. *Id.*

³ Ex. A. However, an x-ray report dated October 15, 2012 (Exs. 32.64 and 32.84) indicates that Mr. Q has *three* intracranial shunt tubes, two on the right and one on the left.

⁴ Ex. A, K O hearing testimony.

⁵ Exs. 32.19, 32.135.

⁶ Ex. 32.3.

⁷ Ex. 32.135.

⁸ Ex. 32.79.

⁹ Ex. 32.79.

¹⁰ Ex. 32.81.

¹¹ Ex. 32.252.

¹² All factual findings in this paragraph are based on Ex. 32.125.

¹³ All factual findings in this paragraph are based on Exs. 32.105 - 32.108.

¹⁴ Exs. 32.102 - 32.104 (original formatting condensed for brevity).

He has no difficulty with handling objects, speaking, [or] seeing. Traveling could cause a problem if it requires him to sit for prolonged periods either in a car or in an airplane seat.

In 2012 Mr. Q reported to his doctor that he had been having low back pain since 2009.¹⁵ He reported that he must position himself in bed flat on his back with a pillow between his legs to avoid back pain at night. He told his doctor that he treated himself with stretching exercises and hot showers. Mr. Q has also treated his back pain with physical therapy and heating pads, and has taken Flexeril and Mobic for pain on an as-needed basis.¹⁶

On February 19, 2013 Mr. Q was seen by Louis L. Kralick, M.D. for evaluation of chest wall pain and abdominal pain.¹⁷ Dr. Kralick concluded that Mr. Q's pain was most likely attributable to fibrous tissue adhesions to his shunt tubing system. Dr. Kralick recommended massage therapy to loosen the areas of fibrosis.

On April 16, 2013 Mr. Q was seen by Dr. Kralick for a follow-up evaluation. Dr. Kralick's report of this encounter states in relevant part as follows:¹⁸

Since his last visit here, [Mr. Q] reports no new complaints of any headaches or neurologic symptoms. He still has some pain along the left anterior chest wall, although this has diminished somewhat. [This] is related to some exuberant fibrosis along the tract of his distal shunt tubing. He actually reports that his headaches have diminished somewhat over the last few weeks.

B. Mr. Q's Neurological Impairments

Mr. Q has historically had some learning problems most likely associated with his hydrocephalus.¹⁹ Testing performed in May 2002 indicated a verbal IQ of 83, a performance IQ of 93, and a full-scale IQ of 86. At that time he was reading at a ninth grade level, writing at an eighth grade level, and his mathematical ability was at the seventh grade level. Although approximately 20% of his public school classes were special education classes, he was able to graduate from high school with a regular diploma.

Mr. Q has a history of seizures and migraine headaches,²⁰ and difficulties with concentration.²¹ In January 2008 Mr. Q was treated in a hospital emergency room for a multi-

¹⁵ All factual findings in this paragraph are based on Ex. 32.102 unless otherwise stated.

¹⁶ All factual findings in this paragraph are based on Exs. 32.115 - 32.119.

¹⁷ All factual findings in this paragraph are based on Exs. 32.59 - 32.61.

¹⁸ Ex. 32.54.

¹⁹ All factual findings in this paragraph are based on Ex. 32.137.

²⁰ Exs. 32.134, 32.154, 32.155. Mr. Q's migraines and seizures appear to have decreased in frequency and severity over the last ten years. In 2007 Mr. Q told his doctor that he had not had a severe migraine since 2003, and that he had not had a seizure since 1999 (Exs. 32.220, 32.221). However, as of 2007 Mr. Q was still having headaches, and

day migraine which was severe enough to cause vomiting.²² On October 15, 2012 Mr. Q was seen at a hospital emergency room for a headache which he reported had lasted two days.²³ A CT scan taken on that date showed that Mr. Q's cerebrospinal fluid spaces were not compressed, that there was no acute intracranial bleeding or abnormal extra-axial fluid, and that there was no acute intracranial abnormality or evidence of hydrocephalus.²⁴

On January 13, 2014 Mr. Q reported to his doctor that he was having headaches about once every other week.²⁵ These make him unable to focus at times.²⁶

C. Mr. Q's Functional Limitations

DVR performed a disability determination or case analysis on Mr. Q in 2008 when he initially applied and was found eligible for Working Disabled Medicaid.²⁷ Mr. Q completed the Division's *Disability and Vocational Report* form on November 26, 2008.²⁸ He wrote that he had previously been working as a parts driver, but had to switch to a shipping and receiving job because of seizures. The DVR assessor stated in that assessment that Mr. Q "is considered credible in his statements as reflected in the medical evidence."²⁹ The assessor also stated that at the time Mr. Q had "significant restrictions in his ability to work," and that "given a sedentary RFC he does not have the ability to perform a full range of sedentary work."³⁰

In early 2009 Mr. Q reported that he was "unable to do housework or chores."³¹ Mr. Q lived at home until approximately two years ago (2012), at which time he moved into his own apartment.³² Although he has been able to live on his own so far, he must sometimes telephone his family to ask how to accomplish various things around the house.³³

In or about October 2013 Mr. Q underwent a Physical Residual Functional Capacity Assessment.³⁴ The assessment report dated October 17, 2013 stated that Mr. Q should avoid

he reported that the headaches were causing vision problems (Ex. 32.221). On examination, he was found to have papilledema, a swelling of the optic disc (where the optic nerve enters the eyeball) (Ex. 32.221).

