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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-160
)
 Claimant.) Division Case No. [REDACTED]
_____)

FAIR HEARING DECISION

STATEMENT OF THE CASE

[REDACTED] (Claimant) applied for Interim Assistance benefits on February 12, 2008 (Ex. 3). The Division of Public Assistance (DPA or Division) sent the Claimant notices that her application was denied on June 4, 2008 and on June 9, 2008 (Ex. 2.0). The Claimant requested a hearing contesting the denial on June 9, 2008 (Ex. 2.0). A hearing was held on September 16, 2008 and on October 14, 2008 before Hearing Officer Larry Pederson (Exs. 2.0, 2.7). Mr. Pederson upheld the Division's denial of the Claimant's Interim Assistance application in a decision dated October 24, 2008 (Exs. 2.0 – 2.7).

The Claimant re-applied for Interim Assistance benefits at some time between October 24, 2008 and January 29, 2009.¹ The Division denied her application on January 29, 2009 (Ex. 3). The Claimant subsequently submitted additional documentation and requested reconsideration of the DPA's denial of January 29, 2009 (Ex. 5). DPA notified the Claimant on February 25, 2009 that the additional documentation did not change its conclusion and that her application would remain denied (Ex. 6). The Claimant requested a fair hearing contesting the denial on March 4, 2009 (Ex. 7.1). This office has jurisdiction to decide this case pursuant to 7 AAC 49.010.

A hearing was held on April 21, 2009 before Hearing Officer Claire Steffens.^{1a} The Claimant appeared telephonically, represented herself, and testified on her own behalf. [REDACTED], a Public

¹ The exact date the Claimant reapplied for Interim Assistance benefits is not in the record. Determination of the exact date of the Claimant's second application is not, however, necessary to the proper adjudication of this case.

^{1a} Following the hearing this case was reassigned to Hearing Officer Jay Durych. Mr. Durych reviewed the digital recording of the hearing, and reviewed the case file, prior to preparing and issuing this decision.

Assistance Analyst with the Division, appeared in person to represent and testify on behalf of the Division. [REDACTED], R.N. testified telephonically on behalf of the Division.

All testimony given and all exhibits offered were admitted into evidence.² At the end of the hearing the record was closed except for certain additional medical documentation which the Claimant was to submit by April 27, 2009. The Claimant never submitted this documentation.

ISSUE

Was the Division correct to deny the Claimant's application for Interim Assistance benefits on or about January 29, 2009 because the Claimant did not meet the program's disability requirements?³

FINDINGS OF FACT⁴

The following facts were established by a preponderance of the evidence:

1. Hearing Officer Larry Pederson's decision dated October 24, 2008, pertaining to the Claimant's prior application for Interim Assistance benefits dated February 12, 2008, was included by the Division as an exhibit in this case (Exs. 2.0 – 2.7). Accordingly, the Findings of Fact from the 2008 decision constitute evidence which must be considered in this case. Those Findings of Fact state in relevant part as follows:

1. The Claimant is currently [REDACTED] years old (birth date [REDACTED]). (Ex. 1) She has a GED. (Claimant testimony)

2. The Claimant's work history consists primarily of physical labor, housekeeping and cannery work. (Claimant testimony) The Claimant last worked in 1997 or 1998 as a housekeeper at a bed and breakfast. (Claimant testimony) After 1998, the Claimant stayed at home and raised her minor son. (Claimant testimony)

3. Dr. [REDACTED], D.O. completed a Preliminary Examination for Interim Assistance form (AD #2) for the Claimant on February 27, 2008. This form diagnosed the Claimant with bilateral shoulder derangement with impingement syndrome, carpal tunnel syndrome, and very early degenerative joint disease. (Ex. 2.13) Dr. [REDACTED] indicated on the form that the Claimant's expected recovery time was 12 months or longer, stating

² The Claimant did not request that the exhibits from her prior Interim Assistance case (OHA Case No. 08-FH-594) be admitted into evidence in this case. Accordingly, only the exhibits (1-17) submitted in the instant case (OHA Case No. 09-FH-160) were admitted into evidence.

