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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-268
)
 Claimant.) DPA Case No. [REDACTED]
)
 _____)

FAIR HEARING DECISION

STATEMENT OF THE CASE

[REDACTED] (Claimant) applied for Interim Assistance (IA) on or about March 12, 2009 (Ex. 1). The Division of Public Assistance (DPA or Division) denied his application for IA benefits on April 13, 2009 (Ex. 2). On April 14, 2009 the Division mailed a notice to the Claimant advising him that his application for IA benefits had been denied (Ex. 3). The Claimant requested a fair hearing contesting the denial on or about April 15, 2009 (Exs. 4.0, 4.1). This office has jurisdiction to decide this case pursuant to 7 AAC 49.010.

Hearings were held on June 2, 2009, July 7, 2009, and September 1, 2009 before Hearing Officer Claire Steffens.¹ The Claimant appeared by telephone at all three hearings, represented himself, and testified on his own behalf. The Claimant's wife, [REDACTED], appeared by telephone at the hearings of July 7, 2009 and September 1, 2009 and testified on the Claimant's behalf. Public Assistance Analyst [REDACTED] appeared at all three hearings to represent and testify on behalf of the Division. [REDACTED], a registered nurse (R.N.) employed by the Division, testified telephonically on behalf of the Division at the hearings of July 7, 2009 and September 1, 2009.

¹ Following the hearing this case was reassigned to Hearing Officer Jay Durych. He reviewed the digital recording of the hearing and the case file prior to preparing and issuing this decision.

ISSUE

Was the Division correct to deny the Claimant’s March 12, 2009 application for Interim Assistance benefits on or about April 14, 2009 based on the assertion that the Claimant did not meet the Interim Assistance Program’s disability requirements?

FINDINGS OF FACT ²

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

1. The Claimant was born on [REDACTED], [REDACTED] (Ex. 5.1) and was [REDACTED] years old at the time the hearings were held in this case.
2. The impairment asserted by the Claimant in this case is deafness or hearing loss with associated balance disorder (Claimant hearing testimony, Ex. 5.2).
3. The Social Security Administration (SSA) Impairment Listing for the impairments asserted by the Claimant are as follows (see 20 CFR Part 404, Subpart P, Appendix 1):

Hearing loss - Listings No. 2.07 and 2.08
Balance disorder – Listing No. 2.07

4. A report by treating physician [REDACTED], M.D., F.A.C.S. dated November 13, 2008 concerning an examination he made of the Claimant on that date states in relevant part as follows (Exs. 2.7 – 2.8 and 18.0 – 18.1):

History of Present Illness: Chief Complaint (1/1): This 42 year old male presents today for evaluation of inner ear problems, decreased hearing bilateral, inability to understand others, muffled sounds, ringing in the ears, tinnitus bilateral, vertigo, and hearing aids needed Background noise does interfere with [his] ability to hear. Discrimination of words is not a problem. The patient has had significant noise exposure . . . in the form of gunshot and machinery [The Claimant] hears so poorly he needs to read subtitles.

* * * * *

Review of Systems: difficulty with hearing, ear drainage, ear pain, headaches, ringing in ears balance problems / dizziness, confusion.

* * * * *

² All of the medical reports in the record were reviewed and considered during the preparation of this decision. However, because some of the medical records were cumulative, 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.

Assessment of Ability to Communicate: Patient communicates and understands English well.

* * * * *

Ears: Hearing was assessed with a tuning fork. The Weber is better right than left. Rinne is negative left and negative right. Schwabach is equal. Finger rub: is unable to hear the finger rub. Ooscopic examination of the external auditory canals is within normal limits. Tympanic membranes are intact and clear. Mobility is normal. Pinna is normal. Both ears have pars flaccid perforation with cholesteatoma formation into the atic area and both canals were obstructed with cerumen.

Procedure Notes: Cerumen impaction removal . . . using suction catheters under the microscope and forceps.

* * * * *

Impression: Conductive hearing loss (389.00), Sensoneural hearing loss (389.10), Cholesteatoma (385.30).

Impairment Rating: The rating of hearing loss summary is configured by using the Guides to the Evaluation of permanent Impairment, Sixth Edition. In looking at his audiogram done on 11/13/08 he has a hearing loss total on the right of 250, giving [him] a unilateral loss of 61.9% [on the right]. On the left is a total of 235 [and] a unilateral rating of 54.4%. This gives [the Claimant] a bilateral hearing impairment of 51.9% by scale with a total body disability of 18% on hearing loss.

