

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

In the Matter of	)	
	)	OAH No. 12-0587-APA
E S. J	)	Former OHA Case No.
_____	)	DPA Case No.

**FAIR HEARING DECISION**

**I. Introduction**

The issue in this case is whether E J is disabled for purposes of Alaska's Interim Assistance program. The Division of Public Assistance (DPA or Division) denied Ms. J' application on the basis that Ms. J did not satisfy the Interim Assistance program's disability requirements.

The Division conceded that Ms. J satisfies the first step of the Interim Assistance analysis (*i.e.*, that she is not currently engaged in substantial gainful activity). During the hearing process Ms. J demonstrated that she satisfies the second step of the Interim Assistance analysis (*i.e.*, she has one or more severe mental and/or physical impairments, and at least one of the impairments satisfies the 12 month durational requirement). On August 31, 2012 an order was entered establishing that Ms. J satisfies step 3 of the Interim Assistance analysis due to the Division's refusal to provide a neuropsychological evaluation for Ms. J as previously ordered. This decision concludes that, as a result of the Division's concession as to Step 1, the evidence establishing the severity and duration of Ms. J' impairments at Step 2, and the August 31, 2012 order's establishment of facts as to step 3, Ms. J satisfies the criteria for receiving Interim Assistance. Accordingly, the Division's decision denying Ms. J' application for Interim Assistance benefits is reversed.

**II. Facts**

**A. Ms. J's Mental Impairments**

Ms. J has mental impairments consisting of alcohol abuse (currently in remission),<sup>1</sup> polysubstance abuse (currently in remission),<sup>2</sup> chronic depression, anxiety, migraine headaches, and insomnia.<sup>3</sup> Prescription medications she has taken for these conditions within the last seven months include celexa, imitrex, paxil, phenylephrine, and trazodone.<sup>4</sup>

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<sup>1</sup> Ms. J testified that she has been sober since November 2011 (for approximately nine months as of the hearing of July 25, 2012). Hearing audio at 39:42.

<sup>2</sup> Ms. J testified that she has not abused drugs for approximately thirty years. Hearing audio at 34:26.

<sup>3</sup> Exs. 3.29, 3.35, 3.37, B16.

<sup>4</sup> Exs. 3.23, B15, B18.

Within the past six months Ms. J has complained of memory loss.<sup>5</sup> She has stated that she often forgets assignments, rules, and other things that people tell her, and is afraid she is getting Alzheimer's disease.<sup>6</sup> Ms. J's counselor told her doctor that other people at No Name House had noticed a cognitive decline.<sup>7</sup> She has also reported decreased concentration and low energy and motivation.<sup>8</sup> On April 11, 2012 a physician's assistant diagnosed Ms. J as having a mild cognitive impairment and recommended that Ms. J undergo a neuropsychological assessment.<sup>9</sup> However, on June 1, 2012 a physician saw Ms. J and ruled out any diagnosis of mild cognitive impairment.<sup>10</sup>

Szilvia Salamon, M.D. completed the Division's Form AD-2 on behalf of Ms. J on April 11, 2012.<sup>11</sup> Dr. Salamon diagnosed Ms. J as suffering from cognitive deficits, depression, migraine headaches, polysubstance abuse in remission, and osteoarthritis. Dr. Salamon wrote that it was not known whether Ms. J would recover from these conditions, and that it would probably take at least 12 months for Ms. J to recover were she to do so. Finally, Dr. Salamon wrote that Ms. J "needs a formal neuropsych assessment to determine [her] level of cognitive dysfunction."<sup>12</sup>

#### ***B. Ms. J's Physical Impairments***

Ms. J's physical impairments consist primarily of back and neck pain. A radiology report dated November 22, 2011 indicates that Ms. J has mild degenerative disk disease in her cervical vertebrae.<sup>13</sup> On November 29, 2011 Ms. J was diagnosed with lumbago.<sup>14</sup> Ms. J has been involved in two automobile accidents which may have caused or contributed to these problems.<sup>15</sup>

#### ***C. Relevant Procedural History***

Ms. J applied for Interim Assistance on April 2, 2012.<sup>16</sup> On April 20, 2012 the Division's Interim Assistance Medical Reviewer denied Ms. J's application on the basis that Ms. J did "not meet the APA program's disability requirements."<sup>17</sup> On April 23, 2012 Ms. J requested a hearing to

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<sup>5</sup> Ex. 3.22.