³ As noted above, the application at issue here was submitted at some time between October 24, 2008 and January 29, 2009 (Exs. 2.7, 3). However, the exact filing date of the Claimant's current application does not appear in the record.

⁴ All of the medical reports in the record 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.

that she hoped the Claimant's upcoming surgery worked: "[i]f not, she will be a permanent cripple in the arms." *Id.* The February 27, 2008 Preliminary Examination report also indicated the Claimant was expected to have permanent back problems. *Id.*

4. Dr. [REDACTED], D.O. completed a second Preliminary Examination for Interim Assistance form (AD #2) for the Claimant on June 9, 2008. This form diagnosed the Claimant with left shoulder impingement syndrome and severe A-C arthritis of the left shoulder. (Ex. 2.3) The form also indicated the Claimant had left shoulder surgery, that she would complete her physical therapy after August 2008, that she was expected to have right shoulder surgery, and that her expected recovery time was 6 months. *Id.*

5. The Claimant's medical records show the following:

- a. The Claimant has a long history of back and shoulder pain. She met with her physician for back and shoulder pain as early as 2001. (Exs. 2.86 – 2.89) She was then diagnosed with fibromyalgia. *Id.*
- b. The Claimant had an MRI of her cervical spine that showed, as of May 2001, "multiple level disk bulges and disk protrusion." (Ex. 2.87) She also had a left shoulder MRI performed at the same time that showed "evidence of a partial thickness or tendonitis of the supraspinal tendon." *Id.*
- c. In January 2003 the Claimant met with her physician and complained of "pain in her right shoulder that has been going on for many years. She has decreased strength which is not new." (Ex. 2.79)
- d. On August 15, 2007 the Claimant had two spinal X Rays performed. The X Rays showed the Claimant had degenerative disc disease at C5 – C6 and L5- S1. (Exs. 2.133 – 2.134)
- e. On August 15, 2007 the Claimant had an X Ray of her left shoulder performed that showed the Claimant had a "mild degenerative change at the acromioclavicular joint." (Ex. 2.135)
- f. On September 10, 2007 the Claimant had several spinal MRIs performed. The lumbosacral spine MRI showed a "bilateral pars defect of L5 with grade I anterior subluxation of L5 on S1 and mild bilateral foraminal stenosis." (Ex. 2.31) The cervical spine MRI showed "central disc bulging at C2-C3 with mild central stenosis at those levels. No foraminal stenosis. Mild disc space narrowing at C6 – C7 with reversal of the cervical curve at that level." (Ex. 2.132)

- g. On September 11, 2007 the Claimant's physician's notes [indicated that] the Claimant had "mild bulging but no significant foraminal encroachment or severe cervical stenosis," that her "lumbar spine MRI does not also show much in the way of nerve root impingement or foraminal stenosis but does show a mild pars defect," and that she had "some mild impingement type symptoms" with both shoulders. (Ex. 2.62) The physician recommended the Claimant "talk to physical therapy for discussion of activities that she can do to treat her discomfort, work on range of motion and strengthening." *Id.*
 - h. On December 20, 2007 the Claimant had MRIs performed on both shoulders. The MRIs showed the Claimant had acromioclavicular degenerative changes in both shoulders. (Exs. 2.47 – 2.48)
 - i. On March 5, 2008 the Claimant elected to have left shoulder surgery, despite her physician's notes that "I think she [is] not going to notice a dramatic improvement with surgery and she seems [to] understand this but she says the pain has been bothersome enough that she would like to do something" (Ex. 2.61)
 - j. The Claimant had left shoulder surgery performed on March 6, 2008. (Ex. 2.46)
 - k. On April 8, 2008, the Claimant's left shoulder surgery was well healed. However, the Claimant was "extremely stiff" and was referred to physical therapy. (Ex. 2.60)
6. The Claimant testified about her physical condition as follows:
- a. She experiences lower back pain.
 - b. Her balance is off.
 - c. She was prescribed a cane but cannot use it because of problems with her shoulders and her hand grip.
 - d. She can sit for only about 10 minutes due to pain. She has to lie down frequently.
 - e. She has difficulty bathing, standing, cooking, cleaning, and doing laundry.
 - f. She has difficulty cutting up her food.