Recommendation: This man has bilateral tympanic membrane perforations with the formation of atic cholesteatomas which have caused the severe conductive hearing loss which translates into [an] 18% total person disability.

These cholesteatoma tumors must be surgically taken care of as they can be life threatening. With the surgery some of the hearing loss may be able to be corrected, but on the other hand the disease may be of such magnitude the control of disease may result in worse hearing. However, the loss in this manner should be able to be corrected with proper hearing amplification with digital hearing aids.

5. The Claimant's medical records from Northern Hearing Services, Inc. dated November 13, 2008 state in relevant part as follows (Exs. 2.5 – 2.6):

History: Hearing loss . . . vertigo / dizziness . . . frequent tinnitus . . . history of noise exposure – 5.5 years military, heavy equipment (3-5 years) . . . having difficulty hearing – can't keep job of being a [DJ].

6. The Claimant applied for Interim Assistance (IA) on or about March 12, 2009 (Ex. 1).

7. A *Preliminary Examination for Interim Assistance* (Form AD#2) prepared by treating physician [REDACTED], M.D. dated April 1, 2009 (Exs. 2.3 – 2.4) states in relevant part as follows:

What is the applicant's diagnosis? This man has bilateral cholesteatoma disease which is eroding the skull to expose brain; when this happens he will get meningitis and die.

Is the applicant expected to recover from this illness or condition? Yes if he gets necessary surgery.

If yes, what is the expected length of time required for recovery or remission? [Two months].

Please provide any other information relevant to the applicant's illness or condition or the expected length of time needed for recovery or remission: With surgery to control the disease and hearing aids this man will no longer be disabled.

8. The Division denied the Claimant's application on April 13, 2009 (Ex. 2). On April 14, 2009 the Division mailed a notice to the Claimant advising him that his application for IA benefits had been denied (Ex. 3). That notice stated in relevant part as follows:

* * * * *

Interim Assistance is a monthly cash grant made to APA applicants who are waiting for a decision on their SSI application. You are not eligible for Interim Assistance for the reason marked below:

* * * * *

Our review of your doctor's preliminary medical examination indicates you do not meet the APA program's disability requirements. If you have additional medical information that may change this decision, you may submit it for further review at any time.

* * * * *

This action is supported by Adult Public Assistance manual Sections 410-8 and 426-2 and 7 AAC 40.070 and 7 AAC 40.170.

9. On or about April 15, 2009 the Claimant requested a fair hearing to contest the Division's denial of his IA application (Exs. 4.0, 4.1). The Claimant's Fair Hearing Request Form, which was completed by a DPA employee based on a telephone call from the Claimant, stated as follows (Ex. 4.1):

IA was denied. [The Claimant] didn't get a DE 25 coupon or a chance to get all the tests [his doctor] needs for a good diagnosis. States he will drop the [Fair Hearing Request] if [DPA allows] him a chance to turn in more medical information with a DE 25 coupon.

10. A *Preliminary Examination for Interim Assistance* (Form AD#2) prepared by [REDACTED], M.D. dated April 21, 2009 (Exs. 5.1 – 5.2) states that the Claimant's diagnosis is "mixed bilateral hearing loss, Eustachian tube dysfunction, chronic mastoiditis, chronic otitis media, [and] balance disorder." The form further stated that the Claimant was not expected to recover from these

conditions, and that “treatment for ears include ear surgery; hearing aids – if no balance improvement would recommend balance testing.”

