

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

In the Matter of)
)
N O. X) OAH No. 12-0613-APA
) Former OHA Case No.
_____) DPA Case No.

DECISION

I. Introduction

N X applied for Interim Assistance benefits on July 22, 2011.¹ Her application was denied by the Division of Public Assistance (DPA or Division)² and Ms. X requested a hearing.³

Hearings were held on December 14, 2011, January 25, 2012, and March 7, 2012. Ms. X participated in the hearings by telephone and represented herself. Public Assistance Analyst Jeff Miller attended the hearings in person and represented the Division. DPA Interim Assistance Medical Reviewer Laura Ladner participated in the hearings by telephone and testified on behalf of the Division.

The Division did not dispute that Ms. X has been diagnosed with rheumatoid arthritis⁴ and that she is not currently working. The Division also agreed that Ms. X' arthritis constitutes a severe impairment that has lasted or will last at least 12 months. Finally, the Division conceded that Ms. X cannot perform her prior relevant work. The parties disagree on only two issues: (1) whether Ms. X' arthritis satisfies the criteria of Listing 14.09 of the Social Security Administration's listing of impairments; and (2) whether Ms. X can still perform sedentary work.

This decision concludes that, while the Division correctly determined that Ms. X' impairment does not satisfy the criteria of Listing 14.09 of the Social Security Administration's listing of impairments, the Division erred when it found that Ms. X can still perform sedentary work. Accordingly, the Division's determination that Ms. X is not eligible for Interim Assistance is reversed.

¹ Exhibit 2.
² Exhibit 4.
³ Exhibit 5.
⁴ Exhibit 3.003.

II. Facts

Ms. X is 47 years old.⁵ She has a high school education with one year of trade school.⁶ From 1990 to 2000 Ms. X worked in a chicken processing plant where she operated a deboning machine; in this job she had to lift baskets weighing about 25 pounds. Between 2000 and 2008 Ms. X worked in a clothes dyeing facility. From 2008 - 2010 Ms. X worked as a computer data entry clerk.⁷

Ms. X suffers from asthma, hypochromic/microcytic anemia, diabetes mellitus type II, essential hypertension, hyperlipidemia, renal insufficiency, rheumatoid arthritis, and osteoarthritis and pain in the right ankle and both knees.⁸ Her asthma is characterized as chronic and stable but not controlled.⁹ She has also been assessed as having "probable" sleep apnea.¹⁰ An electrocardiogram performed in 2010 indicates that Ms. X has sinus tachycardia, a left atrial abnormality, and possible left ventricular hypertrophy.¹¹

Ms. X' right foot was injured in a car accident in 2003. She had ankle surgery following the accident and now has limited ankle flexion and extension.¹² Her ankle pain is sometimes so bad she can barely walk.¹³ An x-ray of Ms. X' knees indicates that she has early osteophyte formation, medial joint space narrowing, and suprapatellar joint effusion.¹⁴ She normally walks with a limp.¹⁵ Within the last 18 months she has sometimes used a walker or a wheelchair for mobility.¹⁶ Ms. X also has a bony abnormality on her left elbow, from a prior injury, which is painful.¹⁷

Ms. X had attention deficit disorder and some learning problems as a teenager.¹⁸ She attempted suicide at age 21 and again at age 25.¹⁹ On February 15, 2011 she was assessed

⁵ Exhibit 1, 3.162.

⁶ Exhibit 3.009.

⁷ Exhibits 3.007, 3.008.

⁸ Exhibits 3.003, 3.042, 3.087, 3.149, 3.165, 3.179, 3.180, 3.182, 3.184, 3.185, 3.189, 3.190.

⁹ Exhibit 3.162.

¹⁰ Exhibit 3.139.

¹¹ Exhibit 3.028.

¹² Exhibit 3.75.

¹³ Exhibit 3.158.

¹⁴ Exhibit 3.063.

¹⁵ Exhibit 3.175.

¹⁶ Exhibit 3.160, 3.162.

¹⁷ Exhibit 3.177.

¹⁸ Exhibit 3.147.

