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

In the Matter of )  
 )  
 [REDACTED], ) OHA Case No. 08-FH-580  
 )  
 Claimant. ) Division Case No. [REDACTED]  
 \_\_\_\_\_ )

**FAIR HEARING DECISION**

**STATEMENT OF THE CASE**

[REDACTED] (Claimant) applied for Interim Assistance on or about May 12, 2008 (Ex. 2.0). The Division of Public Assistance (DPA or Division) denied the application on or about May 22, 2008 (Exs. 4.1, 5). The Claimant requested a fair hearing contesting the denial on or about May 27, 2008 (Exs. 6, 7). However, the record indicates that there was some confusion between the Claimant and DPA as to whether the Claimant was requesting a fair hearing, and the case was not received at the Office of Hearings and Appeals until September 2, 2008.

Hearings were held on October 23, November 6, and December 4, 2008. The Claimant appeared in person at the first two hearings and appeared telephonically at the last hearing. The Claimant represented himself and testified on his own behalf. [REDACTED] appeared in person to represent and testify on behalf of the Division. [REDACTED], a registered nurse (R.N.) employed by the Division, testified telephonically on behalf of the Division.

**ISSUE**

Was the Division correct to deny the Claimant's application for Interim Assistance Benefits on or about May 22, 2008 based on the assertion that the Claimant did not meet the Interim Assistance Program's disability requirements? <sup>1</sup>

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<sup>1</sup> See denial notice dated May 23, 2008 (Ex. 5).

## FINDINGS OF FACT <sup>2</sup>

1. The Claimant was born on [REDACTED] (Ex. 4.2) and was [REDACTED] years old at the time of the hearing.
2. The physical impairments asserted by the Claimant in this case are asthma (Social Security Administration (SSA) Impairment Listing No. 3.03), back pain (SSA Impairment Listing No. 1.01), and degenerative joint disease of the right ankle (SSA Impairment Listing No. 1.02) (Claimant hearing testimony).
3. The Claimant also asserted mental impairments (Claimant hearing testimony). These mental impairments were not well-defined by the Claimant himself. *Id.* However, the Claimant's medical records indicate that the specific mental impairments affecting the Claimant are depression NOS (SSA Impairment Listing No. 12.04), post traumatic stress disorder (SSA Impairment Listing No. 12.06), and panic disorder (SSA Impairment Listing No. 12.06). See Claimant's Exs. 13-19. The Social Security Administration's Impairment Listings classify both post traumatic stress disorder and panic disorder as "Anxiety Related Disorders."
4. A report by clinical psychologist [REDACTED], Ph.D. dated May 17, 2007 estimated that, with treatment, the Claimant would not be expected to recover from his mental health problems for 1-2 years, and further stated that the Claimant was "not likely to succeed at work without treatment. Very slow pace. Hyper-vigilant. Poor attention." (Claimant's Ex. 4). The record indicates that Dr. [REDACTED]' relationship with the Claimant was that of an examining physician rather than a treating physician or reviewing physician.<sup>2a</sup>
5. Exam notes from [REDACTED], M.D. dated June 11, 2007 state that the Claimant had "severe persistent asthma;" degenerative joint disease of the right ankle with an old avulsion fracture of the lateral malleolus; and chronic thoracic and lumbar back pain (Claimant's Ex. 98). The record indicates that Dr. [REDACTED]'s relationship with the Claimant was that of an examining physician rather than a treating physician or reviewing physician (see footnote 2a, above).

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<sup>2</sup> All of the medical reports in the record (over 100 pages total) were reviewed and considered during the preparation of this decision. However, some of the medical records were cumulative, and some were less relevant than others. Accordingly, not every exhibit is specifically referenced in this decision. Abbreviations used in the medical reports have been spelled out in this decision for ease of understanding.

<sup>2a</sup> The Social Security disability regulations distinguish among the opinions of three types of accepted medical sources: (1) sources who have *treated* the claimant; (2) sources who have *examined* the claimant; and (3) sources who have neither examined nor treated the claimant, but express their opinion based upon a *review* of the claimant's medical records. 20 C.F.R. § 404.1527, 20 C.F.R. § 416.927. A treating physician's opinion carries more weight than an examining physician's opinion, and an examining physician's opinion carries more weight than a non-examining reviewing or consulting physician's opinion. *Benecke v. Barnhart*, 379 F.3d 587, 592 (9th Cir.2004); *Lester v. Chater*, 81 F.3d 821, 830 (9th Cir.1995).

6. A medical report by ██████████, M.D. dated June 11, 2007 states:

Needs aggressive asthma treatment [and] orthopedic evaluation for non-radicular back pain . . . [patient is] unemployable at this time due to severe asthma. Needs aggressive 3 month asthma treatment, then re-evaluation. [Claimant's Ex. 89].

7. The medical report by ██████████, M.D. dated June 11, 2007 also states that, at that time, Dr. ██████████ believed that the Claimant could perform light work. The form that he completed defines "light work" (Claimant's Ex. 88) as:

[T]he ability to lift 20 pounds maximum and frequently lift and/or carry up to 10 pounds. Even though the weight lifted may be negligible, light work may also require walking or standing up to six (6) out of eight hours per day, or involve sitting most of the time with occasional pushing and pulling of arm and/or leg controls.<sup>2b</sup>

8. Psychiatrist ██████████, M.D. prepared an evaluation of the Claimant dated September 29, 2007 (Claimant's Exs. 13 – 19). The record indicates that Dr. ██████████'s relationship with the Claimant was that of an examining physician rather than a treating physician or reviewing physician (see footnote 2a, above). Dr. ██████████'s evaluation states in relevant part as follows:

Review of Records: . . . . [H]e lists problems with post traumatic stress disorder with nightmares, flashbacks, mood swings, anxiety attacks, problems with anger . . . . There was also [an] evaluation dated May 17, 2007 [which diagnosed the Claimant with] PTSD severe chronic, major depressive disorder, panic disorder with agoraphobia . . . . [His test scores] were not indicative of somebody who was actually malingering . . . .

Chief Complaint: The claimant says he is applying for disability because he is unable to focus, he has difficulty with anger and depression as well as forgetfulness. He says he has trouble understanding, he has low tolerance for others and he gets impatient and is unable to follow instructions well . . . . he says he is a loner and does not like to be around other people. He says that for all these reasons he is unable to work.

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<sup>2b</sup> 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 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.

History of Present Illness: . . . The claimant [says] that he has had much death in his life and that ■ years ago two friends in two separate incidents were violently murdered and he witnessed both murders and he says “I still see it sometimes,” meaning the way his friends looked just after they were shot. He says that death is very frightening to him and that these incidents were also quite troubling not only because his friends were killed quite suddenly and violently, but because the families of these victims blamed this claimant somewhat . . . he also says that occasionally he has some flashback type events where he sees these traumatic events occurring . . .

The claimant says that he suffers from panic attacks approximately two to three times per week and these last 15-20 minutes at a time. These panic attacks consist of him feeling hot with heavy breathing. He feels stressed with severe anxiety. . .

The claimant says . . . he sleeps approximately four hours per night . . . he has trouble falling asleep. He says that once he falls asleep he then is able to sleep soundly until he wakes up although he says occasionally he will have nightmares . . . . The claimant . . . reports having a decent appetite . . . . He says his energy waxes and wanes and . . . his asthma becomes exacerbated when he feels a good deal of stress and that he “feels stressed all the time.”

The claimant denies suicidal ideation and said the last time he felt suicidal was several months ago. He also denies auditory or visual hallucinations.

Current Medications: (1) Advair; (2) Albuterol; (3) Singulair; (4) Proventil. The claimant does not currently take any psychiatric medications.

\* \* \* \* \*

Family / Social / Environmental History: . . . . [H]e says that he left school in the 10<sup>th</sup> grade and did not complete his GED . . . . [H]e last worked approximately four years ago as a machinist . . . [H]e did this for a few months full time but he stopped because he had difficulty relating successfully with his boss. He says that he would suddenly find himself in a daze and find himself distracted and this would cause accidents because he was not paying attention to the machines . . . .

\* \* \* \* \*

Mental Status Exam: . . . . The claimant denies auditory hallucinations although he says [he has] flashbacks of past traumatic events . . . .