11. At the hearings of July 7, 2009 and September 1, 2009 the Claimant testified in relevant part that:

- a. He has a bachelor’s degree in [REDACTED]. However, he has not performed work in that area (working on radio station equipment such as turntables, compact disc players, and radio transmitters) since 1993.
- b. Since 1993 he has performed [REDACTED] work, operated heavy equipment, and worked as a cook.
- c. He last worked as a [REDACTED] circa 2005 – 2006.
- d. He last worked as a [REDACTED] on December 23, 2007.
- e. He last worked as a [REDACTED] a couple of weeks prior to the hearing of September 1, 2009. That work consisted of replacing windows in a rental property owned by the Claimant’s church. However, that work was unpaid, volunteer work.
- f. He is currently able to perform some work as long as that labor does not require working at any significant height. He cannot work at any significant height because he has a balance disorder which sometimes causes him to fall off of ladders. He is at risk of falling down wherever he is standing.
- g. A typical recent day for the Claimant unfolds as follows: the Claimant wakes up at about 7:30 a.m. He and his wife then give their dogs water and take their dogs for a walk. The Claimant used to walk his dogs along public streets, but he can no longer do so safely because he cannot hear cars approaching. After walking their dogs he and his wife eat breakfast. Then they read. “If the church has something to do,” the Claimant will then “go do it,” meaning that he cooks for Church dinners. These are simple meals. If he starts to get dizzy he sits down. Most of the time the Claimant and his wife stay at home and enjoy their dogs. They go shopping about once per month.
- h. He has had artificial tubes inserted into his Eustachian tubes, but he has not yet had the surgery recommended by Dr. [REDACTED].
- i. Dr. [REDACTED] does not recommend or wish to perform surgery on the Claimant’s affected ear.
- j. His doctors are not sure that hearing aids will work for him.
- k. He cannot afford to buy a traditional hearing aid. He currently uses a hearing device called “Sonic Ear.” However, it does not work very well.
- l. He has had CAMA for 5-6 months but the CAMA program does not cover his hearing problem.

- m. He has applied to the federal Social Security Administration for Social Security Income (SSI) and Social Security Disability Income (SSDI) benefits. These applications were initially denied and are currently in appeal status.
- n. The Claimant did not require a translator / signer during the hearing of September 1, 2009. However, he was using an amplified speaker phone. He stated “I’m not saying I can’t hear you – I can, just not very well.”

12. At the hearing of September 1, 2009 the Claimant’s wife testified in relevant part that:

- a. Her husband had had a hearing problem for at least 5-6 years. He has auditory nerve deafness.
- b. Her husband had a hearing test at Anchorage Audiology in 1998 or 1999. Anchorage Audiology told the Claimant that he had auditory nerve deafness.
- c. If someone says something to the Claimant while he is walking away he cannot hear it. You have to shout or tap him on the shoulder to get his attention. He cannot hear traffic. Even if you are right beside him he does not hear you unless you are yelling or looking right at him.
- d. 75% of the time her husband cannot hear even if he is using his “Sonic Ear” hearing device. ”If you are talking to him you might as well hang it up because he can’t hear at all.”
- e. Her husband could understand her during the hearing only because he was standing right in front of her and can read lips.
- f. Her husband may get dizzy and fall down outside.

13. At the hearing of September 1, 2009 [REDACTED], R.N. of the Division testified in relevant part that:

- a. She is a registered nurse (R.N.) employed by the Division who reviews medical information for Interim Assistance determinations.
- b. She performed the medical eligibility review in this case.
- c. During the eligibility review process, she initially receives a Form AD-2 from the Eligibility Technician. 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. She does not speak or meet directly with the Claimant.
- d. The Claimant’s hearing loss does not make him totally deaf. It can be corrected with the use of a hearing aid.

- e. It is her understanding that the federal SSA disability requirements for deafness are not satisfied unless the claimant is totally deaf.
- f. She was certain that she had reviewed the medical records of the Claimant and not the medical records of another individual (██████████) with a similar name but a different Social Security number.
- g. She received a medical release from the Claimant to obtain information from Dr. ██████'s office, but she did not receive a medical release from the Claimant to obtain information from Dr. ██████'s office.
- h. She denied the Claimant's application for Interim Assistance benefits based solely on the medical evidence in the file.

14. The hearing in this case was continued or postponed twice at the Claimant's request. At the hearing of June 2, 2009 the Claimant requested that the hearing be postponed to allow him time to pursue representation by an attorney. The next hearing of July 7, 2009 was postponed in order to make sure that the Claimant had received all of the Division's exhibits, and to allow the Claimant to confirm, by reviewing same, that the Division had received all of the Claimant's medical records. The Claimant did not request any additional time in order to obtain more medical tests and/or more medical information.

PRINCIPLES OF LAW

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^{3a} by a preponderance of the evidence.⁴

The Interim Assistance Program – In General.

Interim Assistance is a benefit provided by the State of Alaska to Adult Public Assistance applicants while they are waiting for the federal Social Security Administration to approve their federal Supplemental Security Income application. AS 47.25.255; 7 AAC 40.170(a) and (b). The criteria

^{3a} “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 the standard of proof generally applicable in administrative proceedings. *Amerada Hess Pipeline Corp. v. Alaska Public Utilities Commission*, 711 P.2d 1170 (Alaska 1986). The regulations applicable to this case do not specify any particular standard of proof. Accordingly, the “preponderance of the evidence” standard is the standard of proof applicable to this case. 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).

which must be satisfied in order to qualify for Interim Assistance are set forth in 7 AAC 40.180.⁵ These criteria 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).