²¹ Ex. 32.142.

²² Ex. 32.257, 32.258.

²³ Ex. 32.32.

²⁴ Exs. 32.65, 32.83.

²⁵ Ex. A.

²⁶ Ex. 32.3.

²⁷ All references in this paragraph are based on Exs. 32.134 - 32.143.

²⁸ All references in this paragraph are based on Exs. 32.349 - 32.354 unless otherwise stated.

²⁹ Ex. 32.135.

³⁰ Ex. 32.136.

³¹ Ex. 32.234.

³² K O hearing testimony.

³³ K O hearing testimony.

³⁴ All factual findings in this paragraph are based on Exs. 32.18 - 32.25 unless otherwise stated.

heavy lifting, should change position frequently to lessen back pain, and should avoid walking long distances. The assessor noted that in 2012 one of Mr. Q's physicians had previously opined that, were Mr. Q performing sedentary work, he would need to get up every 20 - 30 minutes to relieve pain, and the assessor indicated that he did not disagree with this opinion.³⁵ The assessment also found that Mr. Q should never work using ropes, ladders, or scaffolds, but that he can occasionally climb ramps or stairs, stoop, kneel, or crouch, and that he may frequently balance and crawl. The assessment found that Mr. Q has no manipulative restrictions, no visual limitations, and no communicative limitations.

With regard to environmental limitations, the assessment found that Mr. Q can tolerate unlimited exposure to heat, noise, and fumes, but that he should avoid concentrated exposure to cold, wetness, and humidity, and that he should avoid even moderate exposure to vibration, machinery, and heights.³⁶

D. Mr. Q's Relevant Educational and Vocational Background

Mr. Q has a high school education and a regular diploma,³⁷ although he attended some special education classes throughout grade school, middle school, and high school.³⁸ After high school he attended a trade / vocational program at UAA in automobile mechanics.³⁹ He graduated from that program, but required accommodations, including special tutoring, in order to do so.⁴⁰ In the last 15 years Mr. Q has worked at an athletic club, grocery store, two different auto dealerships, a car wash, and a blind cleaning business.⁴¹ For the last two years Mr. Q has been employed by No Name, where he cleans blinds and drives / makes deliveries.⁴² He earns \$1,800.00 per month.⁴³ This income is insufficient to purchase health insurance or pay for his medical expenses out-of-pocket.⁴⁴

E. Relevant Procedural History

Mr. Q has received Working Disabled Medicaid (WDM) since 2009.⁴⁵ On October 17, 2013 the Department of Labor and Workforce Development's Disability Determination Service

³⁵ Ex. 32.24.
³⁶ Ex. 32.22.
³⁷ Exs. 32.7, 32.322, 32.323.
³⁸ K O hearing testimony.
³⁹ Exs. 32.7, 32.102.
⁴⁰ K O hearing testimony.
⁴¹ Exs. 32.5, 32.136.
⁴² Ex. 32.102, K O hearing testimony.
⁴³ Ex. 2.
⁴⁴ Ex. 32.234, K O hearing testimony.
⁴⁵ Exs. 5.4, 5.5.

(DDS) completed a review to determine Mr. Q's continuing eligibility for WDM.⁴⁶ DDS determined that Mr. Q's condition had improved and that he was no longer legally disabled.⁴⁷ On December 12, 2013 the Division notified Mr. Q that it was terminating his Medicaid benefits effective December 31, 2013.⁴⁸

Mr. Q requested a hearing on December 24, 2013.⁴⁹ Mr. Q's hearing was held on February 14, 2014. Mr. Q did not participate, but was represented by his mother and authorized representative, K O, who testified on his behalf. Public Assistance Analyst Terri Gagne participated in the hearing by phone and represented the Division. Disability Determination Services Chief Patricia Trott participated by phone and testified on the Division's behalf. The record closed at the end of the hearing.⁵⁰

III. Discussion

A. Working Disabled Medicaid

In an effort to improve employment opportunities for individuals with disabilities, Congress authorized the establishment of the Medicaid Buy-in Program, allowing states to expand Medicaid coverage to include working individuals with disabilities whose income and assets would otherwise make them ineligible for traditional Medicaid.⁵¹ The program was authorized by the Balanced Budget Act (BBA) of 1997⁵² and reauthorized by the Ticket to Work and Work Incentives Improvement Act of 1999.⁵³ The program is designed to allow individuals with disabilities to pursue employment without fear of losing access to necessary health care services and supports. The federal Centers for Medicare & Medicaid Services (CMS) has granted states the flexibility to tailor their programs and policies to better align with state resources and to meet the specific needs of their state's target population. This flexibility has led to considerable variations in program design among the states.