¹⁹ Exhibit 3.167.

as having depression, possible bipolar syndrome, and possible psychosis.²⁰ She sometimes has auditory and visual hallucinations.²¹

III. Discussion

A. Introduction

Interim Assistance is a benefit available to individuals while they are waiting for the Social Security Administration (SSA) to approve their application for Supplemental Security Income.²² Among other requirements, to receive Interim Assistance an applicant must be “likely to be found disabled by the Social Security Administration.”²³ Ms. X has the burden of proving that she is likely to be found disabled by the SSA.²⁴

The SSA uses a five-step evaluation process in making its disability determinations.²⁵ Each step is considered in order, and if the SSA finds the applicant disabled at any step, it does not go on to consider subsequent steps.²⁶

The first step in this process looks at the applicant’s current work activity. If the applicant is performing “substantial gainful activity,” the SSA will find that the applicant is not disabled.²⁷ This finding is made regardless of the applicants’ medical condition, age, education, or work experience.²⁸

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.”²⁹ Medical evidence, which consists of “signs, symptoms, and laboratory findings, not only [the applicant’s] statement of symptoms,” is required to establish an applicant’s impairment.³⁰ In order to be considered severe, the impairment or combination of impairments must also be expected to result in death or must have lasted or be expected to

²⁰ Exhibit 3.173.

²¹ Exhibit 3.171.

²² 7 AAC 40.170(b); 7 AAC 40.375.

²³ 7 AAC 40.180(b)(1).

²⁴ 2 AAC 64.290(e).

²⁵ 20 CFR §416.920. This process is describe in detail in OHA Case No 11-FH-134 (Dept. of Health and Social Services 2011), pages 14 – 17.

²⁶ 20 CFR §416.920(a)(4).

²⁷ 20 CFR §416.920(a)(4)(i).

²⁸ 20 CFR §416.920(b).

²⁹ 20 CFR § 416.920(c); 20 C.F.R. § 416.921(a).

³⁰ 20 CFR § 416.908.

last at least 12 months.³¹ If the impairment is not severe under this definition, then the applicant is not disabled.

At step three, the SSA determines whether the applicant's severe impairment meets or medically equals the criteria contained in the SSA's "Listing of Impairments."³² If it does, the applicant is considered disabled.³³

For applicants who are not determined to be disabled at step three, the SSA goes on to step four and looks at the applicant's capacity for work and past relevant work.³⁴ If the applicant is able to perform past relevant work, the applicant is considered not disabled.

Finally, at step five, the SSA looks at the applicant's age, education, and work experience to determine whether the applicant can perform other work in the national economy.³⁵

B. Steps 1 and 2 of the Analysis.

The Division agreed that Ms. X was not engaged in substantial gainful activity, that her arthritis³⁶ impairment was severe, and that her impairment met the 12 month duration requirement.³⁷ Accordingly, it is undisputed that Ms. X satisfies steps 1 and 2 of the SSA's 5-step disability analysis.

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

The next step in the analysis is to determine whether the applicant's severe impairment meets the criteria of the listing of impairments contained in the SSA's regulations at 20 CFR Part 404, Subpart P, Appendix 1 ("the listings"). The applicant bears the burden of establishing that his or her impairment satisfies the requirements of a "listings" impairment.³⁸ To meet a listing, an impairment must meet *all* of the listing's specified criteria; an impairment that manifests only some of these criteria, no matter how severely, does not qualify.³⁹

³¹ 20 CFR § 416.920(a)(4)(ii); 20 CFR §416.909.

³² See 20 CFR § 404, Subpart P, Appendix 1 (hereafter "Appendix 1").

³³ 20 CFR § 416.920(a)(4)(iii).

³⁴ 20 CFR § 416.920(a)(4)(iv).

³⁵ 20 CFR § 416.920(a)(4)(v).

³⁶ The record indicates that Ms. X has *both* rheumatoid arthritis *and* osteoarthritis (see Section II (Facts), above).

³⁷ Ladner testimony.

³⁸ *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).

³⁹ *Sullivan, supra*, 493 U.S. at 530.

