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

In the Matter of	)	
	)	OAH No. 12-0591-APA
D L. X	)	Former OHA Case No.
_____	)	DPA Case No.

DECISION

I. Introduction

D L. X applied for Interim Assistance benefits on January 17, 2012.[1] Her application was denied by the Division of Public Assistance (DPA or Division) on March 12, 2012.[2] Ms. X requested a hearing to contest the Division's denial of her application on April 6, 2012.[3]

Hearings were held on May 30, 2012 and July 5, 2012. Ms. X represented herself and testified on her own behalf. Her father, Y X, attended the second hearing session and testified on his daughter's behalf. Public Assistance Analyst Terri Gagne represented the Division and testified on its behalf. DPA Interim Assistance Medical Reviewer Laura Ladner participated in the hearings and testified on behalf of the Division. At the end of the July 5, 2012 hearing session the record was closed and the case became ripe for decision.

The Division did not dispute that Ms. X is not currently working. The Division also agreed that Ms. X's neck pain / cervical spine problems constitute a severe impairment that has lasted or will last at least 12 months. Finally, the Division conceded that Ms. X cannot perform her prior relevant work. The parties disagree on only two issues: (1) whether Ms. X's neck pain / cervical spine problems satisfy the criteria of Listing 1.04 of the Social Security Administration's listing of impairments; and (2) whether Ms. X can still perform sedentary work.

This decision concludes that, while the Division correctly determined that Ms. X's chronic neck pain does not satisfy the criteria of Listing 1.04 of the Social Security Administration's listing of impairments, the Division erred when it found that Ms. X can still perform sedentary work. Accordingly, the Division's determination that Ms. X is not eligible for Interim Assistance is reversed.

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[1] Exhibit 1.

[2] Exhibit 3.0. The Division issued a supplemental denial notice, providing a clearer explanation of its reasons for denying Ms. X's application, on April 9, 2012 (Exhibit 3.1).

[3] Exhibits 4.0, 4.1.

II. Facts

Ms. X has had migraine headaches since childhood.[4] She also has a long history of neck pain.[5] Both her migraines and her neck pain have gotten worse over the last ten years.[6]

Ms. X has reported a burning sensation between her shoulder blades, shooting pains in both arms, numbness in her arms when raised over her head, and a decreased range of motion in all planes. She has rated her pain level at 7 on a scale of 1 - 10. She reports that her pain is increased by bending, stooping, driving, sitting, straining, twisting, and physical activity.[7]

Ms. X has received chiropractic treatment for her neck pain at least since August 2009.[8] In April 2011 one of her chiropractors reported that despite 14 sessions of cervical traction, there had been no improvement in Ms. X's complaints of headaches and arm pain.[9] He diagnosed Ms. X as having spinal stenosis in the cervical region and degeneration of her cervical intervertebral disks, and stated that her only options were to either have cervical fusion surgery, or apply for disability.[10]

Ms. X has tried to treat her cervical pain with physical therapy and with at least one injection, but these did not help.[11] In the past she has received some relief through chiropractic treatment, but by April 2011 she reported that the effectiveness of this treatment was decreasing.[12]

An MRI of Ms. X's cervical spine taken on January 10, 2011 showed mild spinal stenosis at C3 - C4 and C4 - C5, and mild disc protrusion, mild spinal cord displacement, and mild spinal stenosis at C5 - C6 and C6 - C7.[13] On January 24, 2011 Ms. X was examined by Grant T. Roderer, M.D. He assessed her as having cervicalgia secondary to cervical disk disease, cervical facet joint arthropathy, bilateral occipital neuralgia, cervicogenic headaches,

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4 Exhibit 2.56.
5 Exhibit 2.56.
6 Exhibit 2.56.
7 All preceding findings in this paragraph from Exhibit 2.119.
8 Exhibit B7. Ms. X has continued her chiropractic treatment, and was treated as recently as May 31, 2012 (Ex. C21).
9 Exhibit B4.
10 Exhibit 2.120.
11 Exhibit 2.80. Advanced Pain Centers of Alaska referred her for a surgical consultation because its efforts at conservative treatment had not been successful. *Id.*
12 Exhibit 2.103.
13 Exhibits 2.14, 2.15, 2.40, 2.41, 2.78, 2.79, B5, and B6. The results of an x-ray performed on January 5, 2011 were similar (Exhibit 2.16).

