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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-787
	)	
Claimant.	)	Division Case No. [redacted]
	)	

FAIR HEARING DECISION

STATEMENT OF THE CASE

[redacted] (Claimant) applied for Interim Assistance benefits (Ex. 1). [1] The Division of Public Assistance (DPA or Division) denied the application on or about October 8, 2008 (Ex. 2.3). The Claimant requested a fair hearing contesting the denial on or about October 29, 2008 (Exs. 3-4).

A hearing was held on December 4, 2008. [redacted] appeared telephonically to represent and testify on behalf of the Claimant. The Claimant appeared and testified telephonically. [redacted], a Public Assistance Analyst with the Division, appeared in person to represent the Division, and testified on behalf of the Division. [redacted], R.N. testified telephonically on behalf of the Division.

ISSUE

Was the Division correct to deny the Claimant's October 2008 application for Interim Assistance benefits based on the assertion that the Claimant did not meet the program's disability requirements?

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[1] The record is incomplete with regard to the filing date of the Claimant's current application. A DPA "case profile" dated November 4, 2008 (Exhibit 1) indicates that the Claimant previously applied for Interim Assistance benefits on December 13, 2007, and that that application was denied. It appears that the Claimant's current application was filed in October 2008 (Ex. 2.1), but the exact filing date cannot be determined on this record. In any event, the exact filing date of the Claimant's current application is not necessary for the adjudication of this case.

FINDINGS OF FACT

1. The Claimant was born on [REDACTED] (Ex. 2.7) and was [REDACTED] years of age at the time of the hearing.

2. At the hearing, the Claimant testified that he attended [REDACTED] High School, where he took "slow learning disability classes." However, he does not have a high school diploma or graduation equivalency diploma (Claimant hearing testimony). After high school, the Claimant attended a vocational-technical school in [REDACTED] ([REDACTED] Job Corp.) where he learned plastering and tiling (Claimant hearing testimony).

3. The Claimant testified that he graduated / received diplomas from the vocational / technical school, but stated that his teachers helped him with the reading and math involved (Claimant hearing testimony). The Claimant stated that he has "a real, real bad learning disability . . . . I don't know my time tables, I can't really read, I can't spell, I can't use a calculator . . . it's really bad."

4. The Claimant's last, and apparently only, employment was with [REDACTED] Company (phonetic spelling) in Florida. This was construction work involving both the operation of heavy equipment, and manual labor involving the lifting of items weighing 80-90 pounds (Claimant hearing testimony). The Claimant stated that he worked this job for about 1.5 years (Claimant hearing testimony).

5. In or about May [REDACTED] the Claimant was struck by an automobile while riding his bicycle (Claimant hearing testimony; Exs. 2.9 – 2.12). The Claimant's lower left leg was broken in the accident (Claimant hearing testimony; Exs. 2.9 – 2.12). Following the accident the Claimant was admitted to Jacksonville Hospital in Florida for surgery to his broken leg (Claimant hearing testimony; Exs. 2.9 – 2.12).

6. On June 3, [REDACTED] the Claimant was examined by [REDACTED], M.D. (Exs. 2.9 – 2.12). Dr. [REDACTED]'s report states in relevant part as follows: [2]

> The patient is a [REDACTED] year old man here for a complaint of leg pain. He states that in May 2006 he had a grade 3A open tibia / fibula fracture and the leg almost had to be amputated. It . . . took about 6 months to heal. . . . He stated he was in the hospital for 1 month. He stated that he has not had any physical therapy. He further states that the doctor told him that the leg is very fragile and it could easily break.
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> * * * * * * * * * * * *
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> The patient ambulates with a cane. As I look at both of his legs while wearing shorts, it is difficult to appreciate much difference between the 2 legs. A small transverse, well healed laceration is present at the midshaft level. This is the only

[2] Various medical abbreviations used in this report have been spelled out here for purposes of clarity.

apparent laceration. The incisions from the surgery are well healed and the scars are barely noticeable. He does not specifically complain of pain over the locking screws. When I try to focus on this area, he does not seem to differentiate between pressure over the screws and more generalized pain. He basically states that the whole leg is painful. There is some numbness in the saphenous nerve distribution, which is the area that the laceration traversed. Otherwise his neurovascular exam is grossly intact *except for mild generalized weakness*. {Emphasis added].