A disability determination based on the SSI criteria involves a sequential evaluation. *Briscoe ex rel. Taylor v. Barnhart*, 425 F.3d 345, 351-52 (7th Cir. 2005). This evaluation considers whether (1) the claimant is presently employed; (2) the claimant has a severe impairment or combination of impairments (the duration of the impairment is an aspect of this severity requirement); (3) the claimant's impairment meets or equals any impairment listed in the regulations as being so severe as to preclude substantial gainful activity; (4) the claimant's residual functional capacity leaves him unable to perform his past relevant work; and (5) the claimant is unable to perform any other work existing in significant numbers in the national economy. 20 C.F.R. §§ 404.1520, 416.920. A finding of disability requires an affirmative answer at either step three or step five, above.

I. 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 the applicant is engaged in “substantial

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.

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

(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.

gainful activity” based on these criteria, then he or she 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.

II. 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.

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.

III. Duration.

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

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.

IV. 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 Part 404, Subpart P, Appendix 1. The claimant bears the burden of establishing that his impairments satisfy the requirements of a listings impairment. *Tackett v. Apfel*, 180 F.3d 1094, 1098-1099 (9th Cir.1999); *Sullivan v. Zebley*, 493 U.S. 521, 530-531, 110 S.Ct. 885, 107 L.Ed.2d 967 (1990). To meet a listing, an impairment must meet *all* of the listing's specified criteria. *Sullivan*, 493 U.S. at 530 ("An impairment that manifests only some of these criteria, no matter how severely, does not qualify.").

An impairment is *medically equivalent* to a listed impairment "if it is at least equal in severity and duration to the criteria of any listed impairment." 20 CFR 416.926(a) (emphasis added). Medical equivalence must be based on medical findings. *Sullivan*, 493 U.S. at 531 ("a claimant . . . 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 404.1526(e).

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.

V. 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.

VI. Capability of Performing Other Work.

The final step in the disability analysis is to determine whether the applicant is capable of performing any other work (20 CFR 404.1545(a)(5)(ii)). However, it is not necessary to discuss this step of the analysis further given the disposition of this case.

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.

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.” 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.”

At the hearing the Claimant testified that he was not currently working and that he had not worked since December 23, 2007 (i.e. for the past 20 months). This testimony was not disputed by the Division. Accordingly, the Claimant has carried his burden and has proven, by a preponderance of the evidence, that he is not currently 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).

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.

The Claimant testified that his hearing and balance are poor. He testified that he is currently able to perform some work as long as that labor does not require working at any significant height; but that he cannot work at any significant height because he has a balance disorder which sometimes causes him to fall off of ladders; and that he is at risk of falling down wherever he is standing. Further, if a person is at risk of falling down whenever he or she is standing, then he or she would obviously also have difficulty doing other activities performed while standing, such as walking and carrying.

The Claimant’s testimony regarding his hearing loss and balance problems (which was supported by his wife’s testimony) indicates that his hearing loss and balance problems “significantly [limit his] physical or mental ability to do basic work activities” such as walking, standing, carrying, and hearing. However, to satisfy the “step two” requirement of a severe impairment, a claimant cannot rely solely on lay testimony, but instead must provide *medical evidence* that his or her impairment imposes the limitations asserted. 20 C.F.R. § 416.908.

Accordingly, the following question must be asked and answered: does the medical evidence support the finding of a severe impairment in this case? The report by ██████████, M.D., F.A.C.S. dated November 13, 2008 (Exs. 2.7 – 2.8 and 18.0 – 18.1) states in relevant part as follows:

Impairment Rating: The rating of hearing loss summary is configured by using the Guides to the Evaluation of Permanent Impairment, Sixth Edition. In looking at his audiogram done on 11/13/08 he has a hearing loss total on the right of 250, giving [him] a unilateral loss of 61.9% [on the right]. On the left is a total of 235 [and] a unilateral rating of 54.4%. This gives [the Claimant] a bilateral hearing impairment of 51.9% by scale with a total body disability of 18% on hearing loss.

Recommendation: This man has bilateral tympanic membrane perforations with the formation of attic cholesteatomas which have caused the severe conductive hearing loss which translates into [an] 18% total person disability.

In addition, the *Preliminary Examination for Interim Assistance* (Form AD#2) prepared by [REDACTED], M.D. dated April 21, 2009 (Exs. 5.1 – 5.2) states that the Claimant’s diagnosis