and migraine headaches.[14] On January 25, 2011 Dr. Roderer gave Ms. X a cervical epidural steroid injection.[15] This resulted in no improvement of her pain symptoms.[16]

On February 8, 2011 Advanced Physical Therapy reported that Ms. X's symptoms were consistent with cervicobrachial syndrome with a combination of cervicogenic and migraine headaches.[17] On March 3, 2011 Ms. X was examined by Davis C. Peterson, M.D.[18] Dr. Peterson examined the MRI from January 10, 2011 and found disk dessiccation, loss of cerebrospinal fluid space / disk height, and some severe foraminal stenosis.[19] He assessed Ms. X as having myeloradiculopathy.[20]

An MRI of Ms. X's cervical spine taken on March 4, 2011 showed broad-based disc bulges and mild canal stenosis at C2 - C6.[21] However, on March 8, 2011 Shawn Hadley, M.D. performed a nerve conduction study of Ms. X's left arm, and all measurements were within normal limits.[22]

On March 17, 2012 Ms. X was seen again by Dr. Peterson. He assessed Ms. X as having "[c]hronic neck pain related to cervical degenerative changes, cervical kyphosis with positive Lhermitte, parasthesias, and subtle hyperflexity of the [arms] related to central spinal stenosis and herniated nucleus pulposus . . . producing some cord impingement."[23] Dr. Peterson concluded that "[u]ltimately, given the severity of her neck symptomology and the disc degeneration . . . she may need to consider anterior cervical discectomy and fusion . . . ."[24]

Dr. Peterson examined Ms. X again on July 22, 2011. He found that Ms. X's neck flexion was limited, that she had parethesias[25] extending into both arms, and that her neck pain and headaches seemed to be worsening.[26]

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14 Exhibit 2.57.
15 Exhibit 2.54.
16 Exhibit 2.52.
17 Exhibit 2.73.
18 Exhibits 2.34 - 2.36.
19 Exhibit 2.35.
20 Exhibit 2.36. Cervical stenosis is a condition in which the spinal canal is too small for the spinal cord and nerve roots. This can cause damage to the spinal cord, a condition called *myelopathy*, or pinch nerves as they exit the spinal canal, a condition called *radiculopathy*. Occasionally, damage to the spinal cord and nerve roots may occur, resulting in a condition called *myeloradiculopathy*. *See* University of Virginia School of Medicine's website at http://www.medicine.virginia.edu/clinical/departments/neurosurgery/cervical-stenosis (accessed August 15, 2012).
21 Exhibits 2.37, 2.38, 2.86. Contact with the spinal cord was noted at C1-C2, C3-C4, C4-C5, and C5-C6.
22 Exhibits 2.43, 2.46, 2.47.
23 Exhibit 2.33.
24 Exhibit 2.33.
25 Paresthesia is a sensation of pricking, tingling, or creeping on the skin having no objective cause and usually associated with injury or irritation of a sensory nerve or nerve root. *See* Merriam-Webster online dictionary at http://www.merriam-webster.com/medical/paresthesia (accessed on August 16, 2012).

On February 2, 2012 Ms. X was again examined by Dr. Peterson, this time as part of her application for Interim Assistance. Dr. Peterson wrote at that time that Ms. X's diagnosis was myeloradiculopathy, that she might "need short term pain management," and that he expected her to recover in 3-6 months.[27]

On February 7, 2012 Ms. X completed an APA-4 form as part of her application for Interim Assistance.[28] At that time she reported that she had constant neck pain radiating down her upper back and both arms, migraine headaches 3-4 times per week, that her eyes were extremely light-sensitive, that she had black spots in her vision, and that she had difficulty concentrating.[29] She also reported that she was unable to drive and needed assistance with dressing and cooking.[30]

