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**STATE OF ALASKA  
DEPARTMENT OF HEALTH AND SOCIAL SERVICES  
OFFICE OF HEARINGS AND APPEALS**

In the Matter of	)	
	)	
██████████,	)	OHA Case No. 08-FH-0003
	)	
Claimant.	)	Division Case No. ██████████
_____	)	

**FAIR HEARING DECISION**

**STATEMENT OF THE CASE**

██████████ (Claimant) applied for Interim Assistance on December 6, 2007. (Ex. 1) The Division of Public Assistance (Division) denied his application for Interim Assistance on January 2, 2008. (Ex. 2. 1) The Claimant requested a fair hearing contesting the denial on January 4, 2008. (Ex. 3) This office has jurisdiction pursuant to 7 AAC 49.010.

Pursuant to Claimant's request, a hearing began on January 31, 2008 in front of Hearing Officer Elizabeth Vazquez. The Claimant attended the January 31, 2008 hearing telephonically and represented himself. ██████████, Public Assistance Analyst with the Division, attended the January 31, 2008 hearing in person to represent the Division. The January 31, 2008 hearing was continued at the Claimant's request. No testimony or evidence was taken at the January 31, 2008 portion of the hearing.

This case was then reassigned to Hearing Officer Larry Pederson. The hearing reconvened on April 29, 2008 in front of Hearing Officer Larry Pederson. The Claimant attended the April 29, 2008 hearing telephonically and represented himself. ██████████, Public Assistance Analyst with the Division, attended the April 29, 2008 hearing in person to represent the Division. ██████████, a registered nurse with the Division, attended the April 29, 2008 hearing telephonically and testified on behalf of the Division. The record was left open until May 21, 2008 to allow the Claimant to submit additional medical information (Ex. C), and for the Division to submit its written response. (Ex. D)

## ISSUE

Was the Division correct to deny the Claimant's December 6, 2007 request for Interim Assistance benefits because the medical evidence allegedly did not support his disability claim?

## FINDINGS OF FACT

1. The Claimant is currently [REDACTED] years old (birthdate [REDACTED]). (Ex. 1) He is a high school graduate.
2. The Claimant served in the U.S. Army from [REDACTED]. (Ex. 2.9) His work experience since that time primarily consisted of restaurant management. His most recent employment was telephone sales in 2006. He has not worked since he moved to Alaska in February 2007.
3. On July 23, 2007, the U.S. Department of Veterans Affairs (VA) found the Claimant was 10 percent disabled, effective September 29, 2006, due to arthralgias<sup>1</sup> in the right knee. (Ex. 2.9)
4. The Claimant injured his back in early 2007. He testified he experiences pain in his lower back and legs and numbness in his feet. He stated the injury affects his daily activities as follows:
  - a. He spends most of the day in bed. He cannot sit for more than five minutes.
  - b. He has difficulty walking. He wears a knee brace. He uses one cane, but he needs to use two canes when he walks for a small distance. He is not able to go grocery shopping, because he cannot walk up and down the grocery aisles, even using two canes.
  - c. He can only stand for short periods of time. He cannot take a shower because he cannot stand long enough to take a shower. He cannot stand long enough to perform household chores such as washing dishes: he can wash three plates and then he has to lie down.
  - d. He cannot bend to put on socks or shoes. His roommate puts his socks on for him. He wears slip on shoes, so that he can put his shoes on himself.
  - e. The Claimant is limited to lifting five pounds or less. He said his doctor told him he should not lift anything "heavier than a gallon of milk."
5. The Claimant receives medical treatment from the Veteran's Administration (VA). The VA did not supply a copy of his actual medical records. Instead, the VA provided a computer summary, printed on February 4, 2008, of his medical records from the Kenai VA clinic for the time period from March 30, 2007 through January 11, 2008. (Ex. A) That computer summary shows the following:

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<sup>1</sup> Arthralgia is defined as "[s]evere pain in a joint." *The American Heritage Steadman's Medical Dictionary* 65 (Houghton Mifflin 2002)

a. The Claimant visited the VA clinic on March 30, 2007, complaining of “INCREASING PAIN IN HIS LOW BACK AND CHRONIC PAIN IN BOTH KNEES.” (Ex. A, p. 53)

b. The Claimant had a “COMPENSATION AND PENSION EXAMINATION” with a VA doctor on April 14, 2007. That examination found the Claimant frequently required a brace for walking, that he was able to stand from three to eight hours with short rest periods, and that he could walk for more than one-quarter of a mile, but less than three miles. (Ex. A, pp. 46 – 51) The exam was limited to the Claimant’s right knee arthralgia and did not discuss his lower back injury. (Ex. A, p. 51)