- g. She frequently drops items.
- h. She has severe problems sleeping and only has about 2 hours of uninterrupted sleep per night.
- i. The Claimant was supposed to have surgery performed on her right shoulder. She is currently not planning on having that surgery.

7. The Claimant's daughter also testified about her mother's condition. She spoke about her mother being unable to do housework. She said her mother drops items and is unable to do such things as pick up her grandchild.

[End of Findings of Fact from 2008 decision].

2. The Division's denial notice dated January 29, 2009 (Ex. 3) states in relevant part as follows:

Your application for Adult Public Assistance . . . and Medicaid received on February 12, 2008 is denied because . . . you do not meet the disability requirements for [Adult Public Assistance] and Medicaid. This action is based on [Adult Public Assistance] Manual Sections 424 and 425 Because [the Social Security Administration] has denied your application and our medical reviewer has also denied you we are denying your application. If you want to give us another doctor's determination we will look at it again. If [the Social Security Administration] approves your case we may be able to go back to your original application.

3. A medical report submitted by [REDACTED] dated February 3, 2009 (Ex. 4.5 – 4.6) states in relevant part as follows:

The patient is here for examination for "interim assistance." The patient has had long term neck, back, and bilateral shoulder pain and more recently knee pain, dating back 10+ years. The patient has had an MRI done at ANMC on December 20, 2007 of [both shoulders] which showed tendinosis of the right shoulder and AC joint degenerative changes in the left shoulder . The patient subsequently underwent an AC joint surgery where they excised a distal aspect of the clavicle and revised the acromion. She has had ongoing problems since that time. She also has had semi-frozen shoulder. On September 10, 2007 she had an MRI done at ANMC of her [lumbosacral and cervical spine]. Her lumbosacral spine showed a bilateral pars defect with grade I anterior subluxation of L5-S-1 or spondylolisthesis with mild foraminal stenosis. Her cervical spine MRI showed central bulging disks from C2 – C3 through C6 – C7 with mild stenosis and mild disk space narrowing at C6 – C7 with mild reversible normal lordotic curve . There would be no significant impingement in either place. The patient's knee to my knowledge has not been x-rayed. She has also had some carpal tunnel symptoms. The patient is on a chronic pain medication for this She has not had a carpal tunnel nerve conduction study done in the last few years The patient also said that she [was] unable to do any of her home duties. She is unable to work and unable to take care of herself according to her.

. . . . The patient appears to be in no acute distress She is able to rotate her neck to 45 degrees bilaterally. She is able to flex and touch her chin to her chest Back is unremarkable on flexion and palpation. Deep tendon reflexes are 3+ and equal to the patella. Straight leg raise is questionably positive bilaterally. Shoulders: scar on the left. Limited range of motion abduction. The patient is unable to abduct to even horizontal and limited anterior and posterior rotation and flexion. Her right shoulder has slightly limited range of motion. The patient does have some neck discomfort with axial loading. Musculature: seems to be fairly normal for her frame and weight. Laboratory data: none.

Assessment: Bilateral shoulder pain status post right shoulder surgery tendonosis demonstrated on the left on previous MRI, moderate degenerative changes with cervical and lumbar spine with spondylolisthesis of L5 – S1. Hyperflexion of lower extremities otherwise on examination is unremarkable. Possible carpal tunnel, probable degenerative problems with the knees given her issues elsewhere. The actual degree of disability in the patient is somewhat difficult to tell as this [is] mostly subjective. I think a full evaluation by physical therapy would be warranted for her . . . to assess her capabilities. Also I think prolonged intensive physical therapy might be helpful to return her to a more functional state. Given that her musculature she does not seem to be [indecipherable] one would expect from the lack of inability that she claims she has.