⁴⁶ Exs. 3.1, 3.3.

⁴⁷ Ex. 3.1, 3.3.

⁴⁸ Ex. 4.

⁴⁹ Exs. 5.0, 5.1, 5.2. A verbal hearing request was made on December 24, 2013; a written request was submitted on December 30, 2013.

⁵⁰ Mr. Q's representative submitted a response to the Division's post-hearing filing on October 25, 2013. However, because the record was already closed, and there was no request to re-open the record, this filing was not considered in the adjudication of this case.

⁵¹ Unless otherwise noted, all references in this paragraph are from Kehm, *Enrollment, Employment, and Earnings in the Medicaid Buy-In Program 2011* (May 20, 2013), accessed online at http://www.mathematica-mpr.com/publications/pdfs/health/medicaid_buyin_enrollment.pdf (date accessed November 27, 2013). The report was commissioned by the federal Centers for Medicare & Medicaid Services (CMS). *Id.*

⁵² Public Law 105-33. The individual provisions of the Act have been codified in multiple sections of the United States Code too numerous to mention here.

⁵³ Public Law 106-170, 113 Stat. 1862, 42 U.S.C. 1148 *et. seq.*

The regulation implementing Alaska's Working Disabled Medicaid program is 7 AAC 100.426. That regulation allows individuals with disabilities, who are ineligible for Adult Public Assistance and APA-related Medicaid because of the amount of income earned by the individual or his/her spouse, to nevertheless qualify for Medicaid by meeting certain criteria. The primary criteria are (1) the Department of Labor and Workforce Development or the United States Social Security Administration must determine that the individual is disabled according to SSI criteria; (2) the individual's nonexcludable resources must not exceed \$10,000 for the individual or, (if the individual is living with a spouse) \$15,000; (3) the individual must satisfy all other nonfinancial eligibility criteria for Adult Public Assistance; and (4) the individual must pay a monthly premium (*i.e.* a portion of the cost of the coverage).⁵⁴ Only the first requirement - whether Mr. Q satisfies SSI disability criteria - is at issue in this case.

B. APA and SSI Criteria that are Applicable to Working Disabled Medicaid

The disability standards applicable to Adult Public Assistance (APA), incorporated by reference into Working Disabled Medicaid, are based on AS 47.25.430(a), which states in relevant part that "financial assistance shall be given . . . to every aged, blind, or disabled needy resident . . .".⁵⁵ AS 47.25.615(5) defines "disabled" for purposes of Adult Public Assistance and "state-only" disability determinations as "being unable to engage in substantial gainful activity by reason of a medically determinable physical or mental impairment 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 12 months."⁵⁶

The regulation which implements AS 47.25.430(a) and AS 47.25.615(5) (discussed above) is 7 AAC 40.170(c). That regulation requires disability applicants to meet the definition of disability contained in 42 USC 1382c(a)(3). The federal statutory definition

⁵⁴ See 7 AAC 100.426. Pursuant to Alaska Medicaid regulation 7 AAC 100.400(a), many APA regulations apply to Medicaid eligibility determinations for Working Disabled (and other) Medicaid eligibility categories. One of those is 7 AAC 40.170(c), which states in relevant part that "[a]n otherwise eligible applicant whose income exceeds SSI income standards but is within the income standards of this chapter, must be determined by the division of vocational rehabilitation of the Department of Labor and Workforce Development to meet the definition of disability contained in Title XVI of the Social Security Act, as amended (42 U.S.C. 1382c(a)(3))" (*i.e.* SSI disability criteria).

⁵⁵ See also AS 47.25.590(b) ("[t]he purpose of AS 47.25.430 - 47.25.615 is to furnish financial assistance as far as practicable to needy aged, blind, and disabled persons, and to help them attain self-support or self-care.")

⁵⁶ Alaska's statutory definition of "disabled" (above) is virtually identical to the SSA's definition of "disability" for purposes of its SSI program. Pursuant to 20 C.F.R. § 416.905(a), "disability" is defined as "the inability to do 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 12 months." The same basic definition of disability is found in the Division's *Alaska Adult Public Assistance Manual* at Sections 425-1 and 425-2 D.

(essentially the same as that contained in AS 47.25.615(5), quoted above) is the definition applied by the Social Security Administration (SSA) in determining eligibility for Supplemental Security Income (SSI). The SSA's regulations on disability determinations for SSI are found in Part 416 of Title 20 of the Code of Federal Regulations (C.F.R.).