Ms. X' primary impairment is her arthritis.⁴⁰ The SSA's Listing applicable to Ms. X' arthritis pain is Listing 14.09 - Inflammatory Arthritis.⁴¹ There are several ways in which an applicant may meet this listing. The section applicable here is met by showing:

History of joint pain, swelling, and tenderness, and signs on current physical examination of joint inflammation or deformity in two or more major joints resulting in inability to ambulate effectively or inability to perform fine and gross movements effectively, as defined in 14.00B6b and B2c[.⁴²]

Ms. Ladner testified that a blood test confirmed Ms. X' rheumatoid arthritis.⁴³ The medical records also support a finding that Ms. X has a history of joint pain, swelling, and tenderness.⁴⁴ Joint pain was noted at No Name Regional Hospital on January 29, 2011.⁴⁵ On March 10, 2011, Ms. X was seen by a physician assistant who discussed treatment options for arthritis and noted that she was walking with a limp.⁴⁶ On June 22, 2011 Ms. X went to the emergency room for treatment of knee and shoulder pain attributed to joint pain, swelling, and tenderness.⁴⁷

Listing 14.09 also requires signs of joint inflammation or deformity on a current physical examination. Her most current examination was on August 5, 2011, when she was examined at the No Name Health Center.⁴⁸ Her doctor noted no inflammatory "change," but it is unclear whether there was any existing inflammation on that date.⁴⁹ Ms. X' doctor concluded that her arthritis was disabling when it flared up,⁵⁰ which is the same thing he reported on her AD 2 form.⁵¹

To qualify under Listing 14.09, the arthritis must also result in an inability to ambulate effectively. This is defined as:

an extreme limitation of the ability to walk; *i.e.*, an impairment(s) that interferes very seriously with the individual's ability to independently initiate,

⁴⁰ Exhibit 3.003.

⁴¹ Appendix 1, §14.09.

⁴² Appendix 1, §14.09A.

⁴³ Ladner testimony; Exhibit 3.067.

⁴⁴ The Division argued that this listing required "persistent" pain, swelling, and tenderness. The actual language used in the listing only requires a history of these symptoms along with inflammation or deformity indicated in a current examination.

⁴⁵ Exhibit 3.053.

⁴⁶ Exhibit 3.126.

⁴⁷ Exhibit 3.061. Other medical records also reflect a history of arthritis.

⁴⁸ Exhibits 3.078 – 3.082.

⁴⁹ Exhibit 3.080.

⁵⁰ Exhibit 3.080.

⁵¹ Exhibit 3.003.

sustain, or complete activities. Ineffective ambulation is defined generally as having insufficient lower extremity functioning (see 1.00J) to permit independent ambulation without the use of a hand-held assistive device(s) that limits the functioning of both upper extremities

(2) *To ambulate effectively*, individuals must be capable of sustaining a reasonable walking pace over a sufficient distance to be able to carry out activities of daily living. They must have the ability to travel without companion assistance to and from a place of employment or school. Therefore, examples of ineffective ambulation include, but are not limited to, the inability to walk without the use of a walker, two crutches or two canes, the inability to walk a block at a reasonable pace on rough or uneven surfaces, the inability to use standard public transportation, the inability to carry out routine ambulatory activities, such as shopping and banking, and the inability to climb a few steps at a reasonable pace with the use of a single hand rail. The ability to walk independently about one's home without the use of assistive devices does not, in and of itself, constitute effective ambulation.^[52]

Ms. X testified that she can no longer prepare her own food, and that she needs help dressing and bathing. She needs to use a walker or a wheel chair, and is not able to do her own grocery shopping. She said that her arthritis flare-ups no longer go away. She last saw her doctor in February of 2012, and was told he could not do anything more to help her; that she needed to see a specialist.

Ms. X' testimony regarding her extreme inability to walk, due to her arthritis, was forceful. Further, her medical records show that over the last 18 months she has *sometimes* used a walker or a wheelchair for mobility.⁵³ However, there is no indication in Ms. X' most recent medical records that she is still restricted to use of a wheelchair, a walker, two crutches, or two canes. Accordingly, she does not satisfy the requirements of Listing 14.09. Ms. X has thus failed to carry her burden and did not prove, by a preponderance of the evidence, that her impairments satisfy the criteria of the applicable "listing." It is therefore necessary to proceed to the next steps of the analysis and determine whether Ms. X can still perform her past work (step 4) or other work (step 5).