Plan: (1) Referral to physical therapy. (2) Filled out patient's preliminary examination for interim assistance with no work being done by the patient at this time

4. A *Preliminary Examination for Interim Assistance* (Form AD-2) submitted by [REDACTED], M.D. dated February 3, 2009 (Exs. 4.2 – 4.3 and 4.8 – 4.9) states in relevant part as follows:

What is the applicant's diagnosis: (1) Left shoulder AC joint [indecipherable] joint and subsequent [indecipherable] frozen shoulder; (2) Right shoulder tendonosis per MRI 2007; (3) Cervical spine [indecipherable] with mild central stenosis, [indecipherable] per MRI September 2007; (4) Lumbar spine spondylolisthesis L5 – S1 and mild foraminal stenosis per MRI September 2007; (5) Has carpal tunnel syndrome.

Is the applicant expected to recover from this illness or condition? May respond to an intensive regimen of physical therapy, [indecipherable] spine clinic.

If yes, what is the expected length of time required for recovery or remission? 12 months – history since 2001. Would also recommend referral to physical therapy for complete assessment of physical capability.

Please provide any other information relevant to the applicant's illness or condition or the expected length of time needed for recovery or remission: Currently unable to participate in any work including extensive house work.

5. The Division's *Interim Assistance Medical Review Denial Form* dated February 17, 2009 (Ex. 4.1) states in relevant part as follows:

. . . . Client alleged an inability to work due to shoulder pain, back pain, and degenerative joint disease Denied based on the medical evidence which did not substantiate the client's allegation that she is unable to participate in any and all types of work The [physician's notes dated February 3, 2009] did not disclose that the client's level of disability was such that she was unable to engage in sedentary or light work. Consequently it appeared likely that the client who has a GED would be capable of engaging in some type of work

6. A *Preliminary Examination for Interim Assistance* (Form AD-2) submitted by [REDACTED], M.D. dated March 10, 2009 (Ex. 4.10 – 4.11) states only that there had been “no changes [in the Claimant's status] from form dated February 3, 2009.”

7. At the hearing of April 21, 2009 the Claimant testified telephonically that she:

- a. Is [REDACTED] years old.
- b. Applied for social security disability benefits; her application was denied; and she filed an appeal. Her appeal is currently pending.
- c. Has mostly shoulder and lower back problems. Sometimes her shoulder locks up for periods of up to 4 hours.
- d. Her hand was going numb and her shoulders were in extreme pain as a result of holding the telephone during the hearing.
- e. Often has excruciating pain such that she cannot concentrate and gets confused. She must concentrate to avoid dropping things.
- f. Is starting to refrain from going to the store to go grocery shopping because it is too painful. She has a hard time cooking or doing the dishes. She often uses a microwave oven and paper plates to avoid these tasks.
- g. Her prior work as a hotel/motel housekeeper was very physical work involving pushing, shoving, carrying, and lifting. She can no longer perform that type of work.

8. At the hearing of April 21, 2009 [REDACTED], R.N. testified telephonically that she:

- a. Is a registered nurse (R.N.) and consultant / medical reviewer employed by DPA. She reviews Claimant medical information for Interim Assistance determinations.
- b. Performed the medical eligibility review and made the disability determination in this case.
- c. Initially receives a Form AD-2 from the eligibility technician at the start of the disability determination process. If that form contains enough information to allow a decision to be made, she makes the decision at that time. Otherwise, she obtains

releases from the claimant, requests additional medical documents from the sources for which releases are provided, and then reviews the medical documents provided in response to the releases.

- d. Does not meet with the applicant during the medical review process. She makes her determination based solely on the medical documents provided to her.
- e. Recognizes that the Claimant has a limited range of motion and mild degenerative changes with her skeletal system. However, the medical reports indicated that the Claimant's musculature was essentially intact, her reflexes were fine, and she had no neurological problems.
- f. Believes that the Claimant can perform her own Activities of Daily Living (ADLs) and that the Claimant can perform sedentary work such as answering telephones, filing, and/or acting as an in-store greeter.

9. At the hearing the Claimant requested additional time to obtain medical records pertaining to a March 10, 2009 evaluation performed by Dr. [REDACTED]. The Division did not object, and the record was held open for this additional medical documentation. The Claimant was given until April 27, 2009 to provide her additional medical documentation. The Claimant failed to submit any additional medical records.

PRINCIPLES OF LAW

Introduction.