X-rays: AP and lateral views of the left tibia and fibula show a simple fracture . . . . The [tibia] fracture is well healed. The fibula fracture is also well-healed.

* * * * * * * * * * * *

The patient came here today with his sister. Initially I was under the impression that he was complaining of pain over the hardware. As the discussion progressed, it was clear that his only interest was in getting on disability. He stated that the doctor told him that his leg was very fragile and that if he did anything physical on it, it would shatter. I find this very hard to believe. The fracture is well healed and there is no reason he cannot do normal activities. Additionally, he stated that the fracture was a grade 3A fracture. By definition, this is an open fracture with extensive soft tissue laceration and soft tissue damage to the muscle. This does not appear to me to be this type of injury. This looks like a grade 2 injury, which is well healed. Nevertheless, there is no reason for this patient to be on disability.

* * * * * * * * * * * *

7. On June 15, 2008 , M.D. completed a Form AD-2 on behalf of the Claimant (Exs. 2.5 – 2.8). On that form, Dr. diagnosed the Claimant as having a "healed tibia fracture." In response to the question "Is the applicant expected to recover from this illness or condition?" Dr. marked "Yes." In response to the question "If yes, what is the expected length of time required for recovery or remission? there was no response; the item was left blank. Dr. 's other relevant comments on the form were as follows:

Patient has weakness [indecipherable] leg which would be improved with therapy. No other disability is present . . . .

8. The Claimant applied for interim assistance benefits in or about October 2008 (Ex. 2.1; see footnote 1, above). On October 8, 2008 the DPA's medical reviewer denied the Claimant's application (Ex. 2.3), stating in relevant part as follows:

Denied based on the medical review which indicated that the [Claimant] had [healed] fractures of the left leg which has created some pain but his condition is not severe having not affected his functional abilities. Consequently, it [appears] likely that the [Claimant] could engage in some type of employment.

9. At the hearing, the Claimant testified that he walks using a cane. He stated that he generally walks only to the bathroom and to get the mail. He stated that if he walks too much his ankle “swells up like a balloon” (Claimant hearing testimony).

10. The Claimant testified that he is able to dress himself, but that he has to sit down to do so. He stated that he is able to feed himself, but that he cannot stand up long enough to cook, so his friend cooks for him (Claimant hearing testimony).

11. The Claimant testified that he can only sit for about “15 minutes before I have to get up to stretch my hip and my leg and my ankle . . . and then I have to sit back down for another 10-15 minutes before I start hurting again real bad.” The Claimant stated that he was worried that if he started working again he would re-break his leg and that his leg would then have to be amputated (Claimant hearing testimony).

12. [redacted] [redacted], a friend of the Claimant, testified at the hearing on behalf of the Claimant. She stated that the Claimant had worked as a laborer until he was run over by a drunk driver, and that he had been unable to work since that time. She disagreed with Dr. [redacted]’s diagnosis. She stated that the Claimant’s injury was not a simple fracture and that the Claimant “almost had to have his leg amputated” as a result of the May 2006 accident ([redacted] hearing testimony).

13. Ms. [redacted] asserted that Dr. [redacted] was prejudiced against the Claimant and did not want to see him obtain disability benefits. She stated that the Claimant has numbness in his left leg and foot. She said “he has to be so careful when he walks” . . . he uses a cane . . . “he can’t work anymore . . . he doesn’t want to be collecting disability . . . he wants to go back to work but he can’t . . . because if he does he is going to have to have [the leg] amputated . . . “ ([redacted] hearing testimony).

