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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. 09-FH-51
	)	
Claimant.	)	Division Case No. [redacted]
	)	

FAIR HEARING DECISION

STATEMENT OF THE CASE

[redacted] (Claimant) applied for Interim Assistance at some time prior to January 22, 2009 (Exs. 1, 2.0). The Division of Public Assistance (DPA or Division) denied the application on or about January 22, 2009 (Exs. 2.0, 2.1). DPA mailed a written notice of denial to the Claimant on January 23, 2009 (Ex. 3). The Claimant requested a fair hearing contesting the denial on January 27, 2009 (Exs. 4.0, 4.1). On January 30, 2009 DPA mailed the Claimant a notice advising him that his hearing had been scheduled for February 18, 2009 (Ex. 16.3).

The hearing began on February 18, 2009 before Hearing Officer Patricia Huna-Jines. [1] After receiving approximately 10 minutes of testimony, the hearing was continued until March 18, 2009 to allow the Claimant to obtain and submit additional, more recent medical records.

The hearing reconvened on March 18, 2009. The Claimant appeared in person at both hearings. The Claimant represented himself and testified on his own behalf. [redacted] appeared in person at both hearings to represent and testify on behalf of the Division. [redacted], a

[1] Following the conclusion of the hearings this case was reassigned to Hearing Officer Jay Durych. Mr. Durych reviewed the 239 pages of documents contained in the hardcopy file, and listened to the digital recordings of the two hearings, prior to his preparation and issuance of this decision.

registered nurse (R.N.) employed by the Division, testified telephonically at the second hearing on behalf of the Division.

The record was closed at the conclusion of the hearing of March 18, 2009. However, on April 7, 2009 the Claimant filed an additional 77 pages of documents. DPA objected to the admission of these documents. Because the documents were filed after the record was closed, these documents were not considered in the adjudication of this case.

ISSUE

Was the Division correct to deny the Claimant's application for Interim Assistance Benefits on or about January 22, 2009 based on the assertion that the Claimant did not meet the Interim Assistance Program's disability requirements?

FINDINGS OF FACT [2]

1. The Claimant was born on [redacted] (Ex. 16.1) and was [redacted] years old at the time of the hearing.

2. The physical impairment asserted by the Claimant in this case is diabetes (Claimant hearing testimony; Exs. 2.2 – 2.3). This impairment is categorized by the Social Security Administration (SSA) as Impairment Listing No. 9.08.

3. HbA1c is a test that measures the amount of glycated hemoglobin in the blood (MedLine Plus Medical Encyclopedia – a service of the U.S. National Library of Medicine and the National Institutes of Health, http://www.nlm.nih.gov/medlineplus/ency/article/003640.htm, date accessed June 10, 2009). Glycated hemoglobin is a substance in red blood cells formed when blood sugar (glucose) attaches to hemoglobin. *Id.* Once glycated (sugar-coated), the hemoglobin stays that way throughout the life span of the red blood cell, which is about 120 days. "Diabetes Blood Sugar Test Now Recommended For Diagnosis" (Article in USA Today, June 5, 2009). An HbA1C of 8 means that 8% of one's hemoglobin molecules are glycated. *Id.* People who do not have diabetes typically have an HbA1c reading of 6 or less. *Id.* Higher HbA1c test results may indicate diabetes. *Id.*

4. Diabetic ketoacidosis is a complication of diabetes that occurs when sugar (glucose) is not available as a fuel source for the body and fat is used instead (MedLine Plus Medical Encyclopedia – a service of the U.S. National Library of Medicine and the National Institutes of Health, http://www.nlm.nih.gov/medlineplus/ency/article/000320.htm, date accessed June 10, 2009). The byproducts of fat metabolism are ketones and acid. *Id.* When fat is broken down, ketones and acid build up in the blood. *Id.* A condition called ketoacidosis develops when the blood has more acid than normal. *Id.* Blood glucose levels rise (usually higher than 300 mg/dL)

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[2] All of the medical reports in the record (approximately 200 pages total) were reviewed and considered during the preparation of this decision. However, some of the medical records were cumulative, and some were less relevant than others. Accordingly, not every exhibit is specifically referenced in this decision. Abbreviations used in the medical reports have been spelled out in this decision for ease of understanding.

because the liver produces glucose to try to combat the problem. *Id.* However, the cells cannot pull in that glucose without insulin. *Id.*

5. On August 9, 2003 the Claimant was evaluated by treating physician [2a] [redacted], M.D. (Exs. 2.72 – 2.73). The Claimant was diagnosed with Type 2 diabetes mellitus. *Id.* At the time of the evaluation the Claimant was taking Altace, Avanda-Met, and Humalog. *Id.*

6. A medical report dated August 19, 2003 indicates that the Claimant had an HbA1c reading of 8.3% on that date (Ex. 2.74).