This case involves an application for Interim Assistance benefits. When an application is denied, the applicant has the burden of proof¹⁵ by a preponderance of the evidence.⁶

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 40.180.⁷

⁵ "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).

⁶ 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).

⁷ 7 AAC 40.180, titled "initial determination of disability," provides as follows:

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

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

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).⁸ The Social Security regulations set out a very specific multistep process that must be followed in order to determine whether an applicant is disabled.

I. Is the Claimant Performing 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. If a claimant is performing "substantial gainful activity," then he or she is deemed not to be disabled. If a claimant is not performing "substantial gainful activity," it is necessary to proceed to the next step of the disability analysis and determine whether the Claimant has a severe impairment.

(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.

(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

(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.

⁸ 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.

II. Does the Claimant Have a 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 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 does not qualify as "severe," then the claimant is deemed not disabled. 20 CFR 416.920(a)(4)(ii). If the impairment is deemed severe, it is then necessary to proceed to the third step of the disability analysis and determine whether the Claimant's impairment meets the twelve (12) month durational requirement.

III. Does the Claimant's Impairment Meet the Durational Requirement?

The third 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 deemed not to be 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 relevant Listing of Impairments.

IV. Does the Claimant's Impairment Meet or Equal the Listings?

The fourth step in the analysis is to determine whether the applicant's severe impairment meets or medically equals the criteria of the relevant Listing of Impairments (located at 20 CFR Part 404, Subpart P, Appendix 10). 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 . . . must

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.

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 404.1526(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 criteria of the relevant Listing of Impairments (20 CFR Part 404, Subpart P, Appendix 1), then the applicant is deemed disabled and no further inquiry is required. 20 CFR 416.920(a)(4)(iii). 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 or her prior work.

V. Is the Claimant Capable of Performing His or Her Previous Relevant Work?

The fifth step is to determine whether the severe impairment prevents the applicant from performing his or her previous relevant work. If not prevented from performing his or her previous relevant work, the applicant is deemed not to be disabled. 20 CFR 416.920(a)(4)(iv). Otherwise, it is necessary to proceed to the final step in the analysis and determine whether the applicant can perform any other work.

VI. Can the Claimant Perform Any Other Work?

The sixth and 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.” 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).

Whether an applicant is capable of performing other work requires the application of medical-vocational guidelines that include 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 or she is deemed to be 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.

A preliminary issue is the Division's claim, stated in its denial notice dated January 29, 2009 (Ex. 3), that the Claimant is not eligible for Interim Assistance benefits because the Social Security Administration denied her application. However, the Claimant testified that she had filed an appeal and that her appeal is still pending. The Division did not rebut that testimony. Further, the Division waived that argument by failing to assert it either in its subsequent *Interim Assistance Medical Review Denial Form* dated February 17, 2009 (Ex. 4.1), or at the hearing.

I. Is the Claimant Performing Substantial Gainful Activity?

The first element of the disability analysis is whether the Claimant is performing "any substantial gainful activity." The Claimant asserted that she has not worked since 1997 or 1998 (Claimant hearing testimony). The Division did not contest this assertion. Accordingly, the Claimant has satisfied the first step of the Social Security disability analysis – she has proven, by a preponderance of the evidence, that she 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.

II. Does the Claimant Have a Severe Impairment?

The Claimant's disability claim is based on assertions of neck pain, back pain, bilateral shoulder pain, knee pain, and carpal tunnel syndrome (Exs. 4.5 – 4.6; Claimant hearing testimony). In order to avoid being found to be *not disabled* at this stage, the Claimant must prove that her impairments are medically severe pursuant to 20 CFR 416.920(c). To do this, the Claimant must demonstrate that her impairments significantly limit her ability to do basic work activities such as walking, standing, sitting, and lifting (20 CFR 416.921(b)).

The Claimant testified that she has difficulty sitting, pushing, shoving, carrying, and lifting. However, pursuant to the regulations, a claimant's own statements regarding 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 medical records provide substantial objective support for her complaints of neck pain, back pain, bilateral shoulder pain, knee pain, and carpal tunnel syndrome. See Exhibits 2.1 – 2.2; 4.2 – 4.3; 4.5 – 4.6; and 4.8 – 4.9. 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 the Claimant's medical reports are biased or otherwise untrustworthy. Accordingly, in the absence of contradicting medical evidence, the Claimant's medical reports must be accepted as credible.