On May 23, 2012 Bobby Lucas, D.C., a chiropractor who has treated Ms. X on numerous occasions, completed a Social Security disability form on her behalf.[31] Dr. Lucas reported that Ms. X's symptoms were migraine pain, neck stiffness, arm pain, and dizziness with nausea.[32] He felt that Ms. X could only sit for 15-30 minutes at a time, stand for 20 minutes at a time, and walk for only 1-2 city blocks at a time.[33] He stated that Ms. X could only sit, stand, and walk (in combination) for a total of two hours per day.[34] He wrote that Ms. X could lift and carry no more than ten pounds, and would require a job in which she was allowed to change positions at will and get up and walk for five minutes out of every half hour.[35] He stated that Ms. X would be unable to perform a job requiring reaching over her head, and that she had significant limitations on her ability to grasp and manipulate objects with her hands.[36] He believed that Ms. X would need to take at least one unscheduled work break every work day and that she would likely miss more than four days of work each

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26 Exhibit 2.32.

27 Exhibit 2.4. Dr. Peterson's findings on the Form AD-2 directly conflict with Dr. Peterson's exam report of July 22, 2011, where he wrote that Ms. X was "unemployable with her current symptoms," "unable to work," and a candidate for "either Medicaid or some other type of disability program" (Exhibit 2.32). The findings on the Form AD-2 also conflict with the majority of the other medical evidence in the record. For this reason the information reported on the Form AD-2 is viewed as aberrant and less credible than the other medical evidence.

28 Exhibits 2.5 - 2.10.

29 Exhibit 2.5.

30 Exhibit 2.5.

31 Exhibits C9 - C13.

32 Exhibit C9.

33 Exhibits C10-C11.

34 Exhibit C11.

35 Exhibit C11.

36 Exhibit C11.

month.[37] He opined that Ms. X's pain would constantly interfere with the attention and concentration needed to perform even simple work tasks, and that she would not be capable of performing even "low stress" jobs.[38] He stated that Ms. X's impairments had already lasted at least 12 months, and were expected to continue for at least 12 more months.[39] Finally, he reported that he did not believe Ms. X was malingering.[40]

Ms. X is 39 years old.[41] She is a high school graduate.[42] Over the last 15 years her only employment has been as an office assistant at a chiropractor's office (1999 - 2000) and as a clerk at a video store (1986 - 2011).[43] Her duties at the chiropractor's office involved writing patient summaries and filing paperwork.[44] Her duties as a video store clerk involved standing at the counter / cash register and walking 20-30 feet a few times per day to re-shelve videos.[45] Toward the end of her employment at the video store she was only able to stand for one or two hours a day, she would have to be sent home, and other employees would have to cover for her.[46]

III. Discussion

A. Introduction

Interim Assistance is a benefit available to individuals while they are waiting for the Social Security Administration (SSA) to approve their application for Supplemental Security Income.[47] Among other requirements, to receive Interim Assistance an applicant must be "likely to be found disabled by the Social Security Administration."[48] Ms. X has the burden of proving that she is likely to be found disabled by the SSA.[49]

The SSA uses a five-step evaluation process in making its disability determinations.[50] Each step is considered in order, and if the SSA finds the applicant disabled at any step, it does not go on to consider subsequent steps.[51]

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37 Exhibits C11, C12.
38 Exhibit C10.
39 Exhibit C9.
40 Exhibit C9.
41 Exhibit 1.
42 Exhibits 2.9, 2.67.
43 Exhibit 2.7, C. X hearing testimony.
44 Exhibit 2.8.
45 Exhibit 2.7, C. X hearing testimony.
46 Exhibit 2.7, C. X hearing testimony.
47 7 AAC 40.170(b); 7 AAC 40.375.
48 7 AAC 40.180(b)(1).
49 2 AAC 64.290(e).
50 20 CFR §416.920. This process is describe in detail in OHA Case No 11-FH-000 (Dept. of Health and Social Services 2011), pages 14 – 17.

The first step in this process looks at the applicant's current work activity. If the applicant is performing "substantial gainful activity," the SSA will find that the applicant is not disabled.[52] This finding is made regardless of the applicants' medical condition, age, education, or work experience.[53]

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."[54] 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.[55] In order to be considered severe, the impairment or combination of impairments must also be expected to result in death or must have lasted or be expected to last at least 12 months.[56] If the impairment is not severe under this definition, then the applicant is not disabled.