7. On September 2, 2003 the Claimant was seen again by treating physician [redacted], M.D. (Exs. 2.67 – 2.68). On that date the Claimant had an HbA1c reading of 8.3%. *Id.* Dr. [redacted] noted that "glucose control is far less than optimal. The patient has not been able to afford his Avandia lately." *Id.* At the time of this evaluation the Claimant was taking insulin and Avanda. *Id.*

8. On October 3, 2003 the Claimant was seen again by treating physician [redacted], M.D. (Exs. 2.59 – 2.60). On that date Dr. [redacted] noted that the Claimant's diabetes was "still uncontrolled." *Id.*

9. A medical report by treating physician [redacted], M.D. dated December 4, 2003 indicates that on that date the Claimant had an HbA1c reading of 8.9% (Exs. 2.26, 2.32, and 2.33).

10. A notation on a medical report indicates that the Claimant had an HbA1c reading of 8.7% on March 5, 2004 (Ex. 2.82). As of that date the Claimant was taking aspirin, Avandamet, Lipitor, and Lisinopril (Ex. 2.23).

11. A blood test report dated June 4, 2004 indicates that the Claimant's blood glucose level on that date was 212 mg/dL, and that a normal blood glucose level would have been 75 – 110 mg/dL (Ex. 2.49). As of that date the Claimant was taking aspirin, Avandamet, Lipitor, Lisinopril, and Precose (Ex. 2.20).

12. A lab report dated June 21, 2004 indicates that the Claimant's blood glucose level on that date was 264 mg/dL, and that a normal blood glucose level would have been 65 – 109 mg/dL (Ex. 2.35).

13. A lab report dated June 22, 2004 indicates that the Claimant's blood glucose level on that date was 122 mg/dL, and that a normal blood glucose level would have been 75 – 110 mg/dL (Ex. 2.46). As of that date the Claimant was taking aspirin, Avandia, Lipitor, Metformin, and Precose (Ex. 2.15).

[2a] See discussion in Principles of Law, below for definitions of, and distinctions between, treating physicians, examining physicians, and reviewing physicians.

14. A second lab report also dated June 22, 2004 indicates that the Claimant's blood glucose level on that date was 124 mg/dL, and that a normal blood glucose level would have been 75 – 110 mg/dL (Ex. 2.34).

15. A lab report dated June 27, 2004 indicates that the Claimant's blood glucose level on that date was 248 mg/dL, and that a normal blood glucose level would have been 75 – 110 mg/dL (Ex. 2.41).

16. A lab report dated June 28, 2004 indicates that the Claimant's blood glucose level on that date was 209 mg/dL, and that a normal blood glucose level would have been 75 – 110 mg/dL (Ex. 2.39). As of that date the Claimant was taking Allopurinol, Avandia, Norvasc, and Precose (Ex. 2.13).

17. A lab report indicates that on December 4, 2007 the Claimant's blood glucose level was 239 mg/dL, and that a normal blood glucose level would have been 70 – 114 mg/dL (Ex. A-46). Another lab report indicates that on December 4, 2007 the Claimant's glycosylated (glycated) hemoglobin level (HbA1c level) was 11.7, and that a normal HbA1c level would have been 4.2 – 5.8 (Ex. A-45). The Claimant was taking Lisinopril and metformin at that time (Ex. A-39 – A40).

18. On January 4, 2008 the Claimant had a diabetes follow-up examination with treating physician [redacted], M.D. (Ex. A-36 – A-37). The Claimant was taking Actos, Lisinopril, Lovastatin, and Metformin at that time (Ex. A-36 – A-37).

19. On March 18, 2008 the Claimant had a diabetes follow-up examination with treating physician [redacted], M.D. (Ex. A-33 – A-34). A lab report indicates that on that date the Claimant's glycosylated (glycated) hemoglobin level (HbA1c level) was 9.1, and that a normal HbA1c level would have been 4.2 – 5.8 (Ex. A-45). The Claimant was taking Actos, aspirin, Glipizide, Lisinopril, Lovastatin, and Metformin at that time (Ex. A-33).