14. At the hearing, [redacted] testified that she is a registered nurse (R.N.) employed by the Division who reviews medical information for Interim Assistance determinations ([redacted] hearing testimony; see also Exs. 8.0 – 8.2). Ms. [redacted] performed the medical eligibility review in this case ([redacted] hearing testimony; Ex. 2.3).

15. At the hearing Ms. [redacted] testified that she does not meet with the applicant during the medical review process. She obtains releases from the claimant, requests the medical documents from the sources for which releases are provided, and then reviews the medical documents provided in response to the releases ([redacted] hearing testimony).

16. At the hearing Ms. [redacted] testified that her initial denial of the Claimant’s application had been based largely on Dr. [redacted]’s report (Exs. 2.9 – 2.12). Ms. [redacted] maintained that the Claimant was not disabled based on the relevant criteria, and that the Claimant could still perform the Activities of Daily Living (ADLs). [3]

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[3] See 7 AAC 40.180, discussed below in the Principles of Law section.

17. Some of the Claimant's hearing testimony, and some of Ms. [redacted]'s hearing testimony, was credible. However, significant portions of the Claimant's hearing testimony, and much of Ms. [redacted]'s hearing testimony, appeared to be contradicted by evidence in the Claimant's medical reports.

18. At the hearing, the Claimant requested additional time to obtain medical records pertaining to the May 2006 accident from Jacksonville Hospital in Florida. The record was held open for the providing of additional medical documentation by the Claimant. The Claimant was given until January 5, 2009 to provide his additional medical information. The Division was given until January 15, 2009 to submit any response to the Claimant's supplemental medical information. The Claimant failed to submit any additional medical records.

PRINCIPLES OF LAW

This case involves an application for Interim Assistance benefits. When an application is denied, the applicant has the burden of proof [4] by a preponderance of the evidence. [5]

Interim Assistance is a benefit provided by the State of Alaska to Adult Public Assistance applicants while they are waiting for the Social Security Administration to approve a Supplemental Security Income application. 7 AAC 40.170(a) and (b); AS 47.25.255. The criteria which must be satisfied in order to qualify for Interim Assistance benefits are set forth in 7 AAC 40.180. [6]

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[4] "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).

[5] 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 1064 (West Publishing, 5th Edition, 1979).

[6] 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.
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> (b) The department will make a determination of whether the applicant is disabled based on
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>> (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;
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>> (3) other evidence provided by the applicant under 7 AAC 40.050, if applicable; and

In order to qualify for Interim Assistance, the applicant must satisfy the Social Security Administration's Supplemental Security Income (SSI) disability requirements as set forth in the Social Security regulations. 7 AAC 40.180(b)(1). [7] The Social Security regulations set out a very specific multistep process that must be followed in order to determine whether an applicant 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

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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.
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> (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
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> > (1) the applicant's condition is listed as an impairment category described in (b)(1)(B) of this section;
> >
> > (2) the medical information obtained under (b) of this section documents the applicant's impairment;
> >
> > (3) the 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.

[7] 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). Because the analysis under the federal regulations proceeds in a more understandable, step-by-step manner, this decision is organized according to the analysis used in the federal regulations.

significantly limits a person's physical or mental ability to do basic work activities. 20 C.F.R. 404.1521(a); 20 CFR 416.920(c); 20 CFR 416.921(a). 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). 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 twelve (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 12 months, or can be expected to last for a continuous period of at least twelve months. [8] 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 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 .

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[8] 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.

. . 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 (5th 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

The final step in the disability analysis is to determine whether the applicant is capable of performing any 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 work in the economy that the claimant can perform).

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).

ANALYSIS

It is necessary to review the evidence in this case and decide, using the above multistep Social Security disability analysis, whether the Claimant's impairments satisfy the Social Security disability criteria. 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.

I. Basic Definition of Disability

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."