C. *The Five-Step Disability Analysis Used for SSI, APA, and Working Disabled Medicaid Determinations*

The SSA uses a five-step evaluation process in making its disability determinations.⁵⁷ Each step is considered in order, and if the evaluation shows the applicant to be disabled at any step, it does not go on to consider subsequent steps.⁵⁸ As noted above, 7 AAC 100.400(a) and 7 AAC 40.170(c) incorporate the SSI criteria into Working Disabled Medicaid determinations.

The first step in the SSI disability determination process looks at the applicant's current work activity. If the applicant is performing "substantial gainful activity," the SSA will find that the applicant is not disabled.⁵⁹ This finding is made regardless of the applicant's medical condition, age, education, or work experience.⁶⁰

The second step in the analysis is to determine whether the applicant's impairment is "severe" as defined by the applicable Social Security regulations. A severe impairment is one that significantly limits a person's physical or mental ability to perform "basic work activities."⁶¹ Medical evidence, which consists of "signs, symptoms, and laboratory findings, not only [the applicant's] statement of symptoms," is required to establish an applicant's impairment.⁶² In order to be considered severe, the impairment or combination of impairments must also be expected to result in death, or must have lasted or be expected to last at least 12 months.⁶³ If the impairment is not severe under this definition, then the applicant is not disabled.

The third step of the disability analysis is to determine whether an applicant / recipient's impairments meet or equal the criteria for the particular impairments as listed in the SSA's regulations at 20 C.F.R. Part 404, Subpart P, Appendix 1 ("the Listings"). The applicant / recipient bears the burden of establishing that his or her impairment satisfies the requirements

⁵⁷ 20 C.F.R. § 416.920.

⁵⁸ 20 C.F.R. § 416.920(a)(4).

⁵⁹ 20 C.F.R. § 416.920(a)(4)(i). This first step is skipped or waived for purposes of Working Disabled Medicaid, since the whole purpose of the program is to provide services to keep otherwise disabled people working.

⁶⁰ 20 C.F.R. § 416.920(b).

⁶¹ 20 C.F.R. § 416.920(c); 20 CFR § 416.921(a).

⁶² 20 C.F.R. § 416.908.

⁶³ 20 C.F.R. § 416.920(a)(4)(ii); 20 CFR § 416.909.

of a “Listings” impairment.⁶⁴ To meet a Listing, an impairment must meet *all* of the Listing's specified criteria; an impairment that manifests only some of these criteria, no matter how severely, does not qualify.⁶⁵ If the applicant / recipient's impairments meet or medically equal the applicable criteria contained in the SSA’s “Listing of Impairments,” the applicant / recipient is considered disabled.⁶⁶

If the applicant / recipient is not determined to be disabled at step three, the SSA proceeds to step four and determines the applicant / recipient's ability to perform his or her past relevant work.⁶⁷ If the applicant / recipient is able to perform his or her past relevant work, the applicant / recipient is not disabled.

Finally, if the applicant / recipient is unable to perform his or her past relevant work, the SSA proceeds to step five and examines the applicant’s age, education, and work experience to determine whether the applicant can perform any other work in the national economy.⁶⁸ If the individual can perform no other work, he or she is considered disabled.

D. Step 1 - Substantial Gainful Activity

The first step of the SSI and APA disability analysis normally asks whether the applicant is performing “any substantial gainful activity” (SGA).⁶⁹ However, given that the purpose of the Working Disabled Medicaid program is to allow disabled persons to continue working, substantial gainful activity is disregarded in the Working Disabled Medicaid analysis.⁷⁰ Accordingly, Mr. Q satisfies Step 1 of the disability analysis.

E. Step 2(a) - Are Any of Mr. Q's Impairments Medically Severe?

In order to avoid being found to be *not disabled* at this stage, Mr. Q must prove that at least one of his impairments is medically severe. Pursuant to 20 C.F.R. § 416.920(c), a “severe impairment” is one that “significantly limits [a person’s] physical or mental ability to do basic work activities.” Regulation 20 C.F.R. § 416.921(b) defines “basic work activities:”

[B]asic work activities [mean] the abilities and aptitudes necessary to do most jobs. Examples . . . include - (1) physical functions such as walking, standing, sitting, lifting, pushing, pulling, reaching, carrying, or handling; (2) capacities

⁶⁴ *Tackett v. Apfel*, 180 F.3d 1094, 1098-1099 (9th Cir.1999); *Sullivan v. Zebley*, 493 U.S. 521, 530-531, 110 S.Ct. 885, 107 L.Ed.2d 967 (1990).

⁶⁵ *Sullivan, supra*, 493 U.S. at 530.

⁶⁶ 20 C.F.R. § 416.920(a)(4)(iii).