<sup>6</sup> Exs. 3.18, 3.22. Ms. J has reported a family history of Alzheimer's disease (Ex. 3.18).

<sup>7</sup> Ex. 3.18.

<sup>8</sup> Ex. 3.22.

<sup>9</sup> Ex. 3.20.

<sup>10</sup> Ex. B2.

<sup>11</sup> Exs. 3.3, 3.4, 3.11, 3.12.

<sup>12</sup> Exs. 3.4, 3.12.

<sup>13</sup> Ex. 3.39.

<sup>14</sup> Lumbago is a general term for acute or chronic pain in the lower back. See Merriam-Webster online dictionary at <http://www.merriam-webster.com/medical/lumbago> (date accessed September 24, 2012). It is typically caused by muscle strain, rheumatoid arthritis, osteoarthritis, or a herniated intervertebral disk. See Mosby's Medical Dictionary (8th Edition 2009), accessed online at <http://medical-dictionary.thefreedictionary.com/lumbago>.

<sup>15</sup> Ex. 3.35.

<sup>16</sup> Ex. 2.

<sup>17</sup> Ex. 4.

contest the denial of her application.<sup>18</sup> On May 24, 2012 the Division provided Ms. J with a supplemental denial notice containing a more detailed statement of the basis of the Division's decision.<sup>19</sup>

Ms. J's hearing began on June 12, 2012. However, on that date Ms. J requested that the hearing on the merits of the case be postponed to allow her time to submit additional medical records to the Division, and to allow the Division's Medical Reviewer to review those records. Ms. J's hearing was postponed to July 25, 2012.

Ms. J provided additional medical records to the Division on July 2, 2012. On July 3, 2012 the Division issued a notice stating that, based on the additional medical records provided, it was conceding that Ms. J satisfied the "step 2" durational requirement.<sup>20</sup> However, the Division still found Ms. J not disabled on the basis that she (the Division asserted) could still perform "occupations that require only 1-2 steps to complete the job tasks."<sup>21</sup>

Ms. J's hearing resumed on July 25, 2012. Ms. J represented herself and testified on her own behalf. Jeff Miller, a Public Assistance Analyst with the Division, represented the Division. Laura Ladner, the Division's disability adjudicator/medical reviewer, testified on behalf of the Division. Following the Division's presentation of its case, the undersigned found the evidence regarding the existence of a cognitive impairment to be conflicting. Accordingly, the undersigned ordered the Division to make arrangements for a neuropsychological evaluation for Ms. J, at its expense, pursuant to 7 AAC 49.140. The hearing was continued to August 21, 2012 to allow time for Ms. J to undergo the neuropsychological evaluation and for the physician to submit the written evaluation.

A status conference was held on August 17, 2012. Ms. J stated that she had not yet had her neuropsychological evaluation. The Division's Hearing Representative advised that the Division had not made arrangements for the neuropsychological evaluation. The Division's Hearing Representative explained that he had contacted another DPA employee to make arrangements for issuance of a Medicaid coupon or voucher to cover the neuropsychological evaluation, but that he had been told that such a coupon or voucher would not cover a neuropsychological evaluation.