II. Is the Claimant Performing Substantial Gainful Activity?

The first element of the disability analysis is whether the claimant is performing "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." Pursuant to 20 CFR 404.1572(a), "work may be substantial even if it is done on a part time basis . . . ."

The Claimant asserted that he has not worked since his accident in 2006 (Claimant hearing testimony). The Division did not contest this assertion. Accordingly, the Claimant has met the first step of the Social Security disability analysis – he has proven, by a preponderance of the evidence, that he is not engaged in "substantial gainful activity." It is therefore necessary to proceed to the next step and to determine whether the Claimant is severely impaired.

III. Does the Claimant Have a Severe Impairment?

A severe impairment is one that "significantly limits [a person's] physical or mental ability to do basic work activities." 20 CFR 416.920(c). "Basic work activities" include "physical functions such as walking, standing, sitting, lifting." 20 CFR 416.921(b).

The Claimant's disability claim is based on the fracture of his lower left leg bones sustained in his May ████ accident (Claimant hearing testimony; Exs. 2.9 – 2.12). In order to avoid being found to be *not disabled* at this stage, the Claimant must prove that his impairment is medically severe pursuant to 20 CFR 416.920(c). To do this, the Claimant must demonstrate that his impairment significantly limits his ability to do basic work activities such as walking, standing, sitting, and lifting (20 CFR 416.921(b)).

With regard to walking, the Claimant testified that he walks using a cane. He stated that he generally walks only to the bathroom and to get the mail. He stated that if he walks too much his ankle "swells up like a balloon." See Findings of Fact at Paragraph 9, above. With regard to standing, the Claimant testified that he cannot stand up long enough to cook, so his friend cooks for him. See Findings of Fact at Paragraph 10, above. With regard to sitting, the Claimant testified that he can only sit for about "15 minutes before I have to get up to stretch my hip and my leg and my ankle . . . and then I have to sit back down for another 10-15 minutes before I start hurting again real bad." See Findings of Fact at Paragraph 11, above. Finally, with regard to lifting, there was no evidence in the record regarding the Claimant's lifting abilities.

Both the Claimant and Ms. [REDACTED] testified that the Claimant's physical functions such as walking, standing, and sitting are significantly impaired. However, pursuant to the applicable regulations, a claimant's own statements regarding his symptoms, by themselves, are not sufficient to establish an impairment. 20 C.F.R. § 416.908. The regulations expressly require evidence from medical sources to establish that a claimant has a medically determinable impairment. 20 C.F.R. § 404.1513(a); see also 20 CFR 416.908.

The Claimant's hearing testimony was directly contradicted by the only medical evidence in the record, the June 3, 2008 report of [REDACTED], M.D. (Exs. 2.9 – 2.12). This report states in relevant part as follows:

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> The patient ambulates with a cane. As I look at both of his legs while wearing shorts, it is difficult to appreciate much difference between the 2 legs. A small transverse, well healed laceration is present at the midshaft level. This is the only apparent laceration. The incisions from the surgery are well healed and the scars are barely noticeable. He does not specifically complain of pain over the locking screws. When I try to focus on this area, he does not seem to differentiate between pressure over the screws and more generalized pain. He basically states that the whole leg is painful. There is some numbness in the saphenous nerve distribution, which is the area that the laceration traversed. *Otherwise his neurovascular exam is grossly intact except for mild generalized weakness.* [Emphasis added].
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> X-rays: AP and lateral views of the left tibia and fibula show a simple fracture . . . . The [tibia] fracture is well healed. The fibula fracture is also well-healed.

* * * * * * * * * * * *

> The patient . . . . stated that the doctor told him that his leg was very fragile and that if he did anything physical on it, it would shatter. I find this very hard to believe. *The fracture is well healed and there is no reason he cannot do normal activities.* Additionally, he stated that the fracture was a grade 3A fracture. By definition, this is an open fracture with extensive soft tissue laceration and soft tissue damage to the muscle. This does not appear to me to be this type of injury. This looks like a grade 2 injury, which is well healed. *Nevertheless, there is no reason for this patient to be on disability* . . . . [Emphasis added].