20. On May 20, 2008 the Claimant had a follow-up diabetes examination with treating physician [redacted], M.D. (Ex. A-30 – A-32). The Claimant was taking aspirin, Insulin, Lantus, Lisinopril, Lovastatin, and Metformin at that time (Ex. A-30).

21. On June 2, 2008 the Claimant had a follow-up diabetes examination with treating physician [redacted], M.D. (Ex. A-28 – A-29). The Claimant was taking aspirin, Insulin, Lantus, Lisinopril, Lovastatin, and Metformin at that time (Ex. A-28).

22. On June 18, 2008 the Claimant had a diabetes follow-up examination with treating physician [redacted], M.D. (Ex. A-24 – A-26). The Claimant was taking aspirin, Insulin, Lantus, Lisinopril, and Lovastatin at that time (Ex. A-24). A lab report indicates that on that date the Claimant's blood glucose level was 126 mg/dL, and that a normal blood glucose level would have been 70 – 114 mg/dL (Ex. A-46).

23. On July 8, 2008 the Claimant had a follow-up examination with treating physician [redacted], M.D. (Ex. A-21 – A-23). The Claimant was taking aspirin, Insulin, Lantus,

Lisinopril, Lovastatin, and Metformin at that time (Ex. A-21). A lab report indicates that on that date the Claimant's glycosylated (glycated) hemoglobin level (HbA1c level) was 8.6, and that a normal HbA1c level would have been 4.2 – 5.8 (Ex. A-45).

24. On July 22, 2008 the Claimant had a follow-up examination with treating physician [redacted], M.D. (Ex. A-19 – A-20). The Claimant was taking aspirin, Insulin, Lantus, Lisinopril, Lovastatin, and Metformin at that time (Ex. A-19).

25. On August 5, 2008 the Claimant had a follow-up examination with treating physician [redacted], M.D. (Ex. A-16 – A-18). The Claimant was taking aspirin, Insulin, Lantus, Lisinopril, and Lovastatin at that time (Ex. A-16). A lab report indicates that on that date the Claimant's blood glucose level was 292 mg/dL, and that a normal blood glucose level would have been 70 – 114 mg/dL (Ex. A-45).

26. On September 8, 2008 the Claimant had a follow-up examination with treating physician [redacted], M.D. (Ex. A-14 – A-15). The Claimant was taking aspirin, Insulin, Lantus, Lisinopril, and Lovastatin at that time (Ex. A-14).

27. On September 24, 2008 the Claimant had a follow-up examination with treating physician [redacted], M.D. (Ex. A-12 – A-13). The Claimant was taking aspirin, Insulin, Lantus, Lisinopril, and Lovastatin at that time (Ex. A-12).

28. A *Preliminary Examination for Interim Assistance* (Form AD#2) prepared by examining physician [redacted], M.D. dated October 3, 2008 diagnosed the Claimant with "uncontrolled diabetes type 2" (Exs. 2.2 – 2.3). Dr. [redacted] stated that the Claimant was not expected to recover from his diabetes. *Id.* Dr. [redacted] further stated that the Claimant's "diabetes has been difficult to control at least in part due to very limited financial resources . . . ." *Id.* Dr. [redacted] also noted a current HbA1c reading of 8.6%. *Id.*

29. On November 6, 2008 the Claimant had a follow-up examination with treating physician [redacted], M.D. (Ex. A-9 – A-11). The Claimant was taking aspirin, Insulin, Lantus, Lisinopril, Lovastatin, and Metformin at that time (Ex. A-9).

30. On December 4, 2008 the Claimant had a follow-up examination with treating physician [redacted], M.D. (Ex. A-6 – A-8). The Claimant was taking aspirin, Insulin, Lantus, Lisinopril, Lovastatin, and Metformin at that time (Ex. A-6). On that date the Claimant's glycosylated (glycated) hemoglobin level (HbA1c level) was 12.0; a normal HbA1c level would have been 4.2 – 5.8 (Ex. A-45).

31. On January 5, 2009 the Claimant had a follow-up examination with treating physician [redacted], M.D. (Ex. A-3 – A-5). The Claimant was taking aspirin, Insulin, Lantus, Lisinopril, Lovastatin, and Metformin at that time (Ex. A-3).