\* \* \* \* \*

DSM-IV Diagnosis: Axis I: Post traumatic stress disorder by history, depression NOS, panic disorder without agoraphobia. Axis II: Deferred. Axis III: Asthma. Axis IV: Moderate to severe. Axis V: GAF equals 51.

Discussion / Prognosis: . . . [H]e does not meet the full criteria for major depressive disorder although he does appear to suffer from recurrent and depressed mood. He does appear to suffer from panic disorder . . . he has treatable conditions and the likelihood of recovery is fair, and his recovery all depends upon receiving appropriate treatment. Unfortunately he does not appear to be receiving any kind of regular mental health treatment . . . If he was able to receive weekly psychotherapy as well as appropriate medication management then there is a fair chance that his condition could improve within 12-24 months . . .

Functional Assessment / Medical Source Statement: This claimant does have the ability to perform simple and repetitive tasks although he does not appear to be able to perform more detailed and complex tasks consistently given his problems with poor attention and distractedness and limitations in memory and concentration . . . He also . . . would not be expected to interact successfully with coworkers [and] the public. While he could accept some basic instructions from a supervisor it is quite likely that he would need to have these instructions repeated to him and that he would need very attentive and patient supervision. He does not seem capable of performing work on a consistent basis at this time, nor would he be expected to maintain regular attendance at the work place or complete a normal work day without interruptions from his current psychiatric condition.

\* \* \* \* \*

9. On October 24, 2007 psychologist [REDACTED], Ph.D. prepared a Social Security Administration form relating to the Claimant's application for that program (Claimant's Ex. 38). The record indicates that Dr. [REDACTED]'s relationship with the Claimant was that of an examining physician rather than a treating physician or reviewing physician (see footnote 2a, above). Dr. [REDACTED] stated in relevant part as follows:

. . . Claimant will be capable of the following . . . he can do 3-step tasks and some detailed ones with occasional lapses of concentration and pace . . . he can sustain 2 hour intervals of productive activity over an 8 hour day. He will benefit from extra oversight until he becomes accustomed – he has no substantial employment history. Too many coworkers too close are likely to irritate him . . . he can work in parallel with the public, but effective interaction is too much to expect at this point. Claimant can accept supervision and he is not likely to distract coworkers . . . Claimant can adjust to change, deal with daily hazards, and travel. He may benefit from guidance toward realistic job options.

10. On March 22, 2008 the Claimant was examined by [REDACTED], M.D. (Claimant's Exs. 65-69). The record indicates that Dr. [REDACTED]'s relationship with the Claimant was that of an examining physician rather than a treating physician or reviewing physician (see footnote 2a, above). Dr. [REDACTED]'s report states in relevant part as follows:

\* \* \* \* \*

Chief Complaints: (1) asthma; (2) low back pain.

\* \* \* \* \*

History of Present Illness:

1. Asthma. [The Claimant states] that he has had asthma since he was a baby. He currently is using a nebulizer. His asthma is worse with activity or exposure to any kind of allergens or irritants. Sometimes at night his asthma is particularly troublesome and he needs to use an inhaler a number of times.

He has had a number of hospitalizations, the last one being six months ago. He also frequently has to go to the emergency room. He says that he has needed shots, which might have been epinephrine. He was also intubated many years ago and put on a respirator during a severe asthma attack. He has a history of bilateral pneumothoraces . . . .

2. Low back pain. [The Claimant] has both lower and upper back pain. He has this worse when he is walking, bending, or during an asthma attack. He says that Tylenol does help some. He does have occasional radiating symptoms when he bends over.

Impact On Activities of Daily Living / Mobility: The claimant's ability to walk is variable depending on his asthmatic symptoms. He generally needs an inhaler. At best, he can stand for 15-20 minutes without too much trouble . . . . His basic activities of daily living are intact.

\* \* \* \* \*

Current Medications: (1) Albuterol; (2) Advair; (3) Singulair; (4) Flonase; (5) Flovent; (6) Zyrtec.

Past Medical History: (1) Asthma; (2) Low back pain; (3) Right ankle degenerative joint disease; (4) Posttraumatic stress disorder and depression.

\* \* \* \* \*

General Findings: I do not appreciate any spasm, tenderness, or trigger points today.

Motor Strength / Muscle Bulk and Tone: His strength is grossly 5/5 in upper and lower extremities bilaterally without any focal weakness.

\* \* \* \* \*

Diagnosis: (1) Severe asthma . . . . It is clear that his asthma is extremely limiting to him and I agree with the prior examiner who referred to this as severe . . . . (2) Low back pain without any neurologic signs today. This is likely axial / mechanical. (3) Depression, by report. We did not discuss that today.

Functional Assessment / Medical Source Statement: The claimant could be expected to stand and walk less than two hours in an eight-hour workday. This is due to asthma and shortness of breath. He would not be able to stand longer. The claimant could be expected to sit without restriction . . . . The amount of weight he can lift and carry is less than 10 pounds occasionally and less than 10 pounds frequently because of his asthma and shortness of breath . . . . There are no postural limitations . . . . There are no manipulative limitations . . . . [H]e would certainly not be able to have any exposure to allergens or irritants.

11. In order to satisfy the Social Security Administration (SSA) “Listings” criteria for asthma it is necessary for a claimant, when tested on certain diagnostic equipment, to demonstrate that his or her lungs’ forced expiratory volume (FEV) is equal to or less than certain numerical values specified by the SSA (see discussion in Analysis, below). The numerical values referenced above correspond to the claimant’s height without shoes. *Id.* The Claimant’s height without shoes is 69 inches (Claimant’s Ex. 50). The FEV value specified by the SSA for a person of that height is 1.45 or lower (see discussion in Analysis, below).

12. On March 22, 2008 examining physician [REDACTED], M.D. performed a Pulmonary Function Test (PFT) on the Claimant (Claimant’s Ex. 50). The PFT indicated forced expiratory volumes (FEVs) of 1.71 (Claimant’s Ex. 64), 1.29 (Claimant’s Ex. 62), 1.63 (Claimant’s Ex. 61), 1.29 (Claimant’s Ex. 59), 1.61 (Claimant’s Ex. 58), 1.57 (Claimant’s Ex. 57), 1.29 (Claimant’s Ex. 56), 1.27 (Claimant’s Ex. 55), 1.29 (Claimant’s Ex. 54), 1.15 and 1.14 (Claimant’s Ex. 53), and 1.23 (Claimant’s Ex. 52).

13. As indicated in Paragraph 12, above, some of the Claimant’s PFT results are *above* the SSA’s maximum qualifying FEV level, while some of the Claimant’s PFT results are *below* the SSA’s maximum qualifying FEV level. Averaging the test results gives an average FEV value of 1.3725.

14. A *Preliminary Examination for Interim Assistance* (Form AD#2) prepared by the [REDACTED] Health Center dated May 13, 2008 (Exs. 4.2 – 4.3 and 17.1 – 17.2) states that the Claimant’s diagnosis is “asthma, depression – considered schizoaffective disorder but needs further [evaluation].” The report indicates that the Claimant is not expected to recover from these conditions. *Id.*

15. The Claimant’ testimony indicates that the physicians of the Fairview Health Center’s relationship with the Claimant was that of a treating physician rather than an examining physician or reviewing physician (see footnote 2a, above).

16. The status of the Claimant’s application for Social Security disability benefits as of May 20, 2008 was that his application had been initially denied and that denial had been appealed (Ex. 2.0).

17. At the hearings of October 23, November 6, and December 4, 2008 the Claimant testified with regard to his education and employment that he:

a. Is [REDACTED] years old. He can speak English and understand spoken English. He can read and write English, but not very well.

b. Has a ninth grade education. His medical records may state that he has a Graduation Equivalency Diploma (“GED”), but he says this is incorrect.

c. Has not worked since he was terminated from his last job approximately four years ago. This was a janitorial position. He worked approximately four hours per day. He only worked that job for 8-9 days. He was terminated from that position partly because he could not perform the required lifting (up to 60 pounds), and partly because he can’t follow instructions well and “doesn’t like to be told what to do.”

d. Worked stacking shingles for approximately two weeks at some time within the last ten years.

e. Could not remember what other kinds of work he may have performed. He stated it was mostly “under the table” work.