Dr. [REDACTED] could find no objective medical evidence of an impairment, and in fact opined that the Claimant is not disabled (Exs. 2.9 – 2.12). Substantial weight must be given to the opinion, diagnosis and medical evidence of a medical provider 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). There is no evidence in the record to indicate that Dr. [REDACTED]'s report is biased or otherwise untrustworthy. Accordingly, in the absence of other contradicting medical evidence, Dr. [REDACTED]'s report must be accepted as credible.

In summary, the regulations expressly require evidence from medical sources to establish that a claimant has a medically determinable impairment. The Claimant failed to provide any such medical evidence. The claimant's own statement of symptoms alone will not suffice. 20 C.F.R. § 416.908 Accordingly, the Claimant has failed to prove, by a preponderance of the evidence, that his lower left leg fracture constitutes a medically "severe impairment" as defined by 20 CFR 416.920(c) and 20 CFR 416.921(b). The Claimant is therefore not disabled according to the federal regulations, the requirements of which are incorporated by reference into the State of Alaska's Interim Assistance regulations.

Because the Claimant has been found not to be disabled at this step of the analysis, it is technically unnecessary to proceed with the remainder of the Social Security disability analysis. In this case, however, the remainder of the analysis is presented for the benefit of the parties.

IV. Does the Claimant's Severe Impairment Meet the Durational Requirement?

The next step, pursuant to 20 CFR 416.909, is to decide whether or not the Claimant's impairment has 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").

At the hearing, Ms. [redacted] testified that the Claimant has been impaired since his accident in May 2006. See Findings of Fact at Paragraph 12. While not as explicit, the Claimant's own testimony indicates that his impairments began following the May 2006 accident. At the time of the hearing, it had been approximately two years and seven months (i.e. 31 months) since the May 2006 accident. In addition, the Division did not dispute these facts. Accordingly, the Claimant has proven, by a preponderance of the evidence, that his impairment meets the 12 month durational requirement.

The next step in the Social Security disability analysis requires a determination of whether the Claimant's severe impairment meets the criteria of the Social Security Administration's relevant listing of impairments.

V. Does the Claimant's Impairment Meet the Criteria of the Social Security Administration's Relevant Listing of Impairments?

The next step is to decide whether the Claimant's impairment meets the criteria of the Social Security Administration's relevant listing of impairments.

A. Burden of Proof

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 at page 5, above. 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").

B. The Relevant Listing

The regulations constituting the listing of impairments are located at 20 CFR Pt. 404, Subpart P, Appendix 1. The Claimant's impairment is categorized generally under "Category of Impairments, Musculoskeletal" (20 CFR Pt. 404, Subpart P, Appendix 1, Section 1.01). The specific categorization of the Claimant's impairment is under Section 1.06 ("Fracture of the femur, tibia, pelvis, or one or more of the tarsal bones." The requirements of that listing are as follows:

> A. Solid union not evident on appropriate medically acceptable imaging and not clinically solid; *and* B. Inability to ambulate effectively, as defined in 1.00B2b, and return to effective ambulation did not occur or is not expected to occur within 12 months of onset. [Emphasis added]. [69]

The Claimant failed to present medical evidence demonstrating that the healing of his fracture had not achieved a "solid union," or that the fusion of the broken bones was not "clinically solid." Accordingly, the Claimant has failed to satisfy the criteria of Section 1.06(A).