In summary, the Claimant has met her burden and proved, by a preponderance of the evidence, that her impairments significantly limit her ability to do basic work activities such as walking, standing, sitting, and lifting. Accordingly, the Claimant's impairments are medically severe impairments as defined by 20 CFR 416.920(c) and 20 CFR 416.921(b).

III. 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").

A medical report by [REDACTED], M.D. dated February 3, 2009 (Ex. 4.5 – 4.6) states that the Claimant "has had long term neck, back, and bilateral shoulder pain and more recently knee pain, dating back 10+ years." The Division did not dispute these facts. Accordingly, the Claimant has proven, by a preponderance of the evidence, that her impairments satisfy the 12 - month durational requirement.

The next step in the Social Security disability analysis requires a determination of whether the Claimant's impairment meet the criteria of the Social Security Administration's relevant Listing of Impairments.

IV. 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 impairments meet the criteria of the Social Security Administration's relevant Listing of Impairments. The Social Security Administration's Listing of Impairments is located at 20 CFR Part 404, Subpart P, Appendix 1. The Claimant's impairments are categorized generally under "Category of Impairments, Musculoskeletal" (20 CFR Part 404, Subpart P, Appendix 1, Section 1.00). The specific categorization of the Claimant's bilateral shoulder pain, knee pain, and carpal tunnel syndrome / wrist pain is under Section 1.02.⁹ The specific categorization of the Claimant's neck and back pain is under Section 1.04.¹⁰

⁹ Listing section 1.02, titled "Major dysfunction of a joint(s) (due to any cause)," provides:

Characterized by gross anatomical deformity (e.g., subluxation, contracture, bony or fibrous ankylosis, instability) and chronic joint pain and stiffness with signs of limitation of motion or other abnormal motion of the affected joint(s), and findings on appropriate medically acceptable imaging of joint space narrowing, bony destruction, or ankylosis of the affected joint(s). With: (A) Involvement of one major peripheral weight-bearing joint (i.e., hip, knee, or ankle), resulting in inability to ambulate effectively, as defined in 1.00B2b; or (B) Involvement of one major peripheral joint in each upper extremity (i.e., shoulder, elbow, or wrist-hand), resulting in inability to perform fine and gross movements effectively, as defined in 1.00B2c.

¹⁰ Listing Section 1.04, titled "Disorders of the spine," requires in relevant part as follows:

[H]erniated 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

In order to satisfy Listing 1.02, the Claimant's shoulder pain or carpal tunnel pain must result in an inability to perform fine and gross movements effectively as defined in Listing Section 1.00(B)(2)(c). In order to satisfy Listing 1.02, the Claimant's knee pain must result in an inability to ambulate effectively as defined in Listing Section 1.00(B)(2)(b). In order to satisfy Listing 1.04, the Claimant's neck and back pain must result in *either* an inability to perform fine and gross movements effectively, or an inability to ambulate effectively. See Listing Section 1.00(B)(2)(a).

There is no evidence in the record indicating that the Claimant is unable to ambulate effectively as defined by Listing Section 1.00(B)(2)(b).¹¹ Accordingly, the Claimant's knee pain and back pain do not (individually or collectively) meet the "inability to ambulate" requirements of Listings 1.02 and/or 1.04. The remaining question at this stage of the analysis is whether the Claimant's shoulder pain, carpal tunnel pain, neck pain, and/or neck pain (individually or collectively) prevent the Claimant from effectively performing fine and gross movements.

Listing Section 1.00(B)(2)(c), titled "What we mean by inability to perform fine and gross movements effectively," provides in relevant part as follows:

Inability to perform fine and gross movements effectively means an extreme loss of function of both upper extremities To use their upper extremities effectively, individuals must be capable of sustaining such functions as reaching, pushing, pulling, grasping, and fingering to be able to carry out activities of daily living. Therefore, examples of inability to perform fine and gross movements effectively include, but are not limited to, the inability to prepare a simple meal and feed oneself, the inability to take care of personal hygiene, the inability to sort and handle papers or files, and the inability to place files in a file cabinet at or above waist level.