18. At the hearings of October 23, November 6, and December 4, 2008 the Claimant testified with regard to his health problems that he:

a. Had reported on a medical intake sheet dated June 11, 2007 that he has chronic asthma, severe upper and lower back pains and spasms, shoulder pains and migraine headaches, and ankle problems (see also Claimant’s Ex. 86).

b. Was currently suffering from asthma and that he takes Albuterol, Advair, Flonase, and Singulair regularly. He also uses “a little breathing machine that you have to plug into the wall.” He has been on medication for asthma “almost all [his] life.”

c. Fractured his ankle over ten years ago. It is always painful; it is worse in the cold. He takes Ibuprofen for the pain but states that it is not an effective pain reliever. He has not seen a doctor about it in over one year.

d. Has had back pain for over ten years. He takes Ibuprofen as a pain reliever. He has not seen a doctor about it in over one year. His back pain does not really bother him when he is sitting. It mostly hurts when he stands too long or tries to bend over.

e. On or about November 30, 2008 he was injured in an automobile accident. The vehicle in which he was riding was rear-ended. This is giving him pain and stiffness in his back and neck. Because of this he cannot bend over and it is hard for him to walk. He is being treated by a chiropractor (Dr. Richey) and since the accident is also taking Vicodin and Vallium. The Claimant did not submit any medical records pertaining to this most recent treatment.

f. Has applied for Social Security benefits, but has not yet received a decision on his application.

19. At the hearings of October 23, November 6, and December 4, 2008 the Claimant testified with regard to his mental health problems that he:

- a. Is currently taking Prozac, Doxapine and “a few other things.” He just started on Prozac about a month ago; he was taking Trapezine (phonetic spelling) before that. His mental health “varies from day to day.” He stated “I’m always depressed.” He receives CAMA benefits which occasionally allow him to go to a clinic in Fairview. He does not get to see a mental health professional on a regular basis because he is on a waiting list.
- b. Has had hallucinations for “years,” but could not specify how often.
- c. Has nightmares often. He previously had problems sleeping but can now sleep through the night as long as he takes his medication.
- d. Is “always stressed-out” and apprehensive. He often has panic attacks in which he hyperventilates. He always feels that somebody is ‘out to get’ him.
- e. Has problems maintaining his concentration, although he could not give any concrete examples of this. He is easily distracted.
- f. Has constant feelings of isolation, worthlessness and guilt. He has often had thoughts of suicide.
- g. Often has low energy levels because his medicines make him tired. He has lost interest in most activities.
- h. Has an abnormal amount of anger and hostility toward other people. He has had problems with temper outbursts for years and thinks that is why he cannot hold a job.
- i. Has mental health problems that sometimes give him a low tolerance for other people and make it hard for him to take direction, which affects his ability to sustain employment.

20. At the hearings of October 23, November 6, and December 4, 2008 the Claimant testified with regard to his functional abilities that he:

- a. Does not use crutches or canes, but he cannot stand up or walk too long because he is “always out of breath.” Can stand or walk for 20-30 minutes before he would have to rest for 10 minutes.
- b. Currently lives with friends. He can dress and shower without assistance. He can walk to and from the bus stop. He can get to his doctor appointments by himself. He can do his own shopping. However, he needs help cooking because he forgets that he has something on the stove or in the oven.

c. Might be able to work a job answering a telephone if he “could remember everything that is going on . . . what I need to write down.”

21. ██████████, R.N. is a nurse employed by DPA. The record indicates that Ms. ██████████’s relationship with the Claimant was that of a reviewing source rather than a treating source or examining source (see footnote 2a, above). At the hearing of November 6, 2008 Ms. ██████████ testified that, based on her review of the Claimant’s medical records:

a. The Claimant has the ability to perform simple and repetitive tasks. However, he does not appear to be able to perform more detailed or complex tasks consistently given his problems with poor attention, distractions, and limitations on memory and concentration.

b. The Claimant has the ability to remember locations and work procedures, can understand and carry out short and simple instructions, can be punctual, maintain regular attendance, and perform activities within a schedule. He can perform three-step tasks, can make simple work-related decisions, and can travel using public transportation.

c. The Claimant is able to engage in activities of daily living.

d. The Claimant can perform two hours of productive activity over an eight hour period. He does have problems with social interactions, but there are some jobs where the Claimant would have limited social interactions with other people. For example, the Claimant could stock shelves, empty waste baskets, or answer the phone.

22. The testimonies of Ms. ██████████ and Ms. ██████████ were credible.

23. At the time of the hearing, the Claimant’s testimony appeared to be less credible than that of the DPA’s witnesses because of the Claimant’s manner of speaking and avoidance of eye contact. However, the substance of the Claimant’s hearing testimony is consistent with the findings of ██████████, M.D., ██████████, Ph.D., ██████████, M.D., and ██████████, M.D. (discussed above). Accordingly, although the Claimant’s manner of speaking initially made one question the veracity of the Claimant’s testimony, the fact that the Claimant’s testimony is well corroborated by the medical evidence proves that the Claimant’s testimony was credible.

24. With regard to the Claimant’s use of medications, the report by ██████████, M.D. dated September 29, 2007 (Claimant’s Exs. 13 – 19) states that, at that time, the Claimant was taking Advair, Albuterol, Singulair, and Proventil, and that the Claimant was not then taking any psychiatric medications. The report by ██████████, M.D. dated March 22, 2008 (Claimant’s Exs. 65-69) states that, at that time, the Claimant was taking Advair, Albuterol, Singulair, Flonase, Flovent, and Zyrtec. Again, none of these are psychiatric medications. At the fall 2008 hearings, the Claimant testified that he was then taking Advair, Albuterol, Singulair, and Flonase for his asthma, Ibuprofen for his ankle and back pain, and Prozac, Doxapine, and “a few other things” for his mental health problems.

25. Thus, the record indicates that although the Claimant has regularly taken a number of asthma medications for at least one year prior to the hearings in this case, his use of psychiatric medications has been sporadic, and he has evidently never used prescription medications for his ankle and back pain. The Claimant's hearing testimony indicates that, to date, a major reason for the Claimant's failure to take psychiatric medications on a sustained basis has been the Claimant's lack of funds.

26. Although all but one of the Claimant's medical reports were from approximately 8 - 18 months old at the time of the hearings in this case, the Claimant's testimony, in conjunction with the *Preliminary Examination for Interim Assistance* (Form AD#2) prepared by the ████████ Health Center dated May 13, 2008 (Exs. 4.2 – 4.3 and 17.1 – 17.2), indicate that the Claimant's condition had neither significantly improved nor significantly deteriorated since the other medical reports were generated.

## PRINCIPLES OF LAW

### Introduction; Burden of Proof; Standard of Proof.

This case involves an application for Interim Assistance benefits. When an application is denied, the applicant has the burden of proof<sup>3</sup> by a preponderance of the evidence.<sup>4</sup>

Interim Assistance is a benefit provided by the State to Adult Public Assistance applicants while they are waiting for the Social Security Administration to approve the Supplemental Security Income application. AS 47.25.255; 7 AAC 40.170(a) and (b). The criteria which must be satisfied in order to qualify for Interim Assistance are set forth in 7 AAC 40.180.<sup>15</sup>

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<sup>3</sup> “Ordinarily the party seeking a change in the status quo has the burden of proof.” *State of Alaska Alcohol Beverage Control Board v. Decker*, 700 P.2d 483, 485 (Alaska 1985).

<sup>4</sup> Preponderance of the evidence is defined as “[e]vidence 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* at page 1064 (West Publishing, 5<sup>th</sup> Edition, 1979).

<sup>5</sup> 7 AAC 40.180, titled “initial determination of disability”, provides as follows:

(a) An applicant whose disability is being determined by the department under 7 AAC 40.170(b) must be examined by a psychiatrist or other physician who has entered into a current provider agreement under 7 AAC 43.065. The results of the examination must be provided on a form approved by the department.

(b) The department will make a determination of whether the applicant is disabled based on

(1) a medical review by the department as to whether the applicant is likely to be found disabled by the Social Security Administration, including whether the applicant's impairment meets (A) The SSI program's presumptive disability criteria under 20 C.F.R. 416.934, as revised as of April 1, 2005, and adopted by reference; or (B) Social Security Administration disability criteria for the listings of impairments described in 20 C.F.R. 404, subpart P, appendix 1, as revised as of April 1, 2005, and adopted by reference;

(2) medical evidence provided by the applicant or obtained by the department;

(3) other evidence provided by the applicant under 7 AAC 40.050, if applicable; and

The criteria which must be satisfied in order to qualify for Interim Assistance under 7 AAC 40.180 are equivalent to, and incorporate by reference, the criteria which must be satisfied in order to qualify for Social Security Supplemental Security Income (SSI) disability benefits pursuant to Title 20 of the Code of Federal Regulations (CFR).