32. On February 13, 2009 the Claimant had a follow-up examination with treating physician [redacted], M.D. (Ex. A-0 – A-2). The Claimant was taking aspirin, Cyclobenzaprine, Insulin, Lantus, Lisinopril, Lovastatin, and Metformin at that time (Ex. A-0).

33. A report by treating physician [redacted], O.D. dated March 6, 2009 indicates that the Claimant was diagnosed with myopia; and that he was "suspected" of having glaucoma; and that he had been tested for diplopia but the test results were inconsistent (Exs. 16.1 – 16.2).[2b]

34. The Claimant was employed in January 2008 (Ex. A-36). However, there is no indication in the record that the Claimant has worked since that time, and DPA did not assert that the Claimant was employed at any time relevant to the Claimant's application for benefits (Ex. 2.1).

35. The record indicates that the Claimant's use of diabetic medications has been sporadic. However, the record and the Claimant's hearing testimony indicates that, to date, a major reason for the Claimant's failure to take his diabetic medications on a regular, sustained basis has been the Claimant's lack of funds.

36. The Claimant testified that he generally had blood tests (ie either glycosylated (glycated) hemoglobin level (HbA1c level) tests, or blood glucose level tests), approximately once every three months (see Paragraph 37, below). However, in June 2004 the Claimant had approximately six of these tests during a one month period (see Paragraphs 11-16, above). The Claimant had approximately 3 of these tests during the period June – August 2008 (see Paragraphs 21-25, above). During the fifteen month period from December 4, 2007 through March 6, 2009, the Claimant had a total of seven of these tests, or an average of one test every 2.1 months (*see* Paragraphs 17-33, above). All of these tests indicated elevated glycosylated (glycated) hemoglobin levels or elevated blood glucose levels. The Claimant's average HbA1c reading was 9.36. The Claimant's average blood glucose level was 204.

37. At the hearings of February 18, 2009 and March 18, 2009 the Claimant testified with regard to his health problems that he:

a. Goes to [redacted] "every month" for follow-up on his diabetes, but is only able to get his blood drawn and tested every 3 months.

b. Has had HbA1C readings as high as 12 and 13.

c. "Gets diabetic ulcers on [his] feet because [he has] no feeling whatsoever in them."

[2b] Myopia is a "condition in which the visual images come to a focus in front of the retina of the eye resulting especially in defective vision of distant objects." Merriam-Webster Online Dictionary (http://www.merriam-webster.com/dictionary/myopia - accessed on June 10, 2009). Glaucoma is "a disease of the eye marked by increased pressure within the eyeball that can result in damage to the optic disk and gradual loss of vision." *Id.* at http://www.merriam-webster.com/dictionary/glaucoma. Diplopia is "a disorder of vision in which two images of a single object are seen (as from unequal action of the eye muscles) —called also *double vision.*" *Id.* at *http://www.merriam-webster.com/dictionary/diplopia.*

d. Has blurry vision – "it fades in and out." He sees double out of both eyes – "cover one and they still see double."

38. At the hearing of March 18, 2009 [redacted], R.N. testified that:

a. She is a registered nurse employed by DPA. She has been an R.N. since 1969 and has much experience performing functional assessments.

b. She does not meet with the applicant during the medical review process. She obtains releases from the applicant, requests the medical documents from the sources for which releases are provided, and then reviews the medical documents provided in response to the releases. Her determination of disability is based on these medical documents.

c. The Claimant has diabetes. However, the Claimant's blood sugar levels are "not all that high."

d. With regard to diabetes testing, "they do what they call an A1C. That gives them an average for three months . . and the goal would be below 10 . . . his are at 8.6 . . . 8.7 is not bad." Severe diabetes generally results in A1C readings above 10.

e. The Claimant has some complications related to his diabetes, including (i) some loss of sensation in the toes, (ii) some callouses, (iii) trigger finger, (iv) hearing loss, and (v) some "renal involvement."

f. The Claimant's eyes do not have any physical abnormality; the blood vessels are normal; and the Claimant has good peripheral vision.