Section 1.06(B) requires the Claimant to demonstrate that he is unable "to ambulate effectively, as defined in 1.00B2b." Section 1.00B2b states as follows:

> (1) Definition. Inability to ambulate effectively means an extreme limitation of the ability to walk . . Ineffective ambulation is defined generally as having insufficient lower extremity functioning (see 1.00J) to permit independent ambulation without the use of a hand-held assistive device(s) that limits the functioning of both upper extremities . . . .
>
> (2) To ambulate effectively, individuals must be capable of sustaining a reasonable walking pace over a sufficient distance to be able to carry out activities of daily living. They must have the ability to travel without companion assistance to and from a place of employment or school. Therefore, examples of ineffective ambulation include, but are not limited to, the inability to walk without the use of a walker, two crutches or two canes, the inability to walk a block at a reasonable pace on rough or uneven surfaces, the inability to use standard public transportation, the inability to carry out routine ambulatory activities, such as shopping and banking, and the inability to climb a few steps at a reasonable pace with the use of a single hand rail . . . .

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[9] Section 1.06 is written in the conjunctive; it requires that the Claimant prove *both* that the healing of the fracture was not solid (under subsection A), *and* that he is unable to ambulate effectively (under subsection B). Thus, because the Claimant has not satisfied the criteria of subsection A, it is not technically necessary to proceed with an analysis under subsection B. However, an analysis under subsection B is included here for the sake of thoroughness.

At the hearing, the Claimant testified that he walks using a cane. He stated that he generally walks only to the bathroom and to get the mail. He stated that if he walks too much his ankle "swells up like a balloon." See Findings of Fact at Paragraph 9, above. As noted in Section III at page 9, above, the Claimant's testimony regarding his symptoms is not corroborated by, and in fact is contradicted by, Dr. [redacted]'s report. However, even if the Claimant's testimony were corroborated by medical evidence, his difficulties with walking do not rise to the level required by Sections 1.00B2b and 1.06B (quoted above) because the Claimant is able to walk without the use of a walker, two crutches, or two canes. Accordingly, the Claimant's impairment does not meet the requirements of 20 CFR Pt. 404, Subpart P, Appendix 1, Section 1.06.

In summary, based on the evidence in the record, the Claimant simply has not satisfied his burden of proving, by a preponderance of the evidence, that his lower left leg fracture meets the criteria of the relevant listing (Section 1.06).

VI. Does the Claimant's Impairment Medically Equal the Criteria of the Social Security Administration's Relevant Listing of Impairments?

It is next necessary to determine whether the Claimant's impairments, although not technically *meeting* the criteria of the relevant listings, are never-the-less *equal to, or medically equivalent to*, the relevant listings (20 CFR 404.1520(a)(4)(iii)). The Claimant has the burden of proving the medical equivalence of his impairments by a preponderance of the evidence. See Principles of Law at page 5, above.

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). 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"). In this case, the responsibility for determining medical equivalence rests with the hearing officer (20 CFR 926(e)).

Dr. [redacted]'s report dated June 3, 2008 (Exs. 2.9 – 2.12) states that x-rays "of the left tibia and fibula show a simple fracture . . . . The [tibia] fracture is well healed. The fibula fracture is also well-healed." These findings indicate that the Claimant's fracture healed far too well to be medically equal to the "lack of a solid union" requirement of Section 1.06A, set forth above. Indeed Dr. [redacted] concludes that "the fracture is well healed and there is no reason he cannot do normal activities." This doctor also states, "this looks like a grade 2 injury, which is well healed. Nevertheless, there is no reason for this patient to be on disability . . . ."

At the hearing, the Claimant testified that he walks using a cane; that he generally walks only to the bathroom and to get the mail; and that if he walks too much his ankle "swells up like a balloon." See Findings of Fact at Paragraph 9, above. As noted in Section III at page 9, above, the Claimant's testimony regarding his symptoms is not corroborated by, and in fact is contradicted by, Dr. [redacted]'s report. However, even if the Claimant's testimony were corroborated by medical evidence, the limitations on the Claimant's ability to walk are simply not "medically equal" to the limitations required by Sections 1.00B2b and 1.06B (quoted above) because the Claimant is able to walk without the use of a walker, two crutches, or two canes.