⁶⁷ 20 C.F.R. § 416.920(a)(4)(iv).

⁶⁸ 20 C.F.R. § 416.920(a)(4)(v).

⁶⁹ 20 C.F.R. § 416.972 defines “substantial gainful activity” as work that (a) involves doing significant and productive physical or mental duties, and (b) is done (or intended) for pay or profit.

⁷⁰ See DPA's *Aged, Disabled and Long Term Care Medicaid Eligibility Manual* at Section 534(D).

for seeing, hearing, and speaking; (3) understanding, carrying out, and remembering simple instructions; (4) use of judgment; (5) responding appropriately to supervision, co-workers and usual work situations; and (6) dealing with changes in a routine work setting.

The Division agreed at hearing that Mr. Q's hydrocephalus-related and back / musculoskeletal impairments are medically severe as defined by 20 C.F.R. § 416.920(c).⁷¹ Accordingly, Mr. Q satisfies the "step 2" severity requirement.

F. Step 2(b) - Do Mr. Q's Impairments Satisfy the Duration Requirement?

The SSA's durational regulation states in relevant part that, "[u]nless your impairment is expected to result in death, it must have lasted or must be expected to last for a continuous period of at least 12 months."⁷² The record indicates that Mr. Q's chronic low back pain, hip pain, migraine headaches, and seizures have existed since 2007 or before.⁷³ Further, the Division did not assert at hearing that Mr. Q's impairments fail to satisfy the 12 month durational requirement. Accordingly, Mr. Q satisfies the "step 2" durational requirement.

G. Step 3 - Do any of Mr. Q's Impairments Meet or Equal a "Listing?"

The next step in the analysis is to determine whether any of Mr. Q's impairments meet the criteria of any of the specific impairments listed in the SSA's regulations at 20 C.F.R. Part 404, Subpart P, Appendix 1 ("the Listings"). The applicant bears the burden of establishing that his or her impairment satisfies the requirements of a "Listings" impairment.⁷⁴ To meet a Listing, an impairment must meet *all* of the Listing's specified criteria; an impairment that manifests only some criteria, no matter how severely, does not qualify.⁷⁵

Mr. Q's impairments can be grouped into four basic categories: back pain, hip pain, seizures, and migraine headaches. The Social Security disability rating system classifies each of these four impairments under different Listings. Accordingly, each impairment must be analyzed separately.

⁷¹ Patty Trott hearing testimony.

⁷² 20 C.F.R. § 416.909.

⁷³ See discussion in Section II, above.

⁷⁴ *Tackett v. Apfel*, 180 F.3d 1094, 1098-1099 (9th Cir.1999); *Sullivan v. Zebley*, 493 U.S. 521, 530-531 (1990).

⁷⁵ *Sullivan, supra*, 493 U.S. at 530.

1. Mr. Q's Back Problems

The Social Security disability system classifies Mr. Q's chronic back pain / degenerative disk disease under the Musculoskeletal Listing at 20 C.F.R. Part 404, Subpart P, Appendix 1, § 1.04. This Listing, titled "Disorders of the Spine," provides in relevant part:⁷⁶

1.04 Disorders of the spine (e.g., herniated nucleus pulposus, spinal arachnoiditis, spinal stenosis, osteoarthritis, degenerative disc disease, facet arthritis, vertebral fracture), resulting in compromise of a nerve root (including the cauda equina) or the spinal cord. With:

A. Evidence of nerve root compression characterized by neuro-anatomic distribution of pain, limitation of motion of the spine, motor loss (atrophy with associated muscle weakness or muscle weakness) accompanied by sensory or reflex loss and, if there is involvement of the lower back, positive straight-leg raising test (sitting and supine); or

B. Spinal arachnoiditis, confirmed by an operative note or pathology report of tissue biopsy, or by appropriate medically acceptable imaging, manifested by severe burning or painful dysesthesia, resulting in the need for changes in position or posture more than once every 2 hours; or

C. Lumbar spinal stenosis resulting in pseudoclaudication, established by findings on appropriate medically acceptable imaging, manifested by chronic nonradicular pain and weakness, and resulting in inability to ambulate effectively, as defined in 1.00B2b.

As discussed in Section II, above, Mr. Q's history of back pain is substantial. However, there are no medical reports in the record indicating that his back problems satisfy the specific requirements of SSA Listing 1.04. Accordingly, Mr. Q cannot be found to be disabled based on his back problems.

2. Mr. Q's Joint Problems

The Social Security disability system classifies Mr. Q's hip and elbow joint pain / degenerative joint disease (DJD) under the Musculoskeletal Listing at 20 C.F.R. Part 404, Subpart P, Appendix 1, Section 1.02. Section 1.02 requires in relevant part as follows:

1.02 Major dysfunction of a joint(s) (due to any cause): Characterized 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 . . .

⁷⁶ Appendix 1, §1.04.