At step three, the SSA determines whether the applicant's severe impairment meets or medically equals the criteria contained in the SSA's "Listing of Impairments."[57] If it does, the applicant is considered disabled.[58]

For applicants who are not determined to be disabled at step three, the SSA goes on to step four and looks at the applicant's capacity for work and past relevant work.[59] If the applicant is able to perform past relevant work, the applicant is considered not disabled.

Finally, at step five, the SSA looks at the applicant's age, education, and work experience to determine whether the applicant can perform other work in the national economy.[60]

B. *Steps 1 and 2 of the Analysis.*

The Division agreed that Ms. X was not engaged in substantial gainful activity, that her chronic neck pain constituted a severe impairment, and that this impairment met the 12 month

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51 20 CFR §416.920(a)(4).
52 20 CFR §416.920(a)(4)(i).
53 20 CFR §416.920(b).
54 20 CFR § 416.920(c); 20 C.F.R. § 416.921(a).
55 20 CFR § 416.908.
56 20 CFR § 416.920(a)(4)(ii); 20 CFR §416.909.
57 *See* 20 CFR § 404, Subpart P, Appendix 1 (hereafter "Appendix 1").
58 20 CFR § 416.920(a)(4)(iii).
59 20 CFR § 416.920(a)(4)(iv).
60 20 CFR § 416.920(a)(4)(v).

duration requirement.[61] Accordingly, it is undisputed that Ms. X satisfies step 1 of the SSA's 5-step disability analysis, and that her chronic neck pain satisfies step 2 of the analysis.

There is, however, another impairment indicated in the record which the Division did not concede as being severe - Ms. X's migraine headaches. A medically determinable impairment or combination of impairments may be found "not severe *only if* the evidence establishes a slight abnormality that has no more than a minimal effect on an individual's ability to work."[62] Here, the existence of Ms. X's migraines has been "medically determined."[63] Further, the migraines clearly have more than a minimal effect on Ms. X's ability to work.[64] Finally, Ms. X testified that she has had migraines since childhood, and there is medical evidence of the migraines since January 24, 2011.[65] Accordingly, Ms. X's migraines constitute a medically severe impairment.[66]

C. *Step 3 of the Analysis - Whether the Applicant "Meets the Listing".*

The next step in the analysis is to determine whether the applicant's severe impairment meets the criteria of the listing of impairments contained in the SSA's regulations at 20 CFR Part 404, Subpart P, Appendix 1 ("the Listings"). The applicant bears the burden of establishing that his or her impairment satisfies the requirements of a "Listings" impairment.[67] To meet a Listing, an impairment must meet *all* of the Listing's specified criteria; an impairment that manifests only some of these criteria, no matter how severely, does not qualify.[68]

Ms. X has two medically severe impairments - migraines and chronic neck pain. The Social Security Administration has not included migraine headaches as a "Listed impairment." Accordingly, by definition, Ms. X's migraines fail to "meet the Listings."

Ms. X's chronic neck pain falls within the Social Security Administration's Listing 1.04. This Listing, titled "Disorders of the Spine," provides in relevant part:[69]

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61 Ladner hearing testimony.

62 *Webb v. Barnhart*, 433 F.3d 683, 686 (9th Cir. 2006); s*ee also Smolen v. Chater*, 80 F.3d 1273, 1290 (9th Cir. 1996); *Yuckert v. Bowen*, 841 F.2d 303, 306 (9th Cir. 1988).

63 Exhibits 2.57, 2.73.

64 *See* discussion at pages 2-4, above.

65 Exhibits 2.56, 2.57.

66 It is well established that migraines may, depending on the facts of the particular case, constitute medically severe impairments. *See Southerly v. Astrue*, 2008 WL 1766650 (W.D.Va. 2008); *Orr v. Commissioner of Social Security Administration*, 2009 WL 2337793 (N.D. Tex. 2009).

67 *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).

68 *Sullivan, supra*, 493 U.S. at 530.