Because it would have been pointless to resume the hearing in the absence of the neuropsychological evaluation, the hearing scheduled for August 21, 2012 was canceled. After

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<sup>18</sup> Ex. 5.  
<sup>19</sup> Exs. 13.1, 13.2.  
<sup>20</sup> Ex. 14.  
<sup>21</sup> Ex. 14.

hearing argument the undersigned ruled that 7 AAC 49.140 requires the Division to provide a neuropsychological evaluation for the applicant to determine her eligibility for Interim Assistance. However, following that ruling, counsel for the Division advised that the Division would not comply with the order to provide the neuropsychological evaluation. The undersigned then gave the Division the option of either providing the neuropsychological evaluation, or (alternatively) having an establishment / preclusion order entered, establishing in Ms. J's favor all facts which could reasonably be determined through a neuropsychological evaluation. The Division chose the latter option. On August 31, 2012 an establishment / preclusion order was entered establishing in Ms. J' favor all facts which could reasonably have been determined through a neuropsychological evaluation,<sup>22</sup> and the record closed on that date.

### **III. Discussion**

#### ***A. The Three Step Interim Assistance Disability Determination Process***

The Alaska Public Assistance (APA) program provides financial assistance to “aged, blind, or disabled needy [Alaska] resident[s].”<sup>23</sup> Applicants for APA who are under the age of 65 years are required to apply and qualify for federal Supplemental Security Income (SSI) benefits.<sup>24</sup> Once an applicant is approved for federal Supplemental Security Benefits, he or she is then eligible to receive Adult Public Assistance benefits.<sup>25</sup>

Interim Assistance is a monthly payment in the amount of \$280.00 provided by the Department to Adult Public Assistance applicants while they are waiting for the Social Security Administration (SSA) to approve their Supplemental Security Income applications.<sup>26</sup>

In order to qualify for Interim Assistance, the applicant must be “likely to be found disabled by the Social Security Administration.”<sup>27</sup> An Interim Assistance applicant has the burden of proving that he or she is likely to be found disabled by the SSA.<sup>28</sup>

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<sup>22</sup> A copy of that order is attached as Exhibit 1 to this decision.

<sup>23</sup> AS 47.25.430.

<sup>24</sup> 7 AAC 40.170(a). Adult Public Assistance applicants whose income exceeds the Supplemental Security Income standards are not required to apply for Supplemental Security Income benefits. 7 AAC 40.170(a).

<sup>25</sup> 7 AAC 40.030(a); 7 AAC 40.170(a).

<sup>26</sup> 7 AAC 40.170(a) and (b); AS 47.25.455.

<sup>27</sup> 7 AAC 40.180(b)(1).

<sup>28</sup> A party who is seeking a change in the status quo has the burden of proof. *State, Alcoholic Beverage Control Board v. Decker*, 700 P.2d 483, 485 (Alaska 1985). The normal standard of proof in an administrative proceeding, unless otherwise stated, is the preponderance of the evidence standard. *Amerada Hess Pipeline v. Alaska Public Utilities Comm'n*, 711 P.2d 1170, 1179 n. 14 (Alaska 1986).

The SSA uses a five-step evaluation process in making its disability determinations.<sup>29</sup> Each step is considered in order, and if the SSA finds the applicant disabled at any step, it does not consider subsequent steps.<sup>30</sup>

The Division uses the first three steps of the SSA disability determination process in deciding whether an applicant qualifies for Interim Assistance.<sup>31</sup> The first step looks at the applicant's current work activity. If the applicant is performing "substantial gainful activity," the applicant is not disabled.<sup>32</sup> If the applicant is not performing "substantial gainful activity," it is necessary to proceed to step two.

The second step requires the evaluation of the severity and duration of the applicant's impairment. Medical evidence, which consists of "signs, symptoms, and laboratory findings, not only [the applicant's] statement of symptoms," is required to establish an applicant's impairment.<sup>33</sup> In order to be considered disabled, the impairment or combination of impairments must be severe<sup>34</sup> and must be expected to result in death or must have lasted or be expected to last at least 12 months.<sup>35</sup> If the impairment is not severe or does not meet the duration requirement, then the applicant is not disabled. If the impairment is severe and meets the duration requirement, then it is necessary to proceed to step three.

The third step requires the evaluation of whether the impairment meets or equals one of the listings adopted by the SSA.<sup>36</sup> If it does, the applicant is disabled<sup>37</sup> and qualifies for Interim Assistance. If the applicant's impairment does not meet or equal one of the SSA listings, the applicant does not qualify for Interim Assistance.<sup>38</sup>

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<sup>29</sup> 20 C.F.R. § 416.920.