Pursuant to 20 CFR 404.1505(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.” Based on this definition, the Social Security Administration’s SSI disability analysis contains a very specific multistep process that must be followed in order to determine whether someone is disabled.

### Substantial Gainful Activity

The first step in the analysis is to determine whether the applicant is performing “substantial gainful activity” as defined by the applicable Social Security regulations. “[S]ubstantial gainful activity” means “work that (a) involves doing significant and productive physical or mental duties, and (b) is done (or intended) for pay or profit.” 20 CFR 404.1510.

The regulations state that work “may be substantial even if it is done on a part time basis . . .”. 20 CFR 404.1572(a). If the applicant is engaged in “substantial gainful activity” based on these criteria, then he is not disabled. 20 CFR 416.920(a)(4)(i). If, however, the Claimant is not performing “substantial gainful activity” as defined by the above-quoted regulations, it is necessary to proceed to the next step of the disability analysis and determine whether the Claimant has a severe impairment.

### Severe Impairment.

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.” 20 C.F.R. 404.1521(a); 20 CFR 416.920(c); 20 CFR 416.921(a). 20 CFR 416.921(b) defines “basic work activities.” That regulation states in relevant part as follows:

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(4) a review of the written results of the psychiatrist’s or other physician’s examination under (a) of this section.

(c) In determining whether an applicant’s disability meets the criteria set out in (b)(1)(B) of this section, the department will consider whether the

- (1) the applicant’s condition is listed as an impairment category described in (b)(1)(B) of this section;
- (2) medical information obtained under (b) of this section documents the applicant’s impairment;
- (3) impairment affects the applicant’s activities of daily living;
- (4) the applicant can perform any other work, including sedentary work; and
- (5) the applicant’s impairment has lasted or is expected to last for a continuous period of not less than 12 months.

When we talk about basic work activities, we mean the abilities and aptitudes necessary to do most jobs. Examples of these include - (1) physical functions such as walking, standing, sitting, lifting, pushing, pulling, reaching, carrying, or handling; (2) capacities 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.

Evidence from acceptable medical sources is necessary to establish whether a claimant has a medically determinable impairment. 20 C.F.R. § 404.1513(a); see also 20 CFR 416.908. The claimant's own statement of symptoms alone will not suffice. 20 C.F.R. § 416.908.

Acceptable medical sources include licensed physicians; licensed or certified psychologists; licensed optometrists; licensed podiatrists; and qualified speech-language pathologists. 20 C.F.R. § 404.1513(a). The sources may be treating sources, examining sources, or reviewing sources (see discussion in footnote 1, above). Substantial weight must be given to the opinion, diagnosis and medical evidence of these medical providers unless there is good cause to do otherwise. 20 C.F.R. § 416.1527(d); see also *Lewis v. Callahan*, 125 F.3d 1436, 1440 (11th Cir.1997).

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 it is necessary to proceed to the next step of the disability analysis and determine whether the Claimant's impairment meets the 12 month durational requirement.

#### Duration.

The next step in the analysis is to determine whether the applicant's severe impairment has lasted for a continuous period of at least twelve (12) months, or can be expected to last for a continuous period of at least twelve (12) months. <sup>6</sup> 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, then it is necessary to proceed to the next step of the disability analysis and determine whether the Claimant's impairment meets or equals the criteria set forth in the Social Security Administration's listing of impairments.

#### Severe Impairment That Meets or Equals The Listing.

The next step in the analysis is to determine whether the applicant's severe impairment meets or medically equals the listing of impairments contained in the Social Security regulations located at 20 CFR Pt. 404, Subpart P, Appendix 1. The claimant bears the burden of establishing that his impairments satisfy the requirements of a "listings" impairment. *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

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<sup>6</sup> Although the issue of duration is technically separate and distinct from the issue of severity, the Social Security Disability analysis, as set forth in federal regulation 20 CFR 416.920(a)(4)(ii), treats the durational requirement as part of the "step two" severity analysis.

967 (1990). To meet a listing, an impairment must meet *all* of the listing's specified criteria. *Sullivan*, 493 U.S. at 530 (“An impairment that manifests only some of these criteria, no matter how severely, does not qualify.”).

An impairment is *medically equivalent* to a listed impairment “if it is at least equal in severity and duration to the criteria of any listed impairment.” 20 CFR 416.926(a) (emphasis added). Medical equivalence must be based on medical findings. *Sullivan*, 493 U.S. at 531 (“a claimant . . . must present medical findings equal in severity to *all* the criteria for the one most similar listed impairment”). Responsibility for determining medical equivalence rests with the hearing officer. 20 CFR 926(e).

A finding of disability may be based on the combined effect of multiple impairments which, if considered individually, would not be of the requisite severity. See 20 C.F.R. § 404.1520(a)(4)(ii); 20 C.F.R. § 416.923; 20 C.F.R. § 416.911; 20 C.F.R. § 416.906; and *Loza v. Apfel*, 219 F.3d 378, 393 (5<sup>th</sup> Cir. 2000).

If the applicant’s severe impairment meets or medically equals the listing of impairments contained in the Social Security regulations located at 20 CFR Pt. 404, Subpart P, Appendix 1, then the applicant is deemed disabled and no further inquiry is required. 20 CFR 416.920(a)(4)(iii). However, if the severe impairment does not meet or medically equal the listing of impairments, then it is necessary to proceed to the next step in the analysis and determine whether the applicant can perform his prior relevant work.

#### Capability of Performing Previous Relevant Work.

The next step is to determine whether the applicant’s severe impairment prevents him from performing his previous relevant work. 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, it is necessary to proceed to the next step in the analysis and determine whether the applicant can perform any other work.

#### Capability of Performing Other Work.

Pursuant to 20 CFR 404.1545(a)(5)(ii), if it is determined that a claimant cannot perform his or her past relevant work, it is then necessary to decide whether the applicant “can make an adjustment to any other work that exists in the national economy” or, in other words, whether the applicant is capable of performing other work. At this stage, however, the burden of proof shifts from the claimant to the agency. See 20 CFR 404.1562(c)(2); see also *Robinson v. Sullivan*, 956 F.2d 836, 839 (8th Cir.1992); *Simmons v. Massanari*, 264 F.3d 751, 754-55 (8th Cir.2001) (once a determination is made that a claimant cannot perform past relevant work, the burden shifts to the Commissioner to prove there is other work in the economy that the claimant can perform).

For purposes of determining whether a person can perform other work, the Social Security regulations define the characteristics of different levels of work. 20 CFR 416.967 states as follows:

To determine the physical exertion requirements of work in the national economy, we classify jobs as sedentary, light, medium, heavy, and very heavy. These terms

have the same meaning as they have in the Dictionary of Occupational Titles, published by the Department of Labor. In making disability determinations under this subpart, we use the following definitions:

*(a) Sedentary work.* 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.

*(b) Light work.* 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 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.

*(c) Medium work.* Medium work involves lifting no more than 50 pounds at a time with frequent lifting or carrying of objects weighing up to 25 pounds. If someone can do medium work, we determine that he or she can also do sedentary and light work.

*(d) Heavy work.* Heavy work involves lifting no more than 100 pounds at a time with frequent lifting or carrying of objects . . . up to 50 pounds. If someone can do heavy work . . . he or she can also do medium, light, and sedentary work.

*(e) Very heavy work.* Very heavy work involves lifting objects weighing more than 100 pounds at a time with frequent lifting or carrying of objects weighing 50 pounds or more. If someone can do very heavy work, we determine that he or she can also do heavy, medium, light, and sedentary work.

Whether an applicant is capable of performing other work 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).

#### Age of Medical Records.

In *Cook v. Psychiatric Sec. Review Board*, 860 P.2d 855 (Or. App. 1993), the court stated that "The passage of time does not necessarily render medical reports stale." Similarly, in *Kroger Company v. Wright*, 2004 WL 1243039 (Va. App. 2004), the court stated:

"Whether evidence is stale and fails to reflect a claimant's medical condition is viewed as a question of fact, no different in substance from the obvious principle that

evidence closer in time to the relevant event may be considered more persuasive than evidence more remote. Timing, however, is not necessarily the dispositive factor in evaluating the persuasiveness of evidence. It is merely one of many potential variables that enter into the fact finder's decision to attribute different weight to different evidence.”