c. The Claimant visited the VA clinic on June 8, 2007, complaining of worsening back pain, specifically “pain in left hip radiating down left anterior thigh to behind the knee. Rarely gets to ankle and foot.” (Ex. A, pp. 41 – 42) He underwent an examination where he was diagnosed with lower back pain, and found to have “pain on palpation of L-spine and left sciatic nerve,” limited back flexion, and limited rotation to the right, while his rotation to the left was normal. He also had a positive straight left raise on the left. He was ordered to have a CT scan. (Ex. A, p. 42) The VA records show a CT scan was performed on about June 13, 2007. (Ex. C) The CT scan shows herniated disks with moderate to prominent canal stenosis on L4-5, and mild canal stenosis and posterior disk bulge at L3-4, and possible nerve root impingement on L4-5, and L5 – S1. *Id.*

d. The June 26, 2007 VA computer summary notes state the Claimant has “[l]ow back pain related to L-spine disc extrusion with nerve impingement – ct of l-spine confirms nerve impingement.” (Ex. A, p. 37) A physical exam of the Claimant on June 26, 2007 found him positive for straight leg raise on the left. *Id.*

e. On September 12, 2007, the Claimant had a physical exam. The exam noted a limited range of motion, sciatic nerve tenderness on the right side, and “[r]adiating pain and numbness right leg to foot.” (Ex. A, p. 25) He walked with a limp on the left and did not use an assistive device. *Id.* The Claimant was positive for a straight leg raise on the left on September 12, 2007. (Ex. A, p. 25) The Claimant’s physical exam notes for October 12, 2007 are identical to those of September 12, 2007, including a positive straight leg raise on the left. (Ex. A, p. 21) However, the October 12, 2007 examination notes recommend the Claimant use an “adjustable cane.” *Id.*

f. On December 3, 2007, the Claimant called the VA Clinic complaining of his back pain. In that phone call, he stated he could not stand for more than five minutes, was not able to sit for very long, and complained of numbness, tingling, and severe pain in his left leg. (Ex. A, p. 18) No appointment was scheduled. The Claimant’s primary care physician recommended the Claimant rest in bed. *Id.*

g. An electromyogram (EMG) was performed on the Claimant on or about November 30, 2007. The EMG itself is not part of the record. There is a note in the VA computer summary, dated January 3, 2008, stating “PT has been discharged from Physical therapy, EMG shows no lower extremity radiculopathy.” (Ex.A, p. 14)

6. On June 26, 2007, [REDACTED], a nurse practitioner with the VA Clinic, wrote a letter stating that the Claimant “has a disc herniation in his lower back. He is unable to work until this acute problem has been resolved.” (Ex. 2.7)

7. On December 17, 2007, Ms. [REDACTED] NP, and Dr. [REDACTED], MD, both from the VA Clinic, signed a Preliminary Examination for Interim Assistance form stating the Claimant had the following medical condition: “[s]pinal cord injury producing inability to ambulate without the use of a walker or crutches for more than two weeks.” (Ex. 2.4)

8. Ms. [REDACTED] is a registered nurse employed by the Division, who reviews medical information for state Interim Assistance determinations. Ms. [REDACTED] testified about the Claimant’s various health conditions. Ms. [REDACTED] opined the Claimant was not disabled. She stated the Preliminary Examination form was not filled out properly, because the area of “spinal cord injury” was for damage to the spinal cord itself, i.e. paralysis, and not disk herniation. She also stated, referencing the VA medical summary, that the Claimant could walk for at least a quarter mile. (Ex. A, pp. 3 –5) Ms. Grower stated the medical records showed only the Claimant’s gait was impaired, and he did not require two assistive devices to ambulate. She concluded the Claimant was not disabled because he could perform sedentary work.

### **PRINCIPLES OF LAW**

This case involves an application for Interim Assistance benefits. When an application is denied, the applicant has the burden of proof<sup>2</sup> by a preponderance of the evidence.<sup>3</sup>

Interim Assistance is a benefit provided by the State of Alaska to Adult Public Assistance applicants while they are waiting for the Social Security Administration to approve the Supplemental Security Income application. 7 AAC 40.170(a) and (b); AS 47.25.255.

In order to qualify for Interim Assistance, the applicant must satisfy the Social Security Supplemental Security Income disability requirements as set forth in the Social Security regulations. 7 AAC 40.180(b)(1). The applicant must either fall within the Social Security Administration’s presumptive disability criteria or meet the disability criteria for impairments listed in the Social Security regulations. 7 AAC 40.180(b)(1).