There is no medical evidence in the record indicating that Mr. Q's elbow and hip problems satisfy the specific criteria contained in Section 1.02. Accordingly, Mr. Q cannot be found to be disabled on the basis of his elbow and hip problems.

3. Mr. Q's Seizures

The Social Security disability system classifies Mr. Q's seizures under SSA Listing Section 11.02, which provides in relevant part as follows:

Epilepsy – convulsive epilepsy, (grand mal or psychomotor), documented by detailed description of the typical seizure pattern, including all associated phenomena; occurring more frequently than once a month in spite of at least 3 months of prescribed treatment. With (A) Daytime episodes (loss of consciousness and convulsive seizures) or (B) Nocturnal episodes manifesting residuals which interfere significantly with activity during the day.

The record indicates that, prior to 1999, Mr. Q's seizure disorder may have satisfied all or most of the criteria contained in Listing 11.02. However, in 2007 Mr. Q told his doctor that he had not had a seizure since 1999,⁷⁷ and the record contains no medical documentation of significant seizure activity in recent years. Mr. Q cannot satisfy the requirements of Listing 11.02 without medical documentation confirming that he is still currently having seizures more than once per month. Accordingly, Mr. Q cannot be found to be disabled on the basis of his seizures.

4. Mr. Q's Migraine Headaches

The Social Security Administration has not yet officially classified migraine headaches under a particular listing.⁷⁸ However, several federal district court cases indicate that SSA Listing Section 11.03, (set forth above in the seizure analysis), is an appropriate listing under which to analyze migraines. SSA Question and Answer (“Q & A”) document 09–036 is the SSA's current guidance for determining whether migraine headaches are a medically determinable impairment.⁷⁹ According to the SSA, Listing 11.03 is still the most analogous listing for considering medical equivalence of migraine headaches. The Q & A describes the essential components of Listing 11.03, as those components apply to migraine headaches, as a typical headache event pattern that is documented by detailed descriptions, including all associated phenomena (e.g., premonitory symptoms, aura, duration, intensity, treatment), that occurs more frequently than once weekly with alteration of awareness or an effect that significantly interferes with activity during the day (e.g.,

⁷⁷ Exs. 32.220, 32.221.

⁷⁸ This has been confirmed in several federal district court decisions, including *Miller v. Astrue*, 2011 WL 671752 (D. Ariz. 2011); *Tonsor v. Commissioner of Social Sec.*, 2011 WL 1231602 (C.D. Ill. 2011); *Watts v. Astrue*, 2012 WL 3150369 (C.D. Ill. 2012); and *Romonosky v. Colvin*, 2013 WL 4052921 (W.D. Pa. 2013).

⁷⁹ The SSA document is quoted in *Miller v. Astrue*, 2011 WL 671752 (D. Ariz. 2011).

need for a darkened quiet room, lying down without moving, or sleep disturbance that impacts daytime activities).

Although the record in this case clearly indicates that Mr. Q has migraine headaches, the medical evidence does not contain evidence that the severity of Mr. Q's symptoms are sufficient to satisfy the criteria of SSA document 09-036. Further, on January 13, 2014 Mr. Q reported to his doctor that he was having headaches only about once every other week.⁸⁰ Accordingly, even if there were evidence that Mr. Q's migraines are of the required severity, his migraines are not currently occurring often enough to satisfy the once-per-week frequency requirement. Accordingly, Mr. Q cannot currently be found to be disabled on the basis of his seizures.

5. Summary - None of the Impairments Satisfy "the Listings"

While Mr. Q's impairments are significant, they do not satisfy the specific criteria of any SSA "Listing." It is therefore necessary to proceed to the next step of the disability analysis.

H. Step 4 - Can Mr. Q Still Perform his Past Relevant Work?

The next step in the SSI / APA disability analysis is normally to determine whether an applicant or recipient's impairments prevent him from performing his or her past relevant work.⁸¹ In SSI and APA cases, if the applicant / recipient can still perform his or her previous relevant work, the applicant / recipient is not considered to be disabled.⁸²

Neither the Working Disabled Medicaid regulations nor the Division's *Aged, Disabled and Long Term Care Medicaid Eligibility Manual* expressly state that Step 4 of the SSI / APA disability analysis should be skipped when determining eligibility for Working Disabled Medicaid. However, given that the purpose of the Working Disabled Medicaid program is to allow disabled persons to continue working, it would be nonsensical to apply this step of the disability analysis to Working Disabled cases. Were this step applied, every current Working Disabled Medicaid recipient would lose eligibility, since by definition Working Disabled recipients are currently working. Accordingly, the Working Disabled Medicaid regulations must be interpreted as disregarding Step 4 of the SSI / APA disability analysis when making eligibility determinations for Working Disabled Medicaid. It is therefore necessary to proceed to the final step in the disability analysis and determine whether Mr. Q can be expected to perform work in the national economy.