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

The fourth step in the analysis is to determine whether Ms. X can perform her past work. Ms. X testified that she can no longer perform her past work, and the Division agreed that she could not. Accordingly, it is necessary to proceed to step 5 and look at whether

⁵² Appendix 1, §1.00B2b.

⁵³ Exhibits 3.160, 3.162.

there are any jobs in the national economy that Ms. X can perform with her existing impairments.⁵⁴ At step 5, however, the burden of proof shifts from the applicant to the agency.⁵⁵ To meet its burden at “step 5,” the Division must generally show (1) that the applicant's impairment still permits certain types of activity necessary for other occupations; (2) that the applicant's experience is transferable to other work; and (3) that specific types of jobs exist in the national economy which are suitable for an applicant with these capabilities and skills.⁵⁶ It is not the claimant's burden to develop vocational evidence at step five.⁵⁷

In determining whether Ms. X can perform other work, it is necessary to consider her residual functional capacity.⁵⁸ In doing this, it is important to consider all of her impairments, even those not found to be severe.⁵⁹ Ms. X testified about the effect of her arthritis on her ability to walk. She also testified that she had trouble using her right arm and right hand. She can no longer write or type, or reach with her right arm. In addition, Ms. X has been diagnosed with depression, hypertension, and type 2 diabetes, although the medical records indicate that these three conditions are somewhat under control.⁶⁰

The Division argued that even with these limitations Ms. X is capable of performing sedentary work, and that there were jobs in the economy for individuals who can only perform sedentary work. The preferred method for an agency to carry its burden at step five is through the testimony of a vocational expert.⁶¹ In this case, the Division presented lay vocational testimony through its Medical Reviewer, but did not present expert vocational testimony.

In many circumstances a decision on whether an applicant is disabled can be made, even in the absence of expert vocational testimony, by using the Social Security Administration's Medical-Vocational Guidelines.⁶² These guidelines, known as “the

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

⁵⁵ See 20 CFR § 416.920(a)(4)(v); *Bowen v. Yuckert*, 482 U.S. 137, 144 (1987); *Kail v. Heckler*, 722 F.2d 1496, 1498 (9th Cir. 1984); *Embrey v. Bowen*, 849 F.2d 418, 422 (9th Cir. 1988); *Smolen v. Chater*, 80 F.3d 1273, 1289 (9th Cir. 1996); *Bustamante v. Massanari*, 262 F.3d 949, 953–954 (9th Cir. 2001); *Valentine v. Commissioner, Social Security Administration*, 574 F.3d 685, 689 (9th Cir. 2009).

⁵⁶ *Decker v. Harris*, 647 F.2d 291, 294 (2nd Cir. 1981).

⁵⁷ See *Thompson v. Sullivan*, 987 F.2d 1482, 1491 (10th Cir. 1993).

⁵⁸ See 20 CFR §416.945.

⁵⁹ 20 CFR §416.945(a)(2).

⁶⁰ Exhibit 3.080.

⁶¹ *Lopez v. Califano*, 481 F. Supp. 392 (N.D. Cal. 1979).

⁶² These guidelines are located at 20 CFR, Part 404, Subpart P, Appendix 2.

Grids,” are fact-based generalizations about the availability of jobs for people of varying ages, educational backgrounds, and previous work experience, with differing degrees of exertional impairment.⁶³ The Grids “are used to evaluate the claimant's age, education, past work experience, and RFC [residual functional capacity] in order to determine whether that claimant is disabled.”⁶⁴

In this case, Ms. X is 47 years old, is literate and able to communicate in English, and has a high school education, but has previously performed only unskilled work, and is now limited to sedentary work. Accordingly, *if the Grids were applied*, and if Ms. X were found to be able to perform any work, it would be under Rule 201 of “the Grids” (“Maximum sustained work capability limited to sedentary work as a result of severe medically determinable impairment(s)”). The specific sub-rules that would apply are Rules 201.21 or 201.22. According to these rules, if Ms. X' prior jobs are considered to have involved semi-skilled work, she is deemed *not* to be disabled.