The Social Security regulations presume an applicant is disabled if he or she experiences any of the following:

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<sup>2</sup> “Ordinarily the party seeking a change in the status quo has the burden of proof.” *State, Alcohol Beverage Control Board v. Decker*, 700 P.2d 483, 485 (Alaska 1985)

<sup>3</sup> Preponderance of the evidence is defined as follows:

Evidence which is of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not.

Black’s Law Dictionary 1064 (5<sup>th</sup> Ed. 1979)

- (a) Amputation of a leg at the hip;
- (b) Allegation of total deafness;
- (c) Allegation of total blindness;
- (d) Allegation of bed confinement or immobility without a wheelchair, walker, or crutches, due to a longstanding condition, excluding recent accident and recent surgery;
- (e) Allegation of a stroke (cerebral vascular accident) more than 3 months in the past and continued marked difficulty in walking or using a hand or arm;
- (f) Allegation of cerebral palsy, muscular dystrophy or muscle atrophy and marked difficulty in walking (e.g., use of braces), speaking, or coordination of the hands or arms.
- (g) Allegation of Down syndrome.
- (h) Allegation of severe mental deficiency made by another individual filing on behalf of a claimant who is at least 7 years of age. For example, a mother filing for benefits for her child states that the child attends (or attended) a special school, or special classes in school, because of mental deficiency or is unable to attend any type of school (or if beyond school age, was unable to attend), and requires care and supervision of routine daily activities.
- (i) Allegation of amyotrophic lateral sclerosis (ALS, Lou Gehrig's disease).

20 CFR 416.934.

The Social Security regulations governing whether or not an applicant meets the disability criteria for impairments listed in the Social Security regulations set out a very specific multistep process (“sequential evaluation”) that must be followed in order to determine whether someone is disabled:

1. Is the applicant performing substantial gainful employment as defined by the applicable Social Security regulations? If so, the applicant is not disabled. 20 CFR 416.920(a)(4)(i). If the applicant is not performing substantial gainful employment, then the applicant must satisfy the next question.
2. Is the applicant's impairment severe? A severe impairment is one that “significantly limits [a person's] physical or mental ability to do basic work activities.” 20 CFR 416.920(c). Medical evidence is required to establish an applicant's impairment. 20 CFR 416.908. If an applicant has multiple impairments, the combined effect of all the impairments must be considered in determining whether an applicant is severely impaired. 20 CFR 416.923. If the impairment is not severe, the applicant is not disabled. 20 CFR 416.920(a)(4)(ii). If an applicant is severely impaired, then the applicant must satisfy the next question.
3. Has the applicant's severe impairment lasted for a continuous period of at least 12 months, or can it be expected to last for a continuous period of at least twelve months? 20 CFR 416.909. If the severe impairment does not satisfy this duration requirement, the applicant is not disabled. 20 CFR 416.920(a)(4)(ii). If the severe impairment satisfies this duration requirement, the applicant must satisfy the next question.
4. Does the applicant's severe impairment meet or medically equal the listing of impairments contained in the Social Security regulations located at 20 CFR Pt. 404, Subpt. P, App. 1? If it does, the

applicant is disabled and no further inquiry is required. 20 CFR 416.920(a)(4)(iii). If the severe impairment does not meet or medically equal the listing of impairments, then the applicant must satisfy the next question.

5. Does the applicant's severe impairment prevent him from doing his previous relevant work? This involves an evaluation of the applicant's residual functional capacity. If the applicant is not prevented from performing his previous relevant work, the applicant is not disabled. 20 CFR 416.920(a)(4)(iv). Otherwise, the applicant must satisfy the next question.

6. Is the applicant capable of performing other work? Answering this question requires the application of the Social Security medical vocational guidelines that include the evaluation of the applicant's residual functional capacity, age, education, English literacy, and previous work experience. If the applicant is not capable of performing other work, he is disabled. 20 CFR 416.920(a)(4)(v). If the applicant experiences more than one impairment, all of them must be taken into account in assessing the applicant's residual functional capacity. 20 CFR 416.945(a)(2) and (e).