Although the age at which medical records should be deemed stale will, (as indicated by the above cases), vary depending on the facts of the particular case, a review of recent court decisions indicates that medical records must generally be at least two (2) years old to be considered stale.<sup>6a</sup>

## ANALYSIS

### Introduction.

As an applicant for Interim Assistance benefits, the Claimant has the burden of proving, by a preponderance of the evidence, that his impairments satisfy the Social Security disability criteria (see Principles of Law, above). If they do, the Claimant is disabled by Social Security standards and is eligible for Interim Assistance benefits. If they do not, the Claimant is not disabled by Social Security standards and is not eligible for Interim Assistance benefits.

The *physical impairments* asserted by the Claimant in this case are back pain (SSA Impairment Listing No. 1.01), degenerative joint disease of the right ankle (SSA Impairment Listing No. 1.02), and asthma (SSA Impairment Listing No. 3.03) (Claimant hearing testimony).

The Claimant also asserted *mental impairments*. *Id.* These mental impairments were not well-defined by the Claimant himself. *Id.* However, the Claimant’s medical records indicate that the specific mental impairments affecting the Claimant are depression NOS (SSA Impairment Listing No. 12.04), post traumatic stress disorder (SSA Impairment Listing No. 12.06), and panic disorder without agoraphobia (SSA Impairment Listing No. 12.06). See Claimant’s Exs. 13-19.

The Claimant’s three (3) alleged physical impairments and his three (3) alleged mental impairments will be examined below (in the order stated) to determine whether these impairments satisfy the applicable Social Security Disability criteria.

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<sup>6a</sup> For example, in *Covington v. Cinnirella*, 536 N.Y.S.2d 514, 515 (N.Y. App. Div. 2nd Dept. 1989), a medical report nearly two years old was deemed stale. In *Philpotts v. Petrovic*, 554 N.Y.S.2d 289, 290 (N.Y. App. Div. 2nd Dept. 1990), medical evidence which was more than two-and-a-half years old was deemed stale. In *Medina-Santiago v. Nojovits*, 773 N.Y.S. 2d 294 (N.Y.A.D. 1st Dept. 2004), medical evidence which was three years old was deemed stale. In the Social Security disability case *Lemus v. Astrue*, 2009 WL 817546 (E.D. Cal. 2009), medical evidence which was three years old was deemed stale. In *In re O'Donnell's Case*, 2007 WL 3052957 (Mass.App. 2007), medical evidence which was approximately 3.5 years old was deemed stale. In *Walker v. Allied Septic Tanks*, 522 So.2d 456 (Fla. App. 1st Dist. 1988), medical evidence which was 3-4 years old was deemed stale. In the Social Security disability case *Griffith v. Astrue*, 2009 WL 909630 (W.D.N.Y. 2009), medical evidence which was approximately 4.5 years old was deemed stale. Finally, in *O'Neill v. Rogers*, 559 N.Y.S.2d 669 (N.Y. App. Div. 2nd Dept. 1990), medical reports which were over five years old were deemed stale.

## I. The Claimant Is Not Performing Substantial Gainful Activity.

The first element of the disability analysis is whether the claimant is able to perform “any substantial gainful activity”. Pursuant to 20 CFR 404.1510, “substantial gainful activity” means “work that (a) involves doing significant and productive physical or mental duties, and (b) is done (or intended) for pay or profit.”

At the hearing, the Claimant testified that he has not worked for approximately four (4) years. This testimony was not disputed by the Division. Accordingly, the Claimant has carried his burden and has proven, by a preponderance of the evidence, that he is not performing substantial gainful activity as defined by 20 CFR 404.1510.

## II. Does The Claimant Have a Severe Impairment?

In order to avoid being found to be *not disabled* at this stage, the Claimant must prove that at least one of his impairments is medically severe pursuant to 20 CFR 416.920(c). A severe impairment is one that “significantly limits [a person’s] physical or mental ability to do basic work activities.” 20 CFR §§ 404.1520(c) and 416.920(c).

20 CFR 416.921(b) defines “basic work activities.” That regulation states in relevant part as follows:

When we talk about basic work activities, we mean the abilities and aptitudes necessary to do most jobs. Examples of these include - (1) physical functions such as walking, standing, sitting, lifting, pushing, pulling, reaching, carrying, or handling; (2) capacities 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.

Physical impairments generally affect different job functions than do mental impairments. Accordingly, the Claimant’s alleged physical and mental impairments will be analyzed separately.

### A. Are Any Of The Claimant’s Three Alleged Physical Impairments Severe?

The physical impairments alleged by the Claimant in this case are asthma (SSA Impairment Listing No. 3.03), back pain (SSA Impairment Listing No. 1.01), and degenerative joint disease of the right ankle (SSA Impairment Listing No. 1.02) (Claimant hearing testimony).

With regard to functional limitations based on his alleged *physical* impairments, the Claimant testified that he does not use crutches or canes, but that he can only stand or walk for 20-30 minutes before resting for 10 minutes because he is “always out of breath.”

However, evidence from acceptable medical sources is necessary to establish whether a claimant has a medically determinable impairment. 20 C.F.R. § 404.1513(a); see also 20 CFR 416.908. The claimant’s own statement of symptoms alone will not suffice. 20 C.F.R. § 416.908. The medical

evidence pertaining to the Claimant's alleged physical impairments indicates in relevant part as follows:

1. Notes from examining physician [REDACTED], M.D. dated June 11, 2007 states that the Claimant has "severe persistent asthma;" degenerative joint disease of the right ankle with an old avulsion fracture of the lateral malleolus; and chronic thoracic and lumbar back pain (Claimant's Ex. 98).
2. A medical report by examining physician [REDACTED], M.D. dated June 11, 2007 states that, at that time, Dr. [REDACTED] believed that the Claimant could perform light work. However, Dr. [REDACTED]'s report also states that the Claimant "needs aggressive asthma treatment [and] orthopedic evaluation for non-radicular back pain" and that he is "unemployable at this time due to severe asthma" (Claimant's Ex. 89).
3. A medical report by examining physician [REDACTED], M.D. dated March 22, 2008 (Claimant's Exs. 65-69) states that the Claimant "could be expected to stand and walk less that two hours in an eight-hour workday;" that he "could be expected to sit without restriction," and that "the amount of weight he can lift and carry is less than 10 pounds occasionally and less than 10 pounds frequently because of his asthma and shortness of breath."<sup>6b</sup>

Based on the above medical reports it is clear that the Claimant's asthma (SSA Impairment Listing No. 3.03) significantly affects his ability to perform functions such as walking, standing, sitting, lifting, pushing, pulling, reaching, carrying, or handling. However, the medical records do not indicate that the Claimant's back pain (SSA Impairment Listing No. 1.01) or degenerative joint disease of the right ankle (SSA Impairment Listing No. 1.02) significantly affect his ability to perform the above-referenced functions.

Accordingly, based on the medical evidence, the Claimant has carried his burden and proven, by a preponderance of the evidence, that his asthma constitutes a "severe impairment" as defined by 20 CFR §§ 404.1520(c), 416.920(c), and 416.921(b). However, the Claimant failed to carry his burden, and did not prove by a preponderance of the evidence, that his back pain and degenerative joint disease of the right ankle constitute a "severe impairment" as defined by 20 CFR §§ 404.1520(c), 416.920(c), and 416.921(b).

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<sup>6b</sup> Dr. [REDACTED]'s finding that the Claimant can perform light work would be very significant in the Residual Functional Capacity (RFC) assessment at "Step 4" of the Social Security Disability Analysis. See discussion in Principles of Law at pages 15-16, above. However, the criteria for finding that an impairment is "severe" at "Step 2" of the Social Security Disability Analysis are much less stringent than either (1) the criteria for finding that a Claimant's impairment meets or equals "the Listings" at "Step 3," of the Social Security Disability Analysis; or (2) the criteria for finding that a Claimant can perform other work at "Step 4" of the Social Security Disability Analysis. See footnote 6c, below; see generally Principles of Law, above. Accordingly, Dr. [REDACTED]'s finding that the Claimant is able to perform light work is in no way inconsistent with the finding, at this stage, that the Claimant's asthma constitutes a severe impairment.