69 Appendix 1, §1.04.

> 1.04 Disorders of the spine (e.g., herniated nucleus pulposus, spinal arachnoiditis, spinal stenosis, osteoarthritis, degenerative disc disease, facet arthritis, vertebral fracture), resulting in compromise of a nerve root (including the cauda equina) or the spinal cord. With:
>
> > A. Evidence of nerve root compression characterized by neuro-anatomic distribution of pain, limitation of motion of the spine, motor loss (atrophy with associated muscle weakness or muscle weakness) accompanied by sensory or reflex loss and, if there is involvement of the lower back, positive straight-leg raising test (sitting and supine); or [subsections B and C not applicable to this case].

Ms. X's medical records confirm that she has spinal stenosis, at least a minimal compromise or compression of the spinal cord, neuro-anatomic distribution of her pain, and a limitation of motion in her cervical spine.[70] However, there is no medically documented evidence of muscle atrophy, muscle weakness, or sensory or reflex loss.[71] Accordingly, Ms. X does not satisfy the requirements of Listing 1.04. Ms. X has thus failed to carry her burden and did not prove, by a preponderance of the evidence, that her impairments satisfy the criteria of a "Listing." It is thus necessary to proceed to the next steps of the analysis and determine whether Ms. X can still perform her past work (step 4) or other work (step 5).

D. *Steps 4 and 5 of the Analysis - Can the Applicant Still Work?*

The fourth step in the analysis is to determine whether Ms. X can perform her past work. Ms. X testified that she can no longer perform her past work, and the Division agreed that she could not. Accordingly, it is necessary to proceed to step 5 and determine whether there are any jobs in the national economy that Ms. X can perform with her existing impairments.[72]

At step 5, however, the burden of proof shifts from the applicant to the agency.[73] To meet its burden at "step 5," the Division must generally show (1) that the applicant's impairment still permits certain types of activity necessary for other occupations; (2) that the applicant's experience is transferable to other work; and (3) that specific types of jobs exist in

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70 *See* summary of medical records at pages 2-4, above.

71 On March 8, 2011 Shawn Hadley, M.D. performed a nerve conduction study of Ms. X's left arm, and all measurements were within normal limits. *See* Exhibits 2.43, 2.46, 2.47.

72 20 CFR § 416.920(a)(4)(v); 20 CFR § 416.960(c).

73 *See* 20 CFR § 416.920(a)(4)(v); *Bowen v. Yuckert*, 482 U.S. 137, 144 (1987); *Kail v. Heckler*, 722 F.2d 1496, 1498 (9th Cir. 1984); *Embrey v. Bowen*, 849 F.2d 418, 422 (9th Cir. 1988); *Smolen v. Chater*, 80 F.3d 1273, 1289 (9th Cir. 1996); *Bustamante v. Massanari*, 262 F.3d 949, 953–954 (9th Cir. 2001); *Valentine v. Commissioner, Social Security Administration*, 574 F.3d 685, 689 (9th Cir. 2009).

the national economy which are suitable for an applicant with these capabilities and skills.[74] It is not the applicant's burden to develop vocational evidence at step five.[75]

The Division asserted that Ms. X is capable of performing sedentary work. The preferred method for an agency to carry its burden at step five is through the testimony of a vocational expert.[76] In this case, the Division presented lay vocational testimony through its Medical Reviewer, but did not present expert vocational testimony.

In many circumstances a decision on whether an applicant is disabled can be made, even in the absence of expert vocational testimony, by using the Social Security Administration's Medical-Vocational Guidelines.[77] These guidelines, known as "the Grids," are fact-based generalizations about the availability of jobs for people of varying ages, educational backgrounds, and previous work experience, with differing degrees of exertional impairment.[78] The Grids "are used to evaluate the claimant's age, education, past work experience, and RFC [residual functional capacity] in order to determine whether that claimant is disabled."[79]

In this case the Division applied Rule 201.27 of the Grids to determine that Ms. X is not disabled.[80] Ms. X is 39 years old, is literate and able to communicate in English, and has a high school education, but has previously performed only unskilled work. Accordingly, *assuming for the moment that Ms. X can perform sedentary work*, the Division was correct to apply Rule 201.27 of the Grids. According to this rule, Ms. X would be deemed *not* to be disabled.