Where there is a combination of exertional (physical strength) and non-exertional (non-physical such as pain, flexibility, and mental) factors that limit or restrict an applicant's ability to work, the assessment must take both the exertional and non-exertional limitations or restrictions into account. 20 CFR 416.969a(d). When a person has both exertional and non-exertional limitations or restrictions that limit his ability to work, it is not necessary to strictly follow the Medical Vocational Guidelines located at 20 CFR Pt. 404, Subpt. P, App. 2. 20 CFR 416.969a(d). Those Guidelines do not mandate a result when a person experiences both exertional and non-exertional limitations or restrictions, but merely provide a framework for a decision. *Id.*

### **ANALYSIS**

It is necessary to review the evidence in this case and decide whether or not the Claimant is disabled for the purposes of the Interim Assistance program. In other words, the initial question is whether or not the Claimant is presumptively disabled. If the Claimant is not presumptively disabled, then it is necessary to use the Social Security sequential evaluation analysis to decide if the Claimant's impairments satisfy the Social Security disability criteria. If they do, the Claimant is disabled by Social Security standards and eligible for Interim Assistance benefits. If they do not, the Claimant is not disabled by Social Security standards and not eligible for Interim Assistance benefits.

#### **A. Presumptive Disability**

The Alaska regulation provides for Interim Assistance eligibility for applicants who are presumptively disabled as listed in the federal regulation, 20 CFR 416.934. 7 AAC 40.180(b)(1)(A). The evidence in this case shows the Claimant is potentially eligible for disability under one of the federal presumptive categories: "bed confinement or immobility without a wheelchair, walker, or crutches, due to a longstanding condition, excluding recent accident and recent surgery." 20 CFR 416.934(d). The Claimant's physician did not mark this box on the December 17, 2007 Preliminary Examination for Interim Assistance form. Instead, the Claimant's physician marked the box indicating "[s]pinal cord

injury producing inability to ambulate without the use of a walker or crutches for more than two weeks.” (Ex. 2.4)

Ms. ██████ testified that a “spinal cord injury” referred to a spinal cord injury itself and not to disk herniation. There is absolutely no medical evidence in the record that the Claimant has a spinal cord injury. There is medical evidence of disk herniation. Given Ms. ██████’s testimony, as a nursing professional, that the Claimant does not have a spinal cord injury, there was no medical basis for marking the Preliminary Examination form as the Claimant having a spinal cord injury.

What is more likely is that the Claimant’s doctor marked the wrong box, having meant to mark the box on the Preliminary Examination form that provides for the presumptive disability category of “[b]ed confinement or immobility without a wheelchair, walker, or crutches.” (Ex. 2.4) However, that is mere speculation. Given the fact the Claimant’s physician marked the spinal cord injury presumptive disability section of the Preliminary Examination form, and given that there is a complete lack of medical evidence showing the Claimant has a spinal cord injury, he has not established Interim Assistance eligibility based upon a presumptive disability category. It is therefore necessary to go through the sequential evaluation process.

B. Sequential Evaluation

1. Employment

The Claimant has been unemployed since December 2006. He therefore satisfies the first step in the Social Security Disability analysis.

2. Severe Impairment

Deciding whether or not an individual is severely impaired is the first step in the disability analysis process. The Division did not specifically address this issue in its testimony or argument. However, Ms. ██████ did indicate the Claimant had problems with his gait and that his ability to walk was limited. This satisfies the definition of a severe impairment because it “significantly limits [a person’s] physical or mental ability to do basic work activities.” 20 CFR 416.920(c).

3. Duration

The next step is to decide whether or not the Claimant’s severe impairment has lasted or can be expected to last for a continuous period of at least 12 months. The undisputed medical evidence shows the Claimant’s back problems began in the spring of 2007. The medical evidence shows that the Claimant’s severe impairments have lasted for longer than one year, and satisfy the durational requirement.

#### 4. Meeting or Equaling the Social Security Medical Listings

The next step is to decide whether or not the Claimant's severe impairments meet or medically equal the listing of impairments contained in the Social Security regulations located at 20 CFR Pt. 404, Subpt. P, App. 1. The Claimant has medically documented damage to his knee and herniated disks.

Knee damage and herniated disks are classified as impairments of the musculoskeletal system. 20 CFR Pt. 404, Subpt. P, App. 1, §1.00. Specifically, the Claimant's herniated disks fall under Disorders of the Spine, being a herniated nucleus pulposus with "evidence of nerve root compression characterized by neuron-anatomic distribution of pain, limitation of motion of the spine . . . and if there is involvement of the lower back, positive straight-leg raising test." 20 CFR Pt. 404, Subpt. P, App. 1, §1.04(A). The Claimant's knee damage is a major dysfunction of a joint, although it does not meet the criteria of resulting in an "inability to ambulate effectively." 20 CFR Pt. 404, Subpt. P, App. 1, §1.02(A). In order for the Claimant to meet or medically equal the criteria set out in the musculoskeletal listing, he must have "an extreme limitation of the ability to walk" or "an extreme loss of function of both upper extremities." 20 CFR Pt 404, Subpart P, Appendix 1, §§ 1.00(B)(2)(b)(1) and 1.00(B)(2)(c).