In summary, the Claimant failed to prove, by a preponderance of the evidence, that his impairment is "medically equivalent" to the requirements of 20 CFR Pt. 404, Subpart P, Appendix 1, Section 1.06. Accordingly, it is necessary to proceed to the next question in the Social Security disability analysis: whether or not the Claimant's impairment prevents him from doing his past relevant work (20 CFR 404.1560(a)).

VII. Can the Claimant Perform His Past Relevant Work?

The next issue, pursuant to 20 CFR 404.1560(a), is whether the Claimant's impairment prevents him from doing his past relevant work. The Claimant has the burden of proving, by a preponderance of the evidence, that his impairment prevents him from performing his past relevant work. See Principles of Law at page 5, above.

The Social Security disability regulations define "past relevant work" as "work that you have done within the past 15 years, that was substantial gainful activity, and that lasted long enough for you to learn to do it." See 20 CFR 404.1560(b)(1).

The testimony of a vocational specialist is normally used in Social Security disability cases to determine whether or not a claimant can perform his past relevant work. See 20 CFR 404.1560(b)(2). Unfortunately, no such testimony exists in this case. The only evidence on this issue is the Claimant's own hearing testimony.

At the hearing, the Claimant testified that his prior work consisted of construction work involving both the operation of heavy equipment, and manual labor involving the lifting of items weighing 80-90 pounds (Claimant hearing testimony). The Claimant stated that he worked this job for about 1.5 years (Claimant hearing testimony).

The heavy physical labor previously performed by the Claimant clearly involved lifting, walking, and standing. There is no evidence in the record regarding the Claimant's current ability to lift. However, the Claimant testified that now, after his May ████ accident, he walks using a cane. He stated that he generally walks only to the bathroom and to get the mail. He stated that if he walks too much his ankle "swells up like a balloon." See Findings of Fact at Paragraph 9, above. With regard to standing, the Claimant testified that he cannot stand up long enough to cook, so his friend cooks for him. See Findings of Fact at Paragraph 10, above.

As previously noted in Section III, above, while the Claimant's testimony regarding the extent of his limitations is contradicted by Dr. █████'s report (See Exs. 2.9 – 2.12), this doctor did find that the Claimant had some generalized muscle weakness. See Findings of Fact at Paragraphs 6-7. This medical finding, in conjunction with the Claimant's testimony, is minimally sufficient to support a finding that the Claimant cannot perform his past, very physical work. Accordingly, the Claimant has proven, by a preponderance of the evidence, that he is unable to perform his past work. It is therefore necessary to proceed to the final step in the Social Security disability analysis: determining whether the Claimant can perform other work.

VIII. Can the Claimant Perform 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 claimant "can make an adjustment to any other work that exists in the national economy." 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 work in the economy that the claimant can perform).

In the preceding section, it was determined that the Claimant is unable to perform his past, very physical work. The question at this point is whether, pursuant to 20 CFR 404.1545(a)(5)(ii), other work exists in the national economy that the Claimant can perform; the existence of appropriate work in the location in which the Claimant currently resides is technically irrelevant.

The Social Security Administration classifies the least physically demanding work as "sedentary work." See 20 CFR 416.967(a). That regulation provides as follows:

> (*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.

At the hearing, the Claimant testified that he walks using a cane; that he generally walks only to the bathroom and to get the mail; and that if he walks too much his ankle "swells up like a balloon" (Claimant hearing testimony). The Claimant testified that he cannot stand up long enough to cook (Claimant hearing testimony). The Claimant testified that he can only sit for about "15 minutes before I have to get up to stretch my hip and my leg and my ankle . . . and then I have to sit back down for another 10-15 minutes before I start hurting again real bad." (Claimant hearing testimony).