⁸⁰ Ex. A.

⁸¹ "Past relevant work" is defined as "work that [the applicant has] done within the past 15 years, that was substantial gainful activity, and that lasted long enough for [the applicant] to learn to do it." 7 C.F.R. § 416.960(b)(1).

⁸² 20 C.F.R. § 416.920(a)(4)(iv); 20 C.F.R. § 416.960(b)(2-3).

I. Step 5 - Can Mr. Q Work According to SSI Criteria?

The fifth and final step in the SSI / APA disability analysis asks whether the applicant is reasonably capable of performing work in the national economy.⁸³ In order to determine this, it is typically necessary to (1) determine whether the applicant retains a particular exertional capacity; (2) determine whether the applicant has acquired transferable skills; (3) identify specific jobs that the applicant can perform with the restrictions he or she has been found to have; and (4) verify that the jobs the applicant can do exist in significant numbers in the regional or national economies.⁸⁴ At this stage the burden of proof shifts from the applicant or recipient to the agency.⁸⁵ The ALJ cannot provide vocational evidence.⁸⁶

The preferred method for an agency to carry its burden at step five is through the testimony of a vocational expert.⁸⁷ However, in many cases, a decision on whether an applicant is disabled can be made, even in the absence of expert vocational testimony, by using the Social Security Administration's Medical-Vocational Guidelines (located at 20 C.F.R., Part 404, Subpart P, Appendix 2). These guidelines, known as "the Grids," are fact-based generalizations about the availability of jobs for people of varying ages, educational backgrounds, and previous work experience, with differing degrees of exertional impairment.⁸⁸ The Grids "are used to evaluate the applicant's age, education, past work experience, and RFC [residual functional capacity] in order to determine whether that applicant is disabled."⁸⁹

The first variable which must be determined in order to properly apply the Grids is to determine whether the applicant is able to perform sustained work which is "very heavy," or, alternatively, "heavy," "medium," "light," or "sedentary."⁹⁰ Mr. Q's Physical Residual Functional Capacity assessments found that Mr. Q is limited to light or sedentary work.⁹¹

⁸³ 20 C.F.R. § 416.920(a)(4)(v) and 20 C.F.R. § 416.960(c),

⁸⁴ *Haddock v. Apfel*, 196 F.3d 1084 (10th Cir. 1999).

⁸⁵ See 20 C.F.R. § 416.960(c)(2); see also *Bowen v. Yuckert*, 482 U.S. 137, 144 (1987); *Smolen v. Chater*, 80 F.3d 1273, 1289 (9th Cir.1996); *Tacket v. Apfel*, 180 F.3d 1094, 1099 (9th Cir. 1999); *Bustamante v. Massanari*, 262 F.3d 949, 953-954 (9th Cir.2001); *Valentine v. Commissioner of SSA*, 574 F.3d 685, 689 (9th Cir. 2009).

⁸⁶ *Wilson v. Califano*, 617 F.2d 1050, 1053-1054 (4th Cir. 1980).

⁸⁷ *Lopez v. Califano*, 481 F.Supp. 392 (D.C. Cal. 1979).

⁸⁸ *Holley v. Massanari*, 253 F.3d 1088, 1093 (8th Cir. 2001).

⁸⁹ *Poole v. Astrue*, 2010 WL 2231873 (W. D. Ark. 2010).

⁹⁰ See "the Grids" at Tables 1, 2, and 3.

⁹¹ See discussion in Section II(C), above. 20 C.F.R. 416.967(b) defines "light work" as follows:

Light work involves lifting no more than 20 pounds at a time with frequent lifting or carrying of objects weighing up to 10 pounds. Even though the weight lifted may be very little, a job is in this category when it requires a good deal of walking or standing, or when it involves sitting most of the time with some pushing and pulling of arm or leg controls. To be considered capable of performing a full or wide range of light work, you

The Grids' rules, applicable to persons whose maximum exertional capacity is limited to light work, are found in Table 3 of the Grids. In this case, Mr. Q is 28 years old. He is literate and able to communicate in English, although he cannot write very well. He has a twelfth grade education, and has attended trade / vocational school or college. Based on these facts, Rules 202.20 through 202.22 of “the Grids” all dictate a finding that Mr. Q is *not* disabled according to SSA criteria.

It is well established, however, that “the Grids” cannot be strictly applied if the applicant has a significant non-exertional impairment.⁹² Non-exertional impairments include mental impairments, sensory impairments, and impairments involving environmental limitations.⁹³

In this case, the record indicates that Mr. Q has several non-exertional impairments. First, Mr. Q suffers from migraine headaches.⁹⁴ Second, Mr. Q has a learning disability.⁹⁵ Third, Mr. Q has environmental limitations as to exposure to cold, wetness, humidity, vibration, machinery, and heights.⁹⁶ Accordingly, the Division erred when it relied on the Grids in making its disability determination in this case.