<sup>30</sup> 20 C.F.R. § 416.920(a)(4).

<sup>31</sup> See Commissioner's Decision dated August 20, 2012 in OAH Case No. 12-0688-APA.

<sup>32</sup> 20 C.F.R. § 416.920(a)(4)(i).

<sup>33</sup> 20 C.F.R. § 416.908.

<sup>34</sup> A severe impairment is one that "significantly limits [a person's] physical or mental ability to do basic work activities." 20 C.F.R. § 416.920(c).

<sup>35</sup> 20 C.F.R. § 416.920(a)(4)(ii); 20 C.F.R. § 416.909.

<sup>36</sup> See 20 C.F.R. Pt. 404, Subpart P, Appendix 1 (hereafter "Appendix 1").

<sup>37</sup> 20 C.F.R. § 416.920(a)(4)(iii) and (d).

<sup>38</sup> See Commissioner's Decision dated August 20, 2012 in OAH Case No. 12-0688-APA.

**B. Application of the Three-Step Analysis to This Case**

**1. Step 1 - Is the Applicant Engaged in Substantial Gainful Activity?**

The first step of the disability analysis asks whether the applicant is performing “any substantial gainful activity.”<sup>39</sup> The Division's Medical Reviewer testified at hearing that there was no evidence that Ms. J is currently engaged in substantial gainful activity, and that a case generally does not reach the Medical Reviewer (*i.e.* does not proceed past the Eligibility Technician's review at a DPA field office) unless the Division agrees that the applicant is not working.<sup>40</sup> Accordingly, Ms. J has proven that she is not currently engaged in substantial gainful activity and has satisfied Step 1 of the analysis.

**2. Step 2(a) - Is the Severity Requirement Satisfied?**

At step two of the sequential evaluation process, the adjudicator must determine which of the applicant's alleged impairments, if any, are “severe.”<sup>41</sup> An impairment should be found to be “non-severe” only when the evidence establishes a “slight abnormality” that has “no more than a minimal effect” on an individual's ability to work.<sup>42</sup> The inquiry at Step 2 is “a de minimis screening device to dispose of groundless claims.”<sup>43</sup> If an adjudicator is unable to clearly determine the effect of an impairment or combination of impairments on the individual's ability to do basic work activities, the sequential evaluation should not end with the Step 2 “severity” evaluation.<sup>44</sup>

Further, even if *no single impairment* is found to be severe under this lenient standard, each impairment must still be considered *in combination with all other impairments*.<sup>45</sup>

In this case, the Division did not concede that Ms. J's impairments—alone or in combination--were severe. However, doctors have prescribed, and Ms. J has taken, seven different

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<sup>39</sup> 20 C.F.R. § 416.972 defines “substantial gainful activity” as work that (a) involves doing significant and productive physical or mental duties, and (b) is done (or intended) for pay or profit.

<sup>40</sup> Laura Ladner hearing testimony of July 25, 2012 at 29:28.

<sup>41</sup> 20 C.F.R. § 404.1521.

<sup>42</sup> *Social Security Ruling (SSR)* 85-28, 1985 WL 56856 at 3 (SSA 1985); *see also Yuckert v. Bowen*, 841 F.2d 303, 306 (9<sup>th</sup> Cir. 1988); *Smolen v. Chater*, 80 F.3d 1273, 1290 (9th Cir. 1996); *Webb v. Barnhart*, 433 F.3d 683, 686 (9th Cir. 2006); *Kirby v. Astrue*, 500 F.3d 705, 707–08 (8th Cir. 2007); 20 C.F.R. §§ 404.1521(a), 416.921(a).

<sup>43</sup> *Smolen*, 80 F.3d at 1290 (citing *Bowen v. Yuckert*, 482 U.S. 137, 153–54, 107 S.Ct. 2287, 96 L.Ed.2d 119 (1987)).

<sup>44</sup> S.S.R. 85-28.