[subsection (B) inapplicable and therefore deleted] or

C. Lumbar spinal stenosis resulting in pseudoclaudication, established by findings on appropriate medically acceptable imaging, manifested by chronic nonradicular pain and weakness, and resulting in inability to ambulate effectively, as defined in 1.00B2b.

¹¹ Listing Section 1.00(B)(2)(b), titled "What We Mean by Inability to Ambulate Effectively," provides in relevant part 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 . . . 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 [E]xamples 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

The Claimant testified that she had significant pain in both shoulders; that she had marked difficulty pushing, shoving, carrying, and lifting; that she has refrained from going grocery shopping because it is too painful; and that she has a hard time cooking or doing the dishes. However, medical evidence is required to support her testimony.

The Claimant has been diagnosed with left shoulder impingement syndrome and severe A-C arthritis of the left shoulder, and surgery meant to improve her left shoulder failed (Exs. 2.1 – 2.2). Accordingly, there is medical evidence in the record to support an “extreme loss of function” as to the Claimant’s left arm. However, Listing Section 1.00(B)(2)(c) requires “an extreme loss of function of *both* upper extremities” (emphasis added). Although there is certainly medical evidence in the record indicating limitations of range of motion and functioning of the Claimant’s right shoulder, the medical evidence does not show an “extreme loss of function” as to the Claimant’s right arm.

In summary, the Claimant failed to prove, by a preponderance of the evidence, that her impairments meet or equal the requirements of 20 CFR Part 404, Subpart P, Appendix 1, Sections 1.02 and/or 1.04. Accordingly, it is necessary to proceed to the next question in the Social Security disability analysis: whether or not the Claimant’s impairments prevent her from performing her past relevant work (20 CFR 404.1560(a)).

IV. Can the Claimant Perform Her Past Relevant Work?

The next issue, pursuant to 20 CFR 404.1560(a), is whether the Claimant’s impairment prevents her from performing her past relevant work. The Claimant has the burden of proving that her impairments prevent her from performing her past relevant work by a preponderance of the evidence. See Principles of Law, 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 or her 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.

The Claimant’s prior work consisted primarily of physical labor, housekeeping and cannery work. (Ex. 2.1). The Claimant last worked in 1997 or 1998 as a housekeeper at a bed and breakfast. (Ex. 2.1). Her work as a hotel/motel housekeeper was very physical work involving pushing, shoving, carrying, and lifting (Claimant hearing testimony). The Claimant testified that she can no longer perform that type of work. This testimony was not rebutted by the Division.

The medical evidence (as discussed above) falls short of proving that the Claimant’s right and left shoulder impairments are severe enough to meet or equal the stringent “Listings” criteria. However, the medical evidence does support a finding that the Claimant can no longer perform her past, very physical work. Although the medical report submitted by the Claimant’s treating physician ██████████, M.D. dated February 3, 2009 (Ex. 4.5 – 4.6) states that the Claimant’s “actual degree of disability . . . is somewhat difficult to tell as this [is] mostly subjective,” Dr. ██████████ ultimately

concluded that the Claimant is “currently unable to participate in any work including extensive house work.” See *Preliminary Examination for Interim Assistance* (Form AD-2) submitted by [REDACTED], M.D. dated February 3, 2009 (Exs. 4.2 – 4.3 and 4.8 – 4.9).

In general, the opinions of treating physicians are entitled to controlling weight. *Cruse v. Commissioner of Social Security*, 502 F.3d 532, 540 (6th Cir. 2007); *Walters v. Commissioner of Social Security*, 127 F.3d 525, 529-30 (6th Cir. 1997); 20 C.F.R. § 404.1527(d)(2). This is particularly true where (as here) the Division never asserted that the Claimant could still perform her prior work. The Division asserts only that the Claimant is able to engage in sedentary or light work. See the Division’s *Interim Assistance Medical Review Denial Form* dated February 17, 2009 (Ex. 4.1); see also hearing testimony of [REDACTED], R.N. That allegation is addressed in the next (and last) section of this analysis.