B. Are The Claimant's Alleged Mental Impairments Severe?

The Claimant also asserted mental impairments. *Id.* These mental impairments were not well-defined by the Claimant himself. *Id.* However, the Claimant's medical records indicate that the specific mental impairments affecting the Claimant are depression NOS (SSA Impairment Listing No. 12.04), post traumatic stress disorder (SSA Impairment Listing No. 12.06), and panic disorder without agoraphobia (SSA Impairment Listing No. 12.06). See Claimant's Exs. 13-19.<sup>6c</sup>

With regard to functional limitations based on his alleged *mental* impairments, the Claimant testified that he has problems maintaining his concentration; that he has low energy levels because his medicines make him tired; that he has an abnormal amount of anger and hostility toward other people; and that he has had problems with temper outbursts for years, which affects his ability to sustain employment (Claimant hearing testimony).

The Claimant's testimony indicates that his mental impairments are "severe" as defined by 20 CFR 416.920(c) and 20 CFR 416.921(b). However, evidence from acceptable medical sources is necessary to establish whether a claimant has a medically determinable impairment. 20 C.F.R. § 404.1513(a); see also 20 CFR 416.908. The claimant's own statement of symptoms alone will not suffice. 20 C.F.R. § 416.908. A psychiatric evaluation prepared by examining physician [REDACTED], M.D. dated September 29, 2007 (Claimant's Exs. 13 – 19) states in relevant part as follows:

\* \* \* \* \*

DSM-IV Diagnosis: Axis I: Post traumatic stress disorder by history, depression NOS, panic disorder without agoraphobia. Axis II: Deferred. Axis III: Asthma. Axis IV: Moderate to severe. Axis V: GAF equals 51.

Discussion / Prognosis: . . . [H]e does not meet the full criteria for major depressive disorder although he does appear to suffer from recurrent and depressed mood./ He does appear to suffer from panic disorder . . . he has treatable conditions and the likelihood of recovery is fair, and his recovery all depends upon receiving appropriate treatment. Unfortunately he does not appear to be receiving any kind of regular mental health treatment . . . If he was able to receive weekly psychotherapy as well as appropriate medication management then there is a fair chance that his condition could improve within 12-24 months . . .

Functional Assessment / Medical Source Statement: This claimant does have the ability to perform simple and repetitive tasks although he does not appear to be able to perform more detailed and complex tasks consistently given his problems with poor attention and distractedness and limitations in memory and concentration . . .

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<sup>6c</sup> It is well-settled that the step-two severity inquiry is merely a *de minimis* screening device to dispose of groundless claims. See, e.g., *Edlund v. Massanari*, 253 F.3d 1152, 1158 (9th Cir.2001). Accordingly, it is not necessary to consider at this point whether the Claimant's asserted mental impairments individually or collectively meet the requirements of the relevant Listings of Impairments set forth at 20 CFR Part 404, Subpart P, Appendix 1.



federal district court. On appeal, the court held that the severity criteria were satisfied where (as here) the claimant easily became frustrated, angry, and explosive, and had difficulty dealing with stressful situations. The court then remanded the case to the hearing officer to consider whether the Claimant satisfied the remainder of the sequential SSA disability analysis.

### C. Summary.

The foregoing analysis has demonstrated that:

1. The Claimant's asthma (SSA Impairment Listing No. 3.03), depression NOS (SSA Impairment Listing No. 12.04), post traumatic stress disorder (SSA Impairment Listing No. 12.06), and panic disorder without agoraphobia (SSA Impairment Listing No. 12.06) constitute "severe impairments" as defined by 20 CFR §§ 404.1520(c), 416.920(c), and 416.921(b).
2. The Claimant's back pain (SSA Impairment Listing No. 1.01) and degenerative joint disease of the right ankle (SSA Impairment Listing No. 1.02) do not constitute "severe impairments" as defined by 20 CFR §§ 404.1520(c), 416.920(c), and 416.921(b).

It is now necessary to proceed to the next step of the Social Security disability analysis and to determine whether any of the Claimant's severe impairments (asthma, depression NOS, post traumatic stress disorder, and panic disorder without agoraphobia) satisfy the twelve-month durational requirement.

### III. The Claimant's Severe Impairments Satisfy the 12 Month Durational Requirement.<sup>6d</sup>

The next step pursuant to 20 CFR 416.909 is to decide whether or not the Claimant's severe impairments have lasted or can be expected to last for a continuous period of at least 12 months.

There are medical records documenting the existence of the Claimant's mental health problems since May 17, 2007, approximately 18 months prior to the Claimants hearings (Claimant's Ex. 4). There are medical records documenting the existence of the Claimant's asthma since June 11, 2007, approximately 17 months prior to the Claimants hearings (Claimant's Exs. 89-98). At the hearings of October 23, November 6, and December 4, 2008 the Claimant testified that he was still suffering from each of these impairments. Thus, the minimum duration of the Claimant's severe impairments is 17 months. This is five (5) months longer than the minimum twelve-month period required by 20 CFR 416.909.

In summary, the Claimant has proven, by a preponderance of the evidence, that his asthma and mental health impairments satisfy the 12-month durational requirement. The next step in the Social

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<sup>6d</sup> The Claimant's thoracic and lumbar spinal problems, and the Claimant's degenerative joint disease of the ankle, did not meet the severity criteria discussed in Analysis Section II, above. Accordingly, it is not necessary to discuss whether those alleged impairments meet the 12-month durational requirement.

Security disability analysis requires a determination of whether the Claimant's severe impairments meet the criteria of the Social Security Administration's relevant listing of impairments.

#### IV. Do the Claimant's Severe Impairments Meet the Criteria of the Social Security Administration's Relevant Listings of Impairments?<sup>6e</sup>

The next step is to decide whether the Claimant's severe impairments meet the criteria of the Social Security Administration's relevant listings of impairments. The Claimant bears the burden of establishing that his impairments satisfy the requirements of a "Listings" impairment. 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). This proof must be established by a preponderance of the evidence. See Principles of Law, above. To meet a listing, an impairment must satisfy *all* of the listing's specified criteria. Sullivan, 493 U.S. at 530 ("An impairment that manifests only some of these criteria, no matter how severely, does not qualify").

##### A. Does the Claimant's Asthma Meet the Requirements of the Relevant Listing?

The Social Security disability system classifies the Claimant's asthma under the Respiratory listing. 20 CFR Pt. 404, Subpart P, App. 1, § 3.03. Section 3.03's requirements for a finding of disability due to asthma are as follows:

A. Chronic asthmatic bronchitis. Evaluate under the criteria for chronic obstructive pulmonary disease in 3.02A; OR

B. Attacks (as defined in 3.00C), in spite of prescribed treatment and requiring physician intervention, occurring at least once every 2 months or at least six times a year. Each in-patient hospitalization for longer than 24 hours for control of asthma counts as two attacks, and an evaluation period of at least 12 consecutive months must be used to determine the frequency of attacks.

In order to satisfy the criteria under Section 3.03(A) it is necessary to satisfy the criteria of Section 3.02(A), which is incorporated by reference. Section 3.02(A) requires a finding of "chronic obstructive pulmonary disease, due to any cause, with the FEV [forced expiratory volume] equal to or less than the values specified in table I [of Section 3.02] corresponding to the person's height without shoes . . . ." The Claimant's height without shoes is 69 inches (Claimant's Ex. 50). The FEV value specified by Section 3.02 for a person of that height is 1.45 or lower.

On March 22, 2008 examining physician [REDACTED], M.D. performed a Pulmonary Function Test (PFT) on the Claimant (Claimant's Ex. 50). The PFT indicated forced expiratory volumes (FEVs) of 1.71 (Claimant's Ex. 64), 1.29 (Claimant's Ex. 62), 1.63 (Claimant's Ex. 61), 1.29 (Claimant's Ex. 59), 1.61 (Claimant's Ex. 58), 1.57 (Claimant's Ex. 57), 1.29 (Claimant's Ex.

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<sup>6e</sup> The Claimant's thoracic and lumbar spinal problems, and the Claimant's degenerative joint disease of the ankle, did not meet the severity criteria discussed in Analysis Section II, above. Accordingly, it is not necessary to discuss whether those alleged impairments meet the minimum requirements of the Social Security Administration's Listing of Impairments for the musculoskeletal category.