<sup>45</sup> 20 C.F.R. § 404.1523 states as follows:

In determining whether your physical or mental impairment or impairments are of a sufficient medical severity that such impairment or impairments could be the basis of eligibility under the law, we will consider the combined effect of all of your impairments without regard to whether any such impairment, if considered separately, would be of sufficient severity. If we do find a medically severe combination of impairments, the combined impact of the impairments will be considered throughout the disability determination process.

prescription medications to treat her chronic depression and its related symptoms.<sup>46</sup> Federal disability case law suggests that a prescription for psychotropic medication by itself can indicate the existence of a severe impairment for purposes of Step 2.<sup>47</sup> Further, the Division's letter dated July 3, 2012 implicitly acknowledges that Ms. J's impairments have more than a minimal effect on her ability to work by stating that Ms. J "should be capable of at least doing occupations that require only 1-2 steps to complete the task."<sup>48</sup>

In summary, the record contains medical evidence that Ms. J suffers from degenerative disk disease, migraine headaches, chronic depression, and related mental problems. The combined effect of these impairments has more than a minimal effect on Ms. J ability to perform work-related activities. Accordingly, Ms. J's mental and physical impairments, in combination, are medically severe, and Ms. J has satisfied Step 2 of the disability analysis.

3. Step 2(b) - Is the Durational Requirement Satisfied?

The next step, pursuant to 20 CFR 416.909, is to decide whether or not Ms. J's impairments have lasted, or can be expected to last, for a continuous period of at least 12 months. In this regard, it is important to note that the 12 month duration requirement of 20 CFR 416.909 is retrospective as well as prospective; it looks back in time as well as forward in time (i.e. the impairment "must have lasted or must be expected to last").

The Division's medical reviewer questioned whether Ms. J's mental impairments met the duration requirement. A review of Ms. J's medical records dating back to November 2011 shows a consistent diagnosis of depression.<sup>49</sup> Further, the Division's own AD-2 form, dated April 11, 2012, indicates that Ms. J's impairments were expected to continue for at least 12 months after that date.<sup>50</sup> Thus, as of April 2012 Ms. J's impairments had lasted for at least five months, and were expected to last for at least another 12 months. As a result, the medical evidence shows that Ms. J's impairments met the 12 month durational requirement. Accordingly, Ms. J satisfies step two of the disability determination process.

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<sup>46</sup> See discussion at pages 1-2, above.

<sup>47</sup> See *Cowains v. Astrue*, 2012 WL 3779076 (C.D. Cal. 2012).

<sup>48</sup> Ex. 14.

<sup>49</sup> Ex. 3.35.

<sup>50</sup> Ex. 3.4.

4. Step 3 - Does the Applicant "Meet the Listing?"

The next step in the analysis is to determine whether the applicant's severe impairment(s) meets the specific criteria of one or more of the listings of impairments contained in the SSA's regulations at 20 CFR Part 404, Subpart P, Appendix 1 ("the Listings").

The SSA Listing which applies to depression is Section 12.04 (affective disorders). To the extent that she reached the issue, the Division's Medical Reviewer concluded there was not enough medical evidence in the record to show that Ms. J satisfied SSA listing 12.04.<sup>51</sup>

Ms. J's degenerative disk disease (DJD) falls with the general SSA medical listing for musculoskeletal conditions (Listing 1.00) and the specific listing for disorders of the spine (Listing 1.04).<sup>52</sup> The Division's Medical Reviewer did not reach the issue of whether Ms. J's DJD satisfied the SSA's "Listings" because she concluded at Step 2 that Ms. J's DJD was not a severe impairment.

The record indicates that Ms. J's DJD does not satisfy the requirements of SSA Listing 1.04. Accordingly, Ms. J is not disabled based on her DJD.

