

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

In the Matter of)	OAH No.	12-0456-APA
Q X)	Agency No.	
_____)		

DECISION

I. Introduction

Q X applied for Adult Public Assistance benefits and Interim Assistance (IA). The Division of Public Assistance (division) denied her IA benefits based on a finding that Ms. X was not likely to be found disabled by the Social Security Administration (SSA).¹ Ms. X requested a hearing to contest that decision.

A hearing was held on October 12, 2012. Ms. X appeared by telephone and testified on her own behalf. Ms. Terri Gagne appeared by telephone on behalf of the division. Based on the evidence presented, the division's determination is reversed.

II. Facts

Ms. X's physician indicated that Ms. X has seizures from which she will not recover and a pseudo tumor from which she may recover.² Dr. Troxel goes on to say

She has a long history of seizures – reports continued seizures up to 3 times per week. She cannot drive until seizure free X 6 [months] and should not work from heights or operate heavy machinery.^[3]

She has also been instructed not to bath or swim alone.⁴

III. Discussion

A. *Interim Assistance Eligibility*

Interim Assistance is a benefit available to individuals while they are waiting for the SSA to approve an application for Supplemental Security Income.⁵ Among other requirements, to receive Interim Assistance an applicant must be "likely to be found

¹ The application for Adult Public Assistance was held pending a decision by SSA on whether Ms. X met the SSA disability criteria. These benefits may only be paid after that finding is made.

² Exhibit 2.28.

³ *Id.*

⁴ Exhibit 2.51.

⁵ 7 AAC 40.170(b); 7 AAC 40.375.

disabled by the Social Security Administration.”⁶ Ms. X has the burden of proof on this issue.⁷

The SSA uses a five-step evaluation process in making its disability determinations.⁸ For Alaska’s interim assistance determinations, however, only the first three of these steps are considered.⁹

Under the SSA evaluation process, each step is considered in order, and if the SSA finds the applicant either disabled or not disabled at any step, it does not consider subsequent steps.¹⁰ The first step in this 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.¹¹ This finding is made regardless of the applicants’ medical condition, age, education, or work experience.¹²

At step two, the SSA considers the severity of the applicant’s impairment. In order to be considered disabled, the impairment or combination of impairments must be severe, and must be expected to result in death or must have lasted or be expected to last at least 12 months.¹³ If the impairment is not severe under this definition, then the applicant is not disabled.

At step three, the SSA looks at whether the impairment meets or equals the Listing of Impairments adopted by the SSA.¹⁴ If it does, the applicant is disabled.¹⁵

There is no dispute that Ms. X is not currently performing substantial gainful activity.¹⁶ It is also not disputed that she has a severe impairment that meets the durational

⁶ 7 AAC 40.180(b)(1).

⁷ 2 AAC 64.290(e).

⁸ 20 CFR §416.920. This process is describe in detail in OHA Case No 11-FH-134 (Dept. of Health and Social Services 2011), pages 14 – 17; <http://aws.state.ak.us/officeofadminhearings/Documents/HSS/11-FH-134.pdf>.

⁹ See *In re M.H.*, OAH No. 12-0688-APA (Comm’nr Health & Social Services August 20, 2012); <http://aws.state.ak.us/officeofadminhearings/Documents/APA/APA120668.pdf>

¹⁰ 20 CFR §416.920(a)(4).

¹¹ 20 CFR §416.920(a)(4)(i).

¹² 20 CFR §416.920(b).

¹³ 20 CFR § 416.920(a)(4)(ii); 20 CFR §416.909.

¹⁴ See 20 CFR § 404, Subpart P, Appendix 1. The division looks to the version of the listing that was in effect on April 1, 2005. 7 AAC 40.180(b)(1)(B).

¹⁵ 20 CFR § 416.920(a)(4)(iii).

¹⁶ She testified that she has not been able to work for several years.

requirement.¹⁷ Thus, to be eligible for APA benefits, Ms. X must show she is likely to be found by SSA to meet the applicable listing in effect in April of 2005.¹⁸

B. Requirements for Meeting Listing of Impairments for Seizures

Section 11 of the listings covers neurological disorders including seizures.¹⁹ In determining whether a person's seizures are sufficient to be considered disabling under the listings, the

degree of impairment will be determined according to type, frequency, duration, and sequelae of seizures. At least one detailed description of a typical seizure is required. Such description includes the presence or absence of aura, tongue bites, sphincter control, injuries associated with the attack, and postictal phenomena. . . . Testimony of persons other than the claimant is essential for description of type and frequency of seizures if professional observation is not available.^[20]

To establish disability for convulsive epilepsy, there must be a detailed description of the typical seizure pattern, and the seizures must be occurring more than once a month despite three months of treatment.²¹ In addition, these seizures must include either daytime episodes with loss of consciousness, or nighttime episodes that have residual effects that interfere significantly with activity during the day.²²

For nonconvulsive epilepsy, there must also be a detailed description of a typical seizure, and they must occur more than once weekly despite three months of treatment. In addition, there must be

alteration of awareness or loss of consciousness and transient postictal manifestations of unconventional behavior or significant interference with activity during the day.^[23]

C. Ms. X's Seizures

Ms. X described her seizures at the hearing but, as discussed above, testimony from someone other than the claimant is required by the SSA listing.²⁴ The medical records in

¹⁷ The division conceded these two issues. Exhibit 2.13.