It is well established, however, that "the Grids" cannot be strictly applied if the applicant has a significant non-exertional impairment.[81] The record demonstrates that Ms. X has two non-exertional impairments.

First, Ms. X has chronic neck pain. Pain can be both an exertional limitation and a non-exertional limitation.[82] In this case, Ms. X testified[83] that her neck pain is fairly severe and that it is

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74 *Decker v. Harris*, 647 F.2d 291, 294 (2d Cir. 1981).

75 *See Thompson v. Sullivan*, 987 F.2d 1482, 1491 (10th Cir. 1993).

76 *Lopez v. Califano*, 481 F. Supp. 392 (N.D. Cal. 1979).

77 These guidelines are located at 20 CFR, Part 404, Subpart P, Appendix 2.

78 *Holley v. Massanari*, 253 F.3d 1088, 1093 (8th Cir. 2001).

79 *Poole v. Astrue*, 2010 WL 2231873 (W.D. Ark. 2010).

80 Ladner hearing testimony.

81 20 CFR 416.969a(d); *see also Cole v. Secretary of Health and Human Services*, 820 F.2d 768, 771 (6th Cir. 1987), *Payan v. Chater*, 959 F. Supp. 1197 (C.D. Cal. 1996). Under the Social Security regulations, a person's limitations are classified as exertional or non-exertional (20 CFR 416.969a(a)). Exertional limitations are limitations on a person's ability to walk, sit, stand, etc. *Id*. Non-exertional limitations are limitations on a person's ability to maintain attention, concentrate, remember, etc. (20 CFR 416.969a(c)).

constant (i.e. that her pain is present all the time and not just on exertion).[84] There is ample medical evidence[85] of problems with Ms. X's cervical spine to support her claims of both exertional and non-exertional pain.

Second, Ms. X suffers from migraine headaches. Migraines are also a non-exertional impairment.[86] Accordingly, the Division erred when it relied on the Grids in making its disability determination in this case.

Ms. X testified that her neck pain and migraines prevent her from working. Ms. X's testimony is well supported by the report[87] completed by one of her chiropractors. While a chiropractor is not an "acceptable medical source" for diagnostic purposes as defined in 20 CFR 404.1513(a), it is well established that an ALJ may still consider a chiropractor's opinion in determining the severity of an applicant's impairment.[88]

In summary, the Division conceded that Ms. X can no longer perform her prior work. The burden of proof shifted to the Division, and the Division then failed to prove that Ms. X is capable of performing other work.[89] Ms. X is therefore deemed disabled based on the SSA's regulations and case law which are incorporated into Alaska's Interim Assistance Program.

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[82] *Desrosiers v. Secretary of Health and Human Services*, 846 F.2d 573 (9th Cir. 1988); *Makuch v. Halter*, 170 F. Supp. 2d 117 (D. Mass. 2001); *Garcia v. Commissioner of Social Security*, 2011 WL 4899962 (D. Puerto Rico 2011).

[83] An applicant's "assertions of pain must be given serious consideration by the ALJ in making a determination of disability". *Brown v. Schweiker*, 562 F. Supp. 284, 287 (E.D. Pa. 1983). When it is demonstrated that an applicant suffers from infirmities which could cause pain, the applicant is not required to present objective medical evidence to support the severity of the pain. *Waters v. Bowen*, 709 F. Supp. 278 (D. Mass. 1989); *Light vs. Social Security Administration*, 119 F.3d 789 (9th Cir. 1997).

[84] X hearing testimony and Exhibit 2.5.

[85] It is not necessary to establish a direct cause-and-effect relationship between the impairment and the applicant's subjective complaints of pain. *Souza v. Heckler*, 622 F. Supp. 182 (D.R.I. 1985). All that is necessary is a nexus between the claimant's verifiable medical impairment and allegations of disabling pain. *Finnegan v. Bowen*, 685 F.Supp. 1535 (D. Wyo. 1988); *Calandro v. Bowen*, 697 F.Supp. 423 (D. Wyo. 1988). Pain testimony may not be disregarded simply because it is not fully corroborated by objective medical findings. *Summers v. Bowen*, 813 F.2d 241, 242 (9th Cir. 1987). "[T]he law has never required and does not now require that medical evidence identify an impairment that makes the pain inevitable." *Luna v. Bowen*, 834 F.2d 161, 164 (10th Cir. 1987).