It is well established, however, that “the Grids” cannot be strictly applied if the applicant has a significant non-exertional impairment.⁶⁵ Pain can be both an exertional limitation and a non-exertional limitation.⁶⁶ In this case, Ms. X testified regarding the severity of her ankle and knee pain, and there is ample medical evidence of problems with these joints to support Ms. X' claims of pain.⁶⁷ The physician who completed Ms. X' AD-2 form opined that Ms. X'

⁶³ *Holley v. Massanari*, 253 F.3d 1088, 1093 (8th Cir. 2001).

⁶⁴ *Poole v. Astrue*, 2010 WL 2231873 (W. D. Ark. 2010).

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

⁶⁶ *Desrosiers v. Secretary of Health and Human Services*, 846 F.2d 573 (9th Cir. 1988); *Makuch v. Halter*, 170 F. Supp. 2d 117 (D. Mass. 2001); *Garcia v. Commissioner of Social Security*, 2011 WL 4899962 (D. Puerto Rico 2011).

⁶⁷ It is not necessary to establish a direct cause-and-effect relationship between the impairment and the applicant's subjective complaints of pain. *Souza v. Heckler*, 622 F. Supp. 182 (D.R.I. 1985). All that is necessary is a nexus between the claimant's verifiable medical impairment and allegations of disabling pain. *Finnegan v. Bowen*, 685 F.Supp. 1535 (D. Wyo. 1988); *Calandro v. Bowen*, 697 F.Supp. 423 (D. Wyo. 1988). Pain testimony may not be disregarded simply because it is not fully corroborated by objective medical findings. *Summers v. Bowen*, 813 F.2d 241, 242 (9th Cir. 1987). “[T]he law has never required and does not now require that medical evidence identify an impairment that makes the pain inevitable.” *Luna v. Bowen*, 834 F.2d 161, 164 (10th Cir. 1987).

"[i]ntermittent [arthritis] flares are disabling."⁶⁸ Based on this opinion, Ms. X' testimony that her joint pain is generally bad enough to prevent her from working, is credible.⁶⁹

In summary, the Division conceded that Ms. X can no longer perform her prior work. The burden of proof shifted to the Division, and the Division then failed to prove that Ms. X is capable of performing other work.⁷⁰ Ms. X is therefore deemed disabled based on the SSA's regulations and case law which are incorporated into Alaska's Interim Assistance Program.

IV. Conclusion

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

Dated this 8th day of August, 2012.

Signed

Jay Durych

Administrative Law Judge

⁶⁸ Exhibit 3.003.

⁶⁹ An applicant's "assertions of pain must be given serious consideration by the ALJ in making a determination of disability". *Brown v. Schweiker*, 562 F. Supp. 284, 287 (E.D. Pa. 1983). When it is demonstrated that an applicant suffers from infirmities which could cause pain, the applicant is not required to present objective medical evidence to support the severity of the pain. *Waters v. Bowen*, 709 F. Supp. 278 (D. Mass. 1989); *Light vs. Social Security Administration*, 119 F.3d 789 (9th Cir. 1997).

⁷⁰ "A man is disabled within the meaning of the [Social Security] Act if he can engage in substantial gainful activity only by enduring great pain." *Walston v. Gardner*, 381 F.2d 580, 585-586 (6th Cir. 1967).

Adoption

The undersigned, by delegation from of the Commissioner of Health and Social Services, adopts this Decision, under the authority of AS 44.64.060(e)(1), as the final administrative determination in this matter.

Judicial review of this decision may be obtained by filing an appeal in the Alaska Superior Court in accordance with Alaska R. App. P. 602(a)(2) within 30 days after the date of this decision.

DATED this 17th day of August, 2012.

By: Jay D. Durych

Title/Agency: ALJ, OAH, DOA

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