¹⁸ 7 AAC 40.180(b)(1)(B).

¹⁹ All references to the listings refer to 20 CFR §404, Subpart P, Appendix 1 as it existed on April 1, 2005.

²⁰ Listing 11.00A. "Postictal" means occurring after a seizure. Dorland's Illustrated Medical Dictionary (31st Edition 2007), page 1524.

²¹ Listing 11.02.

²² *Id.*

²³ Listing 11.03.

²⁴ Listing 11.00A.

evidence contain statements from both Ms. X's boyfriend and from her sister.²⁵ While not presented under oath at the hearing, those statements were made to assist in Ms. X's diagnosis and treatment, and are considered reliable.

When first seen in the emergency room in early October of 2011, Ms. X's sister reported the seizure she observed.

Her sister described some right upper extremity rhythmic movement followed by generalized jerking with loss of consciousness and postictal confusion. She did not describe any tongue biting or bowel or bladder incontinence.^[26]

In a follow up visit on November 3, 2011, Ms. X's boyfriend described her seizures:

Her fiancé is here with her today and he states that she has had some episodes where she awakens in the middle of the night. He has found her lying on her side with her "whole body convulsing" that stops and she typically remains asleep. The time when he has tried to arouse her and asked if she is confused or fairly normal and he sates "a little of both." That has happened on approximately two occasions. In addition, she continues to have smaller spells approximately once per week. He reports that these usually occur, if she is stressed or upset for example, she was in an argument with him the other day and had a spell. He reports that she usually stands there and covers her face and shakes sometimes he states her eyes have rolled back. She states she has no warning that she is about to have this spell, but just feels herself coming out of "a catatonic state" afterward she feels worn out and has a headache and wants to sleep.^[27]

Ms. X's physician believes that she has both epileptic and non-epileptic events "as her boyfriend's description of her 'mild seizures' includes things such as standing there and covering her face and shaking."²⁸ According to the Epilepsy Foundation, a non-epileptic seizure is also known as a pseudo seizure and is considered to be of psychological origin.²⁹ The listing for neurological impairments addresses epilepsy "regardless or etiology[.]"³⁰ Seizures caused by psychological factors should be considered along with seizures caused by physical factors. The evidence in this case shows that Ms. X does have frequent seizures, and that she has a severe impairment that meets the durational requirement.

²⁵ Doctors and other medical professionals have not directly observed her seizures.

²⁶ Exhibit 2.47.

²⁷ Exhibit 2.50.

²⁸ Exhibit 2.54.

²⁹ <http://www.epilepsyfoundation.org/aboutepilepsy/seizures/Non-epileptic-seizures.cfm>.

³⁰ Lising 11.00A.

Ms. X's medical records show that she reported having some form of seizure "a few times per week."³¹ There is one contradictory note from her physician, dated October 3, 2011, which says "the events she is describing are not likely to be epileptic seizures."³² This note states that it was sent without first being reviewed by the physician,³³ and the statement that these are not epileptic seizures is inconsistent with other statements by this same physician. This suggestion in this note that Ms. X may not be having epileptic seizures is not given any weight in light of this same physician's conclusion that she does experience epileptic seizures. The weight of the evidence is that she is experiencing both epileptic seizures as well as non-epileptic or pseudo seizures.

Ms. X testified that she continues to have some form of seizure frequently. The division discounts many of these seizures as "not typical of normal seizure activities"³⁴ but the applicable listings only require that the seizure be adequately described; it does not require that the seizure be typical. Given her physician's findings that she is having seizures, and absent medical evidence that what Ms. X and others have described are seizures (either epileptic or pseudo seizure), there is no basis for finding that these are not seizures.

To meet the requirements of listing 11.02, the daytime seizures must be more frequent than once each month, and must include a loss of consciousness and convulsions. Ms. X testified that she has daytime seizures almost every day, and that they often include convulsions and loss of consciousness. This is more than what is discussed in the medical records, but Ms. X testified that she has not been able to return for follow up visits with her physician because she is not able to pay for them. The medical records do not contradict Ms. X's testimony, and there is no reason to question her credibility.

Ms. X is on medication for these seizures, and they have now been continuing for more than three months despite treatment.³⁵ She meets the requirements for this listing and is, therefore, likely to be found disabled by SSA.

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³¹ Exhibit 2.17. *See also* Exhibit 2.20.

³² Exhibit 2.45.

³³ Exhibit 2.46.

³⁴ Exhibit 2.13.

³⁵ *See Listing 11.02* (requirement that seizures continue for three months despite treatment).

IV. Conclusion

The division has agreed that Ms. X has a severe impairment that has lasted more than twelve months. Based on the testimony of Ms. X and the medical records in evidence, her epilepsy meets the requirements for Listing 11.02. Accordingly, the division's determination is reversed. Ms. X is eligible for interim assistance.

Dated this 7th day of November, 2012.

Signed _____
Jeffrey A. Friedman
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 3rd day of December, 2012.

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

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