56), 1.27 (Claimant's Ex. 55), 1.29 (Claimant's Ex. 54), 1.15 and 1.14 (Claimant's Ex. 53), and 1.23 (Claimant's Ex. 52).

Four (4) of the FEV values arrived at in the Claimant's 12 breathing tests are *above* the 1.45 limit, while eight (8) of the FEV values arrived at in the Claimant's 12 breathing tests are *below* the 1.45 limit. The federal regulations do not discuss how multiple tests with results on both sides of the qualifying figure should be handled. A reasonable approach, in the absence of a controlling regulation, is to average the results of the tests. Averaging the test results in this case gives an average FEV value of 1.3725.

The Claimant's average FEV test score of 1.3725 is 0.0775 below the maximum qualifying FEV value for the Claimant's height. Accordingly, the Claimant's asthma symptoms meet the requirements of 20 CFR Pt. 404, Subpart P, App. 1, § 3.03A.

Because the Claimant's severe impairment (asthma) meets or medically equals the relevant criteria of the Listing of Impairments contained in the Social Security regulations located at 20 CFR Pt. 404, Subpart P, Appendix 1, the Claimant is deemed disabled pursuant to 20 CFR 416.920(a)(4)(iii) and no further inquiry is required.

## B. Do the Claimant's Mental Health Problems Meet the Requirements of the Relevant Listings?<sup>7</sup>

The Social Security disability system classifies the Claimant's mental health problems under the "Category of Impairments - Mental" listing (20 CFR Pt. 404, Subpart P, App. 1, Sections 12.00-12.10).

In the psychiatric evaluation prepared by examining physician [REDACTED], M.D. dated September 29, 2007 (Claimant's Exs. 13 – 19), Dr. Choi diagnosed the Claimant as suffering from three (3) specific mental health problems. *Id.* These are depression NOS (SSA Impairment Listing No. 12.04), post traumatic stress disorder (SSA Impairment Listing No. 12.06), and panic disorder without agoraphobia (SSA Impairment Listing No. 12.06). These three disorders will be discussed separately below in the order stated.

### 1. Does the Claimant's Depression Meet the Requirements of Listing Section 12.04?

The Social Security disability system classifies the Claimant's depression under "Affective Disorders" (20 CFR Pt. 404, Subpart P, App. 1, Section 12.04). Section 12.04 provides in relevant part as follows:

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<sup>7</sup> Although not strictly necessary for the adjudication of this case, a discussion of the Claimant's mental impairments is included here in the interest of thoroughness.

12.04 Affective Disorders: Characterized by a disturbance of mood, accompanied by a full or partial manic or depressive syndrome. Mood refers to a prolonged emotion that colors the whole psychic life; it generally involves either depression or elation. The required level of severity for these disorders is met when the requirements in both A and B are satisfied, or when the requirements in C are satisfied.

A. Medically documented persistence, either continuous or intermittent, of one of the following:

1. Depressive syndrome characterized by at least four of the following: a. Anhedonia or pervasive loss of interest in almost all activities; or b. Appetite disturbance with change in weight; or c. Sleep disturbance; or d. Psychomotor agitation or retardation; or e. decreased energy; or f. Feelings of guilt or worthlessness; or g. Difficulty concentrating or thinking; or h. Thoughts of suicide; or i. Hallucinations, delusions or paranoid thinking . . .

\* \* \* \* \*

And

B. Resulting in at least two of the following:

1. Marked restriction of activities of daily living; or
2. Marked difficulties in maintaining social functioning; or
3. Marked difficulties in maintaining concentration, persistence, or pace; or
4. Repeated episodes of decompensation, each of extended duration . . .

Or

C. Medically documented history of a chronic affective disorder of at least 2 years' duration that has caused more than a minimal limitation of ability to do basic work activities, with symptoms or signs currently attenuated by medication or psychosocial support, and one of the following:

1. Repeated episodes of decompensation, each of extended duration; or
2. A residual disease process that has resulted in such marginal adjustment that even a minimal increase in mental demands or change in the environment would be predicted to cause the individual to decompensate; or
3. Current history of 1 or more years' inability to function outside a highly supportive living arrangement, with an indication of continued need for such an arrangement.

The medical evidence in this case is insufficient to meet the requirements of Subsection C (see Findings of Fact at Paragraph 7; Claimant's Exs. 13 – 19). Thus, in order to satisfy Section 12.04, the Claimant must meet the requirements of *both* subsections (A)(1) and (B), above.

Review of the record indicates that the Claimant has medical evidence of the following three out of the nine factors listed in Subsection A:

1. Sleep disturbance (Findings of Fact at Paragraph 7; Claimant's Exs. 13 – 19).

2. Decreased energy (Findings of Fact at Paragraph 7; Claimant's Exs. 13 – 19).
3. Difficulty concentrating or thinking (Findings of Fact at Paragraph 7; Claimant's Exs. 13 – 19).

However, under Subsection A(1), the Claimant is required to present medical evidence supporting *at least four (4) of the nine (9) factors*. The Claimant is one factor short.

In summary, because the Claimant has not satisfied the requirements of *either* subsection 12.04(C), *or* the requirements of *both* subsections 12.04(A) and 12.04(B), the Claimant has failed to meet the "Listings" requirements for depression under 20 CFR Pt. 404, Subpart P, Appendix 1, Section 12.04.

2. Does the Claimant's Panic Disorder or Post Traumatic Stress Disorder (PTSD) Meet the Requirements of Section 12.06?

The Social Security regulations expressly classify the Claimant's panic disorder under "Anxiety Related Disorders" (20 CFR Pt. 404, Subpart P, Appendix 1, Section 12.06). The Social Security regulations themselves do not specify under which specific listing post traumatic stress disorder (PTSD) should be analyzed. Court decisions indicate, however, that post traumatic stress disorder is generally analyzed under Listing Section 12.06.<sup>8</sup> Listing Section 12.06 provides as follows:

12.06 Anxiety Related Disorders: In these disorders anxiety is either the predominant disturbance or it is experienced if the individual attempts to master symptoms; for example, confronting the dreaded object or situation in a phobic disorder or resisting the obsessions or compulsions in obsessive compulsive disorders. The required level of severity for these disorders is met when the requirements in both A and B are satisfied, or when the requirements in both A and C are satisfied.

A. Medically documented findings of at least one of the following:

1. Generalized persistent anxiety accompanied by three out of four of the following signs or symptoms: a. Motor tension; or b. Autonomic hyperactivity; or c. apprehensive expectation; or d. Vigilance and scanning;

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<sup>8</sup> See *Roberts v. Astrue*, 2009 WL 564947 (W.D. Wash. 2009), *Andreas v. Commissioner of Social Security*, 2009 WL 427377 (W.D. Mich. 2009), *York v. Commissioner of Social Security*, 2008 WL 4936971 (D. N.J.2008), *Lewandowski v. Astrue*, 2008 WL 4736788 (E.D. Cal. 2008), *Robinson v. Astrue*, 2008 WL 4790387 (E.D. N.C. 2008), *Dean v. Astrue*, 2008 WL 4585328 (W.D. Wash. 2008), *Taylor v. Astrue*, 2008 WL 3864613 (M.D. Ga. 2008), *Holbrook v. Commissioner of Social Security*, 2008 WL 2608118 (M.D. Fla. 2008), *Wright v. Astrue*, 2008 WL 1438856 (W.D. Va. 2008), *Jones v. Barnhart*, 2004 WL 1592079 (N.D. Ill. 2004), *Burke v. Barnhart*, 2003 WL 23893264 (E.D. Va. 2003), *Rowan v. Barnhart*, 67 Fed.Appx. 725 (3<sup>rd</sup> Cir. 2003), *Raglin v. Barnhart*, 2002 WL 31175213 (E.D. La. 2002), and *McCartney v. Apfel*, 28 Fed.Appx. 277 (4<sup>th</sup> Cir. 2002).

Or

2. A persistent irrational fear of a specific object, activity, or situation which results in a compelling desire to avoid the dreaded object, activity, or situation; or

3. Recurrent severe panic attacks manifested by a sudden unpredictable onset of intense apprehension, fear, terror and sense of impending doom occurring on the average of at least once a week; or

4. Recurrent obsessions or compulsions which are a source of marked distress; or

5. Recurrent and intrusive recollections of a traumatic experience, which are a source of marked distress;

And

B. Resulting in at least two of the following: (1) Marked restriction of activities of daily living; or (2) Marked difficulties in maintaining social functioning; or (3) Marked difficulties in maintaining concentration, persistence, or pace; or (4) Repeated episodes of decompensation, each of extended duration.