39. During the hearing of March 18, 2009 the Hearing Officer asked [redacted] whether the Claimant had "acidosis occurring at least on the average of once every 2 months documented by appropriate blood chemical tests." [redacted] answered "yes, he meets that," but "what he doesn't meet is the severity portion . . . . he doesn't have . . . severe complications which would prevent him from doing lighter sedentary work . . . . He is able to dress himself, he is able to prepare his meals, he is able to . . . live a fairly normal life . . . ." [redacted] concluded that "I couldn't find anything that would have prevented this client from doing sedentary or light work."

40. The record indicates that [redacted] relationship with the Claimant was that of a reviewing source rather than a treating source or examining source.

PRINCIPLES OF LAW

Introduction; Burden of Proof; Standard of Proof.

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

Interim Assistance is a benefit provided by the State to Adult Public Assistance applicants while they are waiting for the Social Security Administration to approve the Supplemental Security Income application. AS 47.25.255; 7 AAC 40.170(a) and (b). The criteria which must be satisfied in order to qualify for Interim Assistance are set forth in 7 AAC 40.180. [25]

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3 "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).

4 Preponderance of the evidence is defined as "[e]vidence which is of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not." *Black's Law Dictionary* at page 1064 (West Publishing, 5th Edition, 1979).

5 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;
> > (3) other evidence provided by the applicant under 7 AAC 40.050, if applicable; and
> > (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 the
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> > (1) the applicant's condition is listed as an impairment category described in (b)(1)(B) of this section;
> > (2) medical information obtained under (b) of this section documents the applicant's impairment;
> > (3) impairment affects the applicant's activities of daily living;
> > (4) the applicant can perform any other work, including sedentary work; and
> > (5) the applicant's impairment has lasted or is expected to last for a continuous period of not less than 12 months.

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

Pursuant to 20 CFR 404.1505(a), "disability" is defined as "the inability to do any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months." Based on this definition, the Social Security Administration's SSI disability analysis contains a very specific multistep process that must be followed in order to determine whether someone is disabled.

Substantial Gainful Activity

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

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

Severe Impairment.

The second step in the analysis is to determine whether the applicant's impairment is "severe" as defined by the applicable Social Security regulations. A severe impairment is one that significantly limits a person's physical or mental ability to perform "basic work activities." 20 C.F.R. 404.1521(a); 20 CFR 416.920(c); 20 CFR 416.921(a). 20 CFR 416.921(b) defines "basic work activities." That regulation states in relevant part as follows:

> When we talk about basic work activities, we mean the abilities and aptitudes necessary to do most jobs. Examples of these include - (1) physical functions such as walking, standing, sitting, lifting, pushing, pulling, reaching, carrying, or handling; (2) capacities for seeing, hearing, and speaking; (3) understanding, carrying out, and remembering simple instructions; (4) use of judgment; (5) responding appropriately to supervision, co-workers and usual work situations; and (6) dealing with changes in a routine work setting.

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

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

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 12 month durational requirement.

Duration.

The next step in the analysis is to determine whether the applicant's severe impairment has lasted for a continuous period of at least twelve (12) months, or can be expected to last for a continuous period of at least twelve (12) months. [6] 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

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6 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.

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 . . . 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.

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

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

> To determine the physical exertion requirements of work in the national economy, we classify jobs as sedentary, light, medium, heavy, and very heavy. These terms have the same meaning as they have in the Dictionary of Occupational Titles, published by the Department of Labor. In making disability determinations under this subpart, we use the following definitions:
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> (*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.
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> *(b) Light work.* Light work involves lifting no more than 20 pounds at a time with frequent lifting or carrying of objects weighing up to 10 pounds. Even though the weight lifted may be very little, a job is in this category when it requires a good deal of walking or standing, or when it involves sitting most of the time with some pushing and pulling of arm or leg controls. To be considered capable of performing a full or wide range of light work, you must have the ability to do substantially all of these activities. If someone can do light work, we determine that he or she can also do sedentary work, unless there are additional limiting factors such as loss of fine dexterity or inability to sit for long periods of time.
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> *(c) Medium work.* Medium work involves lifting no more than 50 pounds at a time with frequent lifting or carrying of objects weighing up to 25 pounds. If someone can do medium work, we determine that he or she can also do sedentary and light work.
>
> *(d) Heavy work.* Heavy work involves lifting no more than 100 pounds at a time with frequent lifting or carrying of objects . . . up to 50 pounds. If someone can do heavy work . . . he or she can also do medium, light, and sedentary work.
>
> *(e) Very heavy work*. Very heavy work involves lifting objects weighing more than 100 pounds at a time with frequent lifting or carrying of objects weighing 50 pounds or more. If someone can do very heavy work, we determine that he or she can also do heavy, medium, light, and sedentary work.