The evidence as to the exact nature and extent of Ms. J's mental impairments was equivocal; her health care provider stated on the Division's Form AD-2 that "[s]he needs a formal neuropsych assessment to determine [her] level of cognitive dysfunction."<sup>53</sup> It was for this reason that, during the hearing of July 25, 2012, the undersigned ordered the Division to make arrangements for a neuropsychological evaluation for Ms. J pursuant to 7 AAC 49.140.<sup>54</sup>

Had the neuropsychological evaluation been conducted, it might have confirmed that Ms. J does not satisfy the requirements of the SSA's listing for depression; in that event, Ms. J's application for Interim Assistance would have been denied.

In this case the Division refused to comply with the order to provide the neuropsychological evaluation. Accordingly, it cannot be known whether, as a factual matter, Ms. J satisfies the SSA's listing for depression. However, as a result of the Division's refusal to provide the neuropsychological evaluation, an establishment / preclusion order was entered establishing in Ms. J's favor all facts which could reasonably be determined through a neuropsychological evaluation.

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<sup>51</sup> Laura Ladner hearing testimony.

<sup>52</sup> See 20 C.F.R. § Part 404, Subpart P, Appendix 1, §§ 1.00 and 1.04.

<sup>53</sup> Ex. 3.4.

<sup>54</sup> Once an applicant requests a hearing, the Department's Fair Hearing regulations, located at 7 AAC 49.010 - 7 AAC 49.900, come into play. Once they come into play, they take precedence over program-specific regulations as to all matters related to hearing procedures. Fair Hearing regulation 7 AAC 49.140 provides in relevant part that, "[i]f the hearing involves medical issues, the division *shall* provide for a medical assessment by a qualified person . . . ." (emphasis added). This regulation clearly authorized, and probably required, the ordering of a neuropsychological evaluation in this case.



A full neuropsychological evaluation would have indicated whether Ms. J satisfied any SSA listings for mental disorders. Accordingly, the effect of the establishment / preclusion order of August 31, 2012 is to create a non-rebuttable presumption that Ms. J satisfies the criteria for one or more of the SSA's listings for mental impairments. For this reason, Ms. J satisfies Step 3 and qualifies for Interim Assistance.

**IV. Conclusion**

Ms. J met her burden of proving that she is likely to be found disabled by the Social Security Administration due to a combination of her physical and mental impairments. As a result, the Division's decision denying Ms. J's application for Interim Assistance is reversed.

DATED this 26th day of September, 2012.

*Signed*  
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Jay D. Durych  
Administrative Law Judge

**BEFORE THE STATE OF ALASKA  
COMMISSIONER OF HEALTH AND SOCIAL SERVICES**

In the Matter of	)	
	)	OAH No. 12-0587-APA
E S. J	)	Former OHA Case No.
_____	)	DPA Case No.

**COMMISSIONER'S DECISION**

The undersigned, in her role as final decision maker in the *Matter of E S. J*, OAH No. 12-0587-APA, and in accordance with AS 44.64.060(e)(5), concurs with the Proposed Fair Hearing Decision of Administrative Law Judge (“ALJ”) Jay Durych dated September 26, 2012 reversing the Division’s decision denying Ms. J’ application for Interim Assistance benefits.

However, in concurring with the outcome and granting Ms. J Interim Assistance benefits, the undersigned disagrees with and does not adopt ALJ Durych’s ruling that an ALJ may order the Division to perform a neuropsychological evaluation pursuant to 7 AAC 49.140. Consequently, no precedent is created in support of the proposition that 7 AAC 49.140 authorizes an ALJ to order a neuropsychological evaluation, or any other assessment other than what is specified by 7 AAC 40.180(a), when adjudicating an administrative appeal of a denial of Interim Assistance benefits.

In all other material respects, except where inconsistent with this Decision, the September 26, 2012 proposed Decision is adopted. This Decision, and the ALJ's September 26, 2012 decision document (as modified above), constitute the final decision of the Commissioner in this case. It is hereby ordered, that the Division’s April 20, 2012 decision denying Ms. J Interim Assistance benefits is reversed.

## APPEAL RIGHTS

This decision is the final administrative action in this proceeding. 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 13<sup>th</sup> day of November, 2012.

By: Signed  
Ree Sailors, Deputy Commissioner  
Department of Health and Social Services

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