Or (C) Resulting in complete inability to function independently outside the area of one's home.

There is no medical evidence in the record to satisfy the criteria of Subsection A(1)(a) or A(1)(b). Accordingly, the Claimant fails to meet the requirements of Subsection A(1). Likewise, there is no medical evidence in the record to satisfy the criteria of Subsection A(2) or A(4).

Subsection A(3) requires evidence of “recurrent severe panic attacks manifested by a sudden unpredictable onset of intense apprehension, fear, terror and sense of impending doom occurring on the average of at least once a week.” In his psychiatric evaluation dated September 29, 2007 (Claimant’s Exs. 13 – 19), examining psychiatrist [REDACTED], M.D. reported that “the claimant says that he suffers from panic attacks approximately two to three times per week and these last 15-20 minutes at a time.” Examining physician [REDACTED] reported that “these panic attacks consist of [the Claimant] feeling hot with heavy breathing.” *Id.* “He feels stressed with severe anxiety . . .” *Id.* Examining physician [REDACTED] concluded that the Claimant “does appear to suffer from panic disorder” and that the Claimant’s psychological test scores “were not indicative of somebody who was actually malingering . . .” *Id.* The Claimant meets the requirements of Subsection A(3) based on examining physician [REDACTED]’s psychological assessment.

Next, Subsection A(5) requires medical documentation of “recurrent and intrusive recollections of a traumatic experience, which are a source of marked distress.” In his psychiatric evaluation dated September 29, 2007 (Claimant’s Exs. 13 – 19) examining physician [REDACTED] reported as follows:

[REDACTED] years ago two [of the Claimant’s] friends in two separate incidents were violently murdered and he witnessed both murders and he says “I still see it

sometimes” meaning the way his friends looked just after they were shot . . . he also says that occasionally he has some flashback type events where he sees these traumatic events occurring . . . The claimant says . . . occasionally he will have nightmares.

Based on his evaluation examining physician ██████ diagnosed the Claimant with post traumatic stress disorder. *Id.*

Witnessing a murder is clearly a traumatic experience. Further, examining physician ██████’s assessment clearly indicates that the Claimant has “recurrent and intrusive recollections” of the murders, and that these recollections are “a source of marked distress” to the Claimant when they occur. Accordingly, the Claimant meets the requirements of Subsection A(5) based on examining physician Choi’s psychological assessment.

Having satisfied the requirements of Subsection A, the Claimant must now satisfy the requirements of *either* Subsection B *or* Subsection C. There is no evidence in the record to satisfy the criteria of Subsection C. Accordingly, if the Claimant is to meet the requirements of Section 12.06, he must satisfy the criteria of Subsection B. That subsection requires a showing of *any two of the following four factors*: (1) Marked restriction of activities of daily living; (2) Marked difficulties in maintaining social functioning; (3) Marked difficulties in maintaining concentration, persistence, or pace and (4) Repeated episodes of decompensation, each of extended duration.

There is no evidence in the record to satisfy the criteria of Subsections B(1) or B(4). However, there is medical evidence in the record supporting Subsections B(2) and B(3). In his psychiatric evaluation dated September 29, 2007 (Claimant’s Exs. 13 – 19) examining physician ██████ reported as follows:

Chief Complaint: The claimant says he is applying for disability because he is unable to focus, he has difficulty with anger and depression as well as forgetfulness. He says he has trouble understanding, he has low tolerance for others and he gets impatient and is unable to follow instructions well . . . he says he is a loner and does not like to be around other people.

\* \* \* \* \*

[H]e last worked approximately four years ago as a ██████ . . . He says that he would suddenly find himself in a daze and find himself distracted and this would cause accidents because he was not paying attention to the machines . . .

This claimant does have the ability to perform simple and repetitive tasks although he does not appear to be able to perform more detailed and complex tasks consistently given his problems with poor attention and distractedness and limitations in memory and concentration . . . He also . . . would not be expected to interact successfully with coworkers [and] the public.

Examining physician ██████’s assessment clearly indicates that the Claimant has “marked difficulties in maintaining social functioning” and “marked difficulties in maintaining concentration.”

Accordingly, the Claimant meets the requirements of Subsection B(2) and B(3) based on examining physician [REDACTED]'s psychological assessment. Because the Claimant satisfies the requirements of Section 12.06(A) and 12.06(B), he satisfies the requirements of Listing Section 12.06 (Anxiety Related Disorders).

In summary, the Claimant has proven, by a preponderance of the evidence, that his Anxiety Related Disorders (post traumatic stress disorder and panic disorder) meet or medically equal the relevant criteria of the Listing of Impairments (Section 12.06) contained in the Social Security regulations located at 20 CFR Pt. 404, Subpart P, Appendix 1.<sup>9</sup> Accordingly, the Claimant is deemed disabled pursuant to 20 CFR 416.920(a)(4)(iii).

### CONCLUSIONS OF LAW

1. The Claimant carried his burden and proved, by a preponderance of the evidence, that:
  - a. He is not currently engaged in substantial gainful activity as defined by 20 CFR 404.1510.
  - b. His asthma (SSA Impairment Listing No. 3.03), post traumatic stress disorder (SSA Impairment Listing No. 12.06), and panic disorder (SSA Impairment Listing No. 12.06) constitute medically severe impairments as defined by 20 CFR 416.920(c) and 20 CFR 416.921(b).
  - c. His asthma (SSA Impairment Listing No. 3.03), post traumatic stress disorder (SSA Impairment Listing No. 12.06), and panic disorder (SSA Impairment Listing No. 12.06) have lasted or can be expected to last for 12 months or longer, and the Claimant therefore satisfies the twelve month durational requirement of 20 CFR 416.909 and 20 CFR 416.920(a)(4)(ii).
  - d. His asthma equals the requirements for Respiratory Impairments located at 20 CFR Part 404, Subpart P, Appendix 1, § 3.03, and the Claimant is therefore deemed disabled on this basis pursuant to 20 CFR 416.920(a)(4)(iii).
  - e. His panic disorder and post traumatic stress disorder equal the requirements for Anxiety Related Disorders located at 20 CFR Pt. 404, Subpart P, Appendix 1, §

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<sup>9</sup> This conclusion is supported by the court's decision in *Roberts v. Sullivan*, 732 F.Supp. 78 (N.D. Ind. 1990). In that case, the court held that a claimant who suffered from psychological disorders was disabled under Social Security Act and was entitled to supplemental security income benefits where, although claimant was able to care for her personal needs unassisted, her psychological impairments hampered her ability to interact appropriately and communicate effectively with others and prevented her from seeking competitive employment.

12.06, and the Claimant is therefore deemed disabled on this basis pursuant to 20 CFR 416.920(a)(4)(iii).

2. The Claimant failed to prove, by a preponderance of the evidence, that:
  - a. His back pain (SSA Impairment Listing No. 1.01) or degenerative joint disease of the right ankle (SSA Impairment Listing No. 1.02) constitute medically severe impairments as defined by 20 CFR 416.920(c) and 20 CFR 416.921(b);
  - b. His Depression NOS meets the SSA Listings requirements for Depression located at 20 CFR Pt. 404, Subpart P, Appendix 1, § 12.04.
3. The Division was therefore not correct when it denied, on or about May 22, 2008, the Claimant's application for Interim Assistance benefits submitted on or about May 12, 2008.

### **DECISION**

The Division erred when it denied, on or about May 22, 2008, the Claimant's application for Interim Assistance benefits submitted on or about May 12, 2008.

### **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 \_\_\_\_\_ day of June, 2009.

\_\_\_\_\_  
Jay Durych  
Hearing Authority

### **CERTIFICATE OF SERVICE**

I certify that on this \_\_\_\_\_ day of June, 2009,  
true and correct copies of the foregoing were sent to

the Claimant via U.S.P.S. mail, and to the remainder of the service list by e-mail, as follows:

Claimant – Certified Mail, Return Receipt Requested

[REDACTED], Director  
[REDACTED], Policy & Program Development  
[REDACTED], Staff Development & Training  
[REDACTED], Administrative Assistant II  
[REDACTED], Eligibility Technician I  
[REDACTED], Fair Hearing Representative

By \_\_\_\_\_  
Al Levitre, Law Office Assistant I