Whether an applicant is capable of performing other work requires the application of the Social Security medical vocational guidelines that include the evaluation of the applicant's residual functional capacity, age, education, English literacy, and previous work experience. If the applicant is not capable of performing other work, he is disabled. 20 CFR 416.920(a)(4)(v).

Age of Medical Records.

In *Cook v. Psychiatric Sec. Review Board*, 860 P.2d 855 (Or. App. 1993), the court stated that "The passage of time does not necessarily render medical reports stale." Although the age at

which medical records should be deemed stale will vary depending on the facts of the particular case, a review of relevant court decisions indicates that medical records must generally be at least two (2) years old to be considered stale. [6a]

ANALYSIS

Introduction.

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

The impairment asserted by the Claimant in this case is diabetes (Claimant hearing testimony; Exs. 2.2 – 2.3). This impairment is categorized by the Social Security Administration (SSA) as Impairment Listing No. 9.08. See 20 CFR Pt. 404, Subpart P, Appendix 1, § 9.08. The Claimant's alleged physical impairment must be examined, according to the Social Security Administration's 5-step sequential analysis (discussed in the Principles of Law, above), to determine whether the Claimant's impairment satisfies the applicable Social Security Disability criteria.

I. Is The Claimant Performing Substantial Gainful Activity?

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

The Claimant was employed in January [redacted] (Ex. A-36). However, there is no indication in the record that the Claimant has worked since that time. Further, DPA never asserted, as a basis for denial of his application for benefits, that the Claimant was employed (See Ex. 2.1, Ex. 3, DPA Fair Hearing Position Statement, and [redacted] hearing testimony). Accordingly, the Division has conceded this issue. [7] The Claimant has therefore carried his burden and has proven, by a

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

preponderance of the evidence, that he is not performing substantial gainful activity as defined by 20 CFR 404.1510.

II. Does The Claimant Have a Severe Impairment?

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

The courts have held that the "step two" severity requirement is a de minimis screening device to dispose of groundless claims. *Webb v. Barnhart*, 433 F.3d 683, 687 (9th Cir.2005). A severe impairment or combination of impairments within the meaning of "step two" exists when there is more than a minimal effect on an individual's ability to do basic work activities. *Webb*, 433 F.3d at 686; *Mayes v. Massanari*, 276 F.3d 453, 460 (9th Cir.2001); *see also* 20 C.F.R. § 416.921(a).

The record in this case is poorly developed with regard to the existence of limitations on the Claimant's ability to perform work activities. Normally this would result in a finding that the Claimant failed to carry his burden of proving, by a preponderance of the evidence, that his impairment is medically severe as defined by 20 CFR 416.920(c). However, the courts have held that when a claimant meets or equals the "Listings" criteria at "step 3" of the Social Security Disability analysis, the claimant is deemed to have a severe impairment, in satisfaction of the "step 2" criteria, as a matter of law. In *Williamson v. Secretary of Health and Human Services*, 796 F.2d 146 (6th Cir. 1986), the court stated:

> We cannot accept the Secretary's argument that, when the evaluation terminates at step two on a finding of no severe impairment, it does not matter whether the claimant satisfies the criteria in the Listing of Impairments. This view of the law is erroneous because it means that impairments that are serious enough to satisfy the listing can be considered not serious enough to be "severe" under sections 416.920(c) and 416.921. Such a reading of the regulations is illogical.
>
> We believe that if a claimant arguably satisfies the criteria of a listed impairment in Appendix 1, it is not proper to preclude a consideration of the listing by finding the impairment non-severe at the second stage of the inquiry . . . .
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> * * * * * * * * * * * *

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[7] DPA's notice of denial (Ex. 3) based DPA's denial of the Claimant's application only on the alleged lack of severity of the Claimant's impairment. However, the regulations and case law all indicate that an agency may not assert a basis of denial, reduction, or termination of benefits which is not stated in the agency's initial notice of denial. See 7 AAC 49.070; *Baker v. State of Alaska Department of Health and Social Services*, 191 P.3d 1005 (Alaska 2008); and *Allen v. State of Alaska Department of Health & Social Services, Division of Public Assistance*, 203 P.3d 1155 (Alaska 2009).