Where (as here) an applicant or recipient cannot perform the full range of work in a particular category due to non-exertional impairments, an agency must introduce testimony from a

must have the ability to do substantially all of these activities. If someone can do light work, we determine that he or she can also do sedentary work, unless there are additional limiting factors such as loss of fine dexterity or inability to sit for long periods of time.

20 C.F.R. 416.967(a) defines "sedentary work" as follows:

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

⁹² 20 C.F.R. 416.969a(d); *see also Cole v. Secretary of Health and Human Services*, 820 F.2d 768, 771 (6th Cir. 1987), *Payan v. Chater*, 959 F. Supp. 1197 (C.D. Cal. 1996). Under the Social Security regulations, a person's limitations are classified as exertional or non-exertional (20 C.F.R. 416.969a(a)). Exertional limitations are limitations on a person's ability to walk, sit, stand, etc. *Id.* Non-exertional limitations are limitations on a person's ability to maintain attention, concentrate, remember, etc. (20 C.F.R. 416.969a(c)).

⁹³ *See Cole, supra*, 820 F.2d at 772; *see also Johnson v. Secretary*, 872 F.2d 810, 814 (8th Cir. 1989) (headaches are a non-exertional impairment); *Gray v. Apfel*, 192 F.3d 799, 802 (8th Cir. 1999) (pain, mental incapacity are non-exertional impairments); *Van Winkle v. Barnhart*, 55 Fed. Appendix 784 (8th Cir. 2003).

⁹⁴ Migraines are a non-exertional impairment. *See Foote v. Chater*, 67 F.3d 1553, 1559 (11th Cir. 1995); *May v. Commissioner of Social Security Admin.*, 226 Fed. Appx. 955, 960 (11th Cir. 2007); *McKinzey v. Astrue*, 641 F.3d 884, 889 (7th Cir. III. 2011).

⁹⁵ Learning disabilities are non-exertional impairments. *See Lucy v. Chater*, 113 F.3d 905, 908 (8th Cir. 1997); *Foreman v. Callahan*, 122 F.3d 24 (8th Cir. 1997).

⁹⁶ Ex. 32.22. Environmental limitations are non-exertional impairments. *See* 20 C.F.R. Pt. 404, Subpt. P, App. 2 § 200.00(e); 20 C.F.R. § 416.969a(c); *Cole v. Secretary of Health and Human Services*, 820 F.2d 768, 772 (6th Cir. 1987); *Desrosiers v. Secretary of Health & Human Services*, 846 F.2d 573, 579 (9th Cir. 1988); *Abbot v. Sullivan*, 905 F.2d 918, 926 (6th Cir. 1990); *Penny v. Sullivan*, 2 F.3d 953, 958 (9th Cir. 1993); *Carreon v. Massanari*, 51 Fed. Appx. 571, 575–76 (6th Cir. 2002).

vocational expert as to the availability of jobs that a person with the applicant's profile could perform.⁹⁷ The Division did not do so in this case. Mr. Q is therefore deemed disabled based on the SSA's regulations and case law which are incorporated into Alaska's Medicaid Working Disabled program.

IV. Conclusion

Mr. Q has medically severe impairments which have lasted for a continuous period of at least 12 months. Mr. Q's impairments do not satisfy the specific criteria of any of SSA's applicable listings. However, the preponderance of the evidence indicates that Mr. Q cannot perform the full range of sedentary work, and the Division did not introduce evidence of particular jobs, existing in the national economy, which Mr. Q can perform. The Division's decision terminating Mr. Q's Working Disabled Medicaid benefits is therefore reversed.

DATED this 11th day of March, 2014.

Signed _____
Jay Durych
Administrative Law Judge

Adoption

The undersigned, by delegation from of the Commissioner of Health and Social Services, adopts this Decision, under the authority of AS 44.64.060(e)(1), as the final administrative determination in this matter.

Judicial review of this decision may be obtained by filing an appeal in the Alaska Superior Court in accordance with Alaska R. App. P. 602(a)(2) within 30 days after the date of this decision.

DATED this 14th day of April, 2014.

By: *Signed* _____
Name: Ree Sailors
Title: Deputy Commissioner, DHSS

[This document has been modified to conform to the technical standards for publication.]

⁹⁷ See, for example, *Trent v. Secretary of Health and Human Services*, 788 F.Supp. 939 (E.D. Ky. 1992); *Gathright v. Shalala*, 872 F.Supp. 893 (1993); *Banks v. Apfel*, 144 F.Supp. 2d 752 (2001); *Johnson v. Barnhart*, 378 F.Supp.2d. 274 (2005); *Baker v. Barnhart*, 457 F.3d 882, 888, 894-895 (8th Cir. 2006).