If the Claimant's hearing testimony was uncontroverted, and was supported by a [redacted] of medical evidence, it would be enough to show that the Claimant cannot perform sedentary work. However, as previously mentioned, the Claimant's hearing testimony is directly contradicted by Dr. [redacted]'s report dated June 3, 2008 (Exs. 2.9 – 2.12). Dr. [redacted] concluded that, although the Claimant had some muscle weakness, "the [Claimant's] fracture is well healed and there is no reason he cannot do normal activities . . . . there is no reason for this patient to be on disability." Thus, the strength and credibility of the Claimant's testimony must be weighed against the strength and credibility of Dr. [redacted]'s report.

Because the Claimant is trying to obtain disability benefits, he has a natural bias and motive to exaggerate his symptoms. On the other hand, Dr. [redacted] will gain nothing, and will lose nothing, regardless of whether the Claimant is found to be eligible for benefits. Accordingly, Dr. [redacted] has no motive to exaggerate or provide biased information.

The statement in Dr. ████'s report that the Claimant has some muscle weakness (See Findings of Fact at Paragraphs 6 and 7, above) is sufficient, in conjunction with the Claimant's testimony and in the absence of opposing evidence, to prove that the Claimant cannot perform his past, very physical work. However, the Claimant's testimony regarding his physical limitations cannot overcome Dr. ████'s credible finding that "the [Claimant's] fracture is well healed and there is no reason he cannot do normal activities." Because the Claimant is physically able to perform "normal activities," the Claimant is physically able to perform sedentary work as defined by 20 CFR 416.967(a).

The Claimant asserted, however, that, in addition to his physical impairment, he had learning deficiencies which affected his ability to work (Claimant hearing testimony). He stated that he has "a real, real bad learning disability . . . . I don't know my time tables, I can't really read, I can't spell, I can't use a calculator . . . it's really bad." However, this testimony was contradicted by the Claimant's own testimony that he had graduated / received diplomas from a vocational / technical school, and that he had performed work which included the operation of heavy machinery (Claimant hearing testimony).

The Claimant's completion of his trade school courses and his operation of heavy equipment would necessarily have required some minimal ability to read gauges and operating instructions and to make simple calculations. Accordingly, the Claimant's asserted learning disability is clearly not sufficiently severe to prevent the Claimant from performing routine, non-intellectual, sedentary work.

In summary, the Division met its burden of proving, by a preponderance of the evidence, that the Claimant can perform sedentary work. Accordingly, the Claimant is not disabled based on the applicable state and federal disability criteria. The Division was therefore correct when it denied the Claimant's application for Interim Assistance.

CONCLUSIONS OF LAW

1. The Claimant is not currently engaged in substantial gainful activity as defined by 20 CFR 404.1510.

2. The Claimant's impairment is not medically severe pursuant to 20 CFR 416.920(c) and 20 CFR 416.921(b).

3. The Claimant's impairment has lasted or can be expected to last for 12 months or longer, and the Claimant therefore satisfies the durational requirements of 20 CFR 416.909 and 20 CFR 416.920(a)(4)(ii).

4. The Claimant's impairment does not meet, and does not medically equal, the requirements of the Social Security Administration's applicable Listing of Impairments.

5. The Claimant is not capable of performing his past relevant work.

6. The Claimant is capable of performing sedentary work.

7. The Division was therefore correct when it denied the Claimant's October 2008 application for Interim Assistance benefits.

DECISION

The Division correctly denied the Claimant's October 2008 application for Interim Assistance benefits.

APPEAL RIGHTS

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

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

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

DATED this ______ day of March, 2009.

________*/Signed/*______________________
Jay Durych
Hearing Authority

CERTIFICATE OF SERVICE

I certify that on this ______ day of March, 2009, true and correct copies of the foregoing document 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], Administrative Assistant II
[redacted], Eligibility Technician I
[redacted], Staff Development & Training
[redacted], Fair Hearing Representative

____
Al Levitre
Law Office Assistant I