[86] *Foote v. Chater*, 67 F.3d 1553, 1559 (11th Cir.1995); *May v. Commissioner of Social Security Admin.*, 226 Fed. Appx. 955, 960 (11th Cir.2007); *McKinzey v. Astrue*, 641 F.3d 884, 889 (7th Cir.Ill.2011).

[87] Exhibits C9 - C13.

[88] 20 CFR 404.1513(d); *cf. Carpenter v. Astrue*, 537 F.3d 1264, 1267–68 (10th Cir.2008) ("[a]lthough a chiropractor is not an ' acceptable medical source' for diagnosing an impairment under the regulations, the [SSA] has made clear that the opinion of such an 'other source' is relevant to the questions of severity and functionality"); *Kus v. Astrue*, 276 Fed. Appx. 555, 556 (9th Cir.2008) ("[a]s with other witnesses, the ALJ was required to take into account evidence from Kus's chiropractor 'unless he or she expressly determine[d] to disregard such testimony' and gave reasons for doing so").

[89] "A man is disabled within the meaning of the [Social Security] Act if he can engage in substantial gainful activity only by enduring great pain." *Walston v. Gardner*, 381 F.2d 580, 585-586 (6th Cir. 1967).

IV. Conclusion

The Division has not met its burden of proving that Ms. X has the residual functional capacity to perform sedentary work that exists in the national economy. Accordingly, the Division's denial of Ms. X's application for Interim Assistance is reversed.

Dated this 20th day of August, 2012.

Signed
Jay Durych
Administrative Law Judge

Non-Adoption Options

B. The undersigned, by delegation from the Commissioner of Health and Social Services and in accordance with AS 44.64.060(e)(3), revises the enforcement action, determination of best interest, order, award, remedy, sanction, penalty, or other disposition of the case as set forth below, and adopts the proposed decision as revised:

The decision of the administrative law judge (ALJ) is adopted *in part* as discussed in Section D, below. However, because the ALJ found that Ms. X's impairments do not meet or equal any of the listings in the SSA's Listing of Impairments at 20 C.F.R Part 404, Subpart P, Appendix 1, Ms. X *is not* eligible for Interim Assistance.

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 4th day of September, 2012.

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

D. The undersigned, by delegation from the Commissioner of Health and Social Services and in accordance with AS 44.64.060(e)(5), rejects, modifies or amends the interpretation or application of a statute or regulation in the decision as follows and for these reasons:

The decision of the administrative law judge (ALJ) in this case was issued just prior to the Issuance of the Commissioner's Decision issued on August 20, 2012 in OAH Case No. 12-0688-APA. The Commissioner's Decision in OAH Case No. 12-0688-APA concluded that, in determining eligibility for Interim Assistance under 7 AAC 40.180, the regulation requires the determination of whether the applicant is performing substantial gainful activity, whether the applicant's impairment is severe, whether the applicant's impairment has lasted or is expected to last for more than 12 months, and whether the

applicant's impairment satisfies the criteria contained in the Social Security Administration's "Listing of Impairments." That decision concluded, however, that 7 AAC 40.180 *does not* require the Department to follow the analyses used in steps 4 and 5 of the SSA's Supplemental Security Income disability analysis.

> The ALJ's proposed decision correctly concluded that Ms. X's impairments do not meet or equal any of the listings in the SSA's Listing of Impairments at 20 C.F.R. Part 404, Subpart P, Appendix 1. This is where the ALJ's analysis, Under 7 AAC 40.180, should have ended. Accordingly, the portion of the ALJ's Proposed decision in Section III(D) at pages 8-11 of the decision is not adopted. The remainder of the ALJ's decision is adopted. Because Ms. X's impairments do not meet or equal any of the listings in the SSA's Listing of Impairments at 20 C.F.R Part 404, Subpart P, Appendix 1, she is not eligible for Interim Assistance.

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 4th day of September, 2012.

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

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