> . . . [I]t is clear that a finding, at step two, that no severe impairment exists is fundamentally inconsistent with facts that show the listing is satisfied. Impairments that meet the criteria of the Listing of Impairments are by definition so clearly serious and disabling that the regulations require the Secretary to find the claimant disabled without further consideration of age, education or work experience. *See* §§ 416.911, 416.920(d); *see also Johnson v. Secretary of Health and Human Services,* 794 F.2d 1106 (6th Cir. 1986).
>
> * * * * * * * * * * * *
>
> In view of this standard for determining when an impairment is not severe, any impairment that meets the criteria in the Listing of Impairments can hardly be classed as non-severe.
>
> Consequently, if a court's reading of the record should reveal that the listing's criteria are satisfied according to valid tests and credible reports, an ALJ's [hearing officer's] finding of no severe impairment at step two cannot be found to be supported by substantial evidence. We do not mean to reorder the sequential process to require that the ALJ [hearing officer] consider whether a claimant's impairment meets the listing before deciding whether the impairment is severe; we merely conclude that a finding of non-severity at step two cannot be supported by substantial evidence when it appears that the listed criteria are met.

Williamson v. Secretary of Health and Human Services 796 F.2d 146 (6th Cir. 1986).

In this case, as discussed in Analysis Section IV, below, the Claimant satisfies the "Listings" criteria for diabetes set forth at 20 CFR Part 404, Subpart P, Appendix 1, § 9.08. Accordingly, pursuant to *Williamson,* above, the Claimant has carried his burden and proven, by a preponderance of the evidence, that his diabetes constitutes a "severe impairment" as defined by 20 CFR §§ 404.1520(c), 416.920(c), and 416.921(b).

III. Does The Claimant's Severe Impairment Satisfy the 12 Month Durational Requirement?

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

The record contains medical evidence documenting the existence of the Claimant's diabetes since August 9, 2003 (Exs. 2.72 – 2.73). The record contains medical evidence documenting that the Claimant was still suffering from as of February 13, 2009 (Ex. A-0 – A-2). At the hearings of February 18 and March 18, 2009 the Claimant testified that he was still suffering from his diabetes. Thus, the minimum duration of the Claimant's diabetes is approximately 5 years and 7 months. This is approximately 4 years and 7 months longer than the minimum twelve-month period required by 20 CFR 416.909.

In summary, the Claimant has proven, by a preponderance of the evidence, that his diabetes satisfies the 12-month durational requirement. The next step in the Social Security disability

analysis requires a determination of whether the Claimant's diabetes meets or equals the criteria of the Social Security Administration's relevant listing of impairments.

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

The next step is to decide whether the Claimant's severe impairment (diabetes) meets the criteria of the Social Security Administration's relevant listing of impairments. The Claimant bears the burden of establishing that his impairments satisfy the requirements of a "Listings" impairment. *Tackett v. Apfel*, 180 F.3d 1094, 1098-1099 (9th Cir.1999); *Sullivan v. Zebley*, 493 U.S. 521, 530-531, 110 S.Ct. 885, 107 L.Ed.2d 967 (1990). This proof must be established by a preponderance of the evidence. See Principles of Law, above. To meet a listing, an impairment must satisfy *all* of the listing's specified criteria. *Sullivan*, 493 U.S. at 530 ("An impairment that manifests only some of these criteria, no matter how severely, does not qualify").

The Social Security disability system classifies the Claimant's diabetes under the Endocrine System listing. 20 CFR Part 404, Subpart P, Appendix 1, § 9.08. Section 9.08's requirements for a finding of disability due to diabetes are as follows:

> A. Neuropathy demonstrated by significant and persistent disorganization of motor function in two extremities resulting in sustained disturbance of gross and dexterous movements, or gait and station (see 11.00C); or
>
> B. Acidosis occurring at least on the average of once every 2 months documented by appropriate blood chemical tests (pH or pCO_2 or bicarbonate levels); or
>
> C. Retinitis proliferans; evaluate the visual impairment under the criteria in 2.02, 2.03, or 2.04.

There is no evidence in the record indicating that the Claimant has neuropathy to the degree required for a finding of disability under § 9.08(A). Likewise, there is no evidence in the record indicating that the Claimant has diabetes-related visual impairment to the degree required for a finding of disability under § 9.08(C).