None of the evidence presented shows any limitations with regard to the Claimant's arms, shoulders, or hands. The evidence, however, does show evidence of a limited ability to walk. An "extreme limitation of the ability to walk" includes the "inability to walk without the use of a walker, two crutches, or two canes" and "the inability to carry out routine ambulatory activities, such as shopping and banking." 20 CFR Subpt. P, App.1, § 1.00(B)(2)(b).

There was contrasting evidence presented on the issue of whether the Claimant's ability to walk was limited. Ms. ██████ testified the Claimant could walk a quarter of a mile. Her testimony was based upon a VA Clinic examination that was conducted on April 14, 2007. (Ex. A, pp. 46 – 51) The Claimant, on the other hand, testified he required two canes to walk and that he was unable to shop for groceries, because he could not walk up and down the aisles

The medical records show the Claimant first came into the VA Clinic complaining of back pain on March 30, 2007, and then again went back into the VA Clinic complaining of worsening back pain on June 8, 2007. Then, on June 26, 2007, Laurie Stevenson, a nurse practitioner with the VA Clinic, wrote a letter stating that the Claimant "has a disc herniation in his lower back. He is unable to work until this acute problem has been resolved." (Ex. 2.7)

In other words, the medical records show a deterioration of the Claimant's condition after his April 14, 2007 exam. Because of the documented deterioration in the Claimant's condition, the Division could not rely on the results of the April 14, 2007 exam to conclude the Claimant was able to walk a quarter mile.

The medical evidence in his case shows the Claimant has a knee brace, and that as of October 12, 2007, his physician recommended that he use an adjustable cane. (Ex. A, p. 21) The VA Clinic records for this Claimant were quite limited. However, the Claimant's testimony was consistent with the limited medical records. His records do establish that he has herniated disks and a bad knee. He,



per the medical records, required both a knee brace and one cane. His testimony he now requires two canes for walking is credible. It should also be noted that as of December 2007, his physician recommended he stay in bed as much as possible. (Ex. A, p. 18). In addition, the Claimant was physically examined at the VA Clinic on September 12 and October 12, 2007. Both of those exams found a limited range of motion, sciatic nerve tenderness on the right side, radiating pain to numbness on the right leg down to the right foot, and a positive leg raise test. *See* Finding of Fact 5(e) above. There is some contrasting medical evidence being an EMG that purportedly shows no radiculopathy, however the actual EMG report is not contained in the record. The notes, albeit limited, of the actual physical examinations of the Claimant have more weight than the cursory reference to an EMG.

The Claimant's credible testimony is consistent with the medical records in this case. He had a preexisting knee injury that required a knee brace. He then developed a back injury that became progressively worse in the summer and fall of 2007, which makes him unable to perform tasks such as grocery shopping, and that he cannot walk without his knee brace and the assistance of two canes. This satisfies the regulatory requirement that he have an "an extreme limitation of the ability to walk." As a result, the Claimant meets or equals the medical listing for an impairment of the musculoskeletal system and is disabled according to the Social Security disability regulations.

### **CONCLUSIONS OF LAW**

1. The Claimant's herniated disks do not qualify him as presumptively disabled according to the Social Security disability evaluation process.
2. The herniated disks have lasted or can be expected to last for 12 months or longer. They, along with his right knee injury, qualify him as severely impaired according to the Social Security disability regulations.
2. Those conditions meet or medically equal the Social Security listings of impairments because they extremely limit the Claimant's ability to walk.
3. The Division was therefore not correct when it denied the Claimant's December 6, 2007 request for Interim Assistance benefits.

### **DECISION**

The Division was not correct when it denied the Claimant's December 6, 2007 application for Interim Assistance benefits.

### **APPEAL RIGHTS**

If for any reason the Claimant is not satisfied with this decision, the Claimant has the right to appeal by requesting a review by the Director. To do this, the Claimant must send a written request directly to:

Director of the Division of Public Assistance  
Department of Health and Social Services  
PO Box 110640  
Juneau, AK 99811-0640

An appeal request must be sent within 15 days from the date of receipt of this decision. Filing an appeal with the Director could result in the reversal of this decision.

DATED this 23rd day of July, 2008.

Larry Pederson  
Hearing Authority

CERTIFICATE OF SERVICE

I certify that on this 23rd day of July, 2008, true and correct copies of the foregoing were sent to:

Claimant – Certified Mail, Return Receipt Requested.

 Director  
 Policy & Program Development  
 Staff Development & Training  
 Fair Hearing Representative

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Al Levitre  
Law Office Assistant I