Accordingly, the Claimant has proven, by a preponderance of the evidence, that she is unable to perform her past work. It is therefore necessary to proceed to the final step in the Social Security disability analysis and determine whether the Claimant can perform any other work.

V. 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).

The Division asserts that the Claimant can perform light or sedentary work. The Social Security Administration defines “light work” in 20 CFR 416.967(b) as follows:

(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.

The Claimant testified that she was prescribed a cane but cannot use it because of problems with her shoulders and her hand grip (Ex. 2.2). She also testified that she can sit for only about 10 minutes due to pain and has to lie down frequently (Ex. 2.3). The report by [REDACTED], M.D. dated February 3, 2009 (Ex. 4.5 – 4.6) confirms the Claimant’s allegation of knee pain. Finally, the record contains an abundance of medical evidence to support the Claimant’s allegations of back pain. See Findings of Fact at paragraphs 1 and 4 above. The medical evidence of back and knee problems supports the Claimant’s assertions that it is difficult for her to walk, stand, or sit.

In summary, at this stage the Division has the burden of proving that the Claimant is able to perform light work. The Division has not carried that burden.

The final issue, upon which the Claimant's disability claim hinges, is whether the Claimant can perform sedentary work. In the absence of a controlling rule, this issue would require a detailed analysis of conflicting facts. The issue is made more difficult by the fact (noted above) that the parties do not have the benefit of a vocational expert's testimony in this case.

The Social Security Administration has, however, promulgated medical-vocational guidelines at 20 CFR, Part 404, Subpart P, Appendix 2. These guidelines, known as "the Grids," seek to make the disability determination process more certain and uniform by mandating a given result when certain factual prerequisites are satisfied.

Rule 201.12 of 20 CFR, Part 404, Subpart P, Appendix 2 provides that persons who (a) are aged 50-54; (b) have graduated from high school; (c) whose education did not qualify them for direct entry into skilled work; (d) whose prior work experience is unskilled; and (e) who are limited to sedentary work, are deemed disabled as a matter of law. The Claimant comes within the scope of this rule because (a) she is ■ years old; (b) she has a GED, which is equivalent to a high school diploma; (c) her GED did not qualify her for direct entry into skilled work; (d) her work experience (performing cannery work and housekeeping) is unskilled; and (e) she is at best limited to sedentary work.

In summary, Rule 201.12 of 20 CFR, Part 404, Subpart P, Appendix 2 mandates a finding that the Claimant is disabled. For this reason, the Division was not correct to deny the Claimant's application for Interim Assistance benefits based on the assertion that the Claimant did not meet the program's disability requirements.

CONCLUSIONS OF LAW

1. The Claimant carried her burden and proved, by a preponderance of the evidence, that:
 - a. The Claimant is not currently engaged in substantial gainful activity as defined by 20 CFR 404.1510.
 - b. The Claimant's impairment is medically severe as defined by 20 CFR 416.920(c) and 20 CFR 416.921(b).
 - c. 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).
 - d. The Claimant is not capable of performing her past relevant work.
2. The Claimant failed to carry her burden and did not prove, by a preponderance of the evidence, that her impairments meet or medically equal the requirements of the Social Security Administration's applicable Listing of Impairments (20 CFR Part 404, Subpart P, Appendix 1, Sections 1.02 and 1.04).

3. The Division failed to carry its burden and did not prove, by a preponderance of the evidence, that the Claimant is capable of performing light or sedentary work.

4. The Division was therefore not correct when it denied the Claimant's application for Interim Assistance benefits on or about January 29, 2009.

DECISION

The Division erred when it denied the Claimant's application for Interim Assistance benefits on or about January 29, 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.


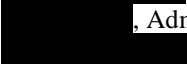


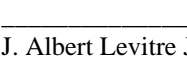

DATED this _____ day of July, 2009.

Jay Durych
Hearing Authority

CERTIFICATE OF SERVICE

I certify that on this _____ day of July, 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

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

J. Albert Levitre Jr.
Law Office Assistant I