However, the record does contain medical evidence of acidosis under § 9.08(B). The crucial issue is whether the evidence of acidosis is sufficient to satisfy the criteria of § 9.08(B).

The Claimant testified that he generally had blood tests (ie either glycosylated (glycated) hemoglobin level (HbA1c level), or blood glucose level tests), approximately once every three months (see Findings of Fact at Paragraph 37, above). However, in June 2004 the Claimant had approximately six of these tests during a one month period (see Findings of Fact at Paragraphs 11-16, above). More recently, the Claimant also had approximately 3 of these tests during the period June – August 2008 (see Findings of Fact at Paragraphs 21-25, above). During the fifteen month period from December 4, 2007 through March 6, 2009, the Claimant had a total of seven of these tests, or an average of one test every 2.1 months (see Findings of Fact at Paragraphs 17-

33, above). All of these tests indicated elevated glycosylated (glycated) hemoglobin levels or elevated blood glucose levels.

During the hearing of March 18, 2009 the Hearing Officer asked [redacted], the DPA's medical expert, whether the Claimant had "acidosis occurring at least on the average of once every 2 months documented by appropriate blood chemical tests." In admirable candor, [redacted] answered "yes, he meets that . . . ." Thus, the DPA conceded at the hearing of March 18, 2009 that the Claimant satisfied the "Listings" requirements for diabetes set forth in § 9.08(B).

Even without [redacted] testimony the record contains ample evidence of acidosis of a level sufficient to satisfy § 9.08(B). Diabetic ketoacidosis is generally indicated by HbA1c readings higher than 6 and by blood glucose levels higher than 300 mg/dL. *See* Findings of Fact at Paragraphs 3-4, above. The Claimant's average HbA1c reading was 9.36. *See* Findings of Fact at Paragraph 36, above. The Claimant's average blood glucose level was 204. *Id.* Although the Claimant's average blood glucose level was not above the 300 mg/dL mark specified by the quoted medical sources (*See* Findings of Fact at Paragraphs 3-4, above), the Claimant's average blood glucose level was well above the 114 mg/dL mark which the Claimant's lab reports indicated was the maximum acceptable level for the Claimant (*See* Findings of Fact at Paragraphs 11 - 17, 22, and 25, above).

Because the Claimant's impairment (diabetes) meets the relevant criteria of the Listing of Impairments for diabetes set forth in the Social Security regulations at 20 CFR Part 404, Subpart P, Appendix 1, Section 9.08(B), the Claimant is deemed disabled pursuant to 20 CFR 416.920(a)(4)(iii) and no further inquiry is required.

CONCLUSIONS OF LAW

1. The Claimant carried his burden and proved, by a preponderance of the evidence, that:

    a. He is not currently engaged in substantial gainful activity as defined by 20 CFR 404.1510.

    b. His diabetes (SSA Impairment Listing No. 9.08) constitutes a medically severe impairment as defined by 20 CFR 416.920(c) and 20 CFR 416.921(b).

    c. His diabetes (SSA Impairment Listing No. 9.08) has lasted or can be expected to last for 12 months or longer, and the Claimant therefore satisfies the twelve month durational requirement of 20 CFR 416.909 and 20 CFR 416.920(a)(4)(ii).

    d. His diabetes meets or equals the requirements for Endocrine System Impairments located at 20 CFR Part 404, Subpart P, Appendix 1, § 9.08(B), and the Claimant is therefore deemed disabled on this basis pursuant to 20 CFR 416.920(a)(4)(iii).

2. The Division was therefore not correct when it denied the Claimant's application for Interim Assistance benefits on or about January 22, 2009.

DECISION

The Division erred when it denied the Claimant's application for Interim Assistance benefits on or about January 22, 2009.

APPEAL RIGHTS

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

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

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

DATED this _____ day of June, 2009.

_____
Jay Durych
Hearing Authority

CERTIFICATE OF SERVICE

I certify that on this _____ day of June, 2009, true and correct copies of the foregoing were sent to the Claimant via U.S.P.S. mail, and to the remainder of the service list by e-mail, as follows:

Claimant – Certified Mail, Return Receipt Requested
[redacted], Director
[redacted], Policy & Program Development
[redacted], Staff Development & Training
[redacted], Administrative Assistant II
[redacted], Eligibility Technician I
[redacted], Fair Hearing Representative

By_____
Al Levitre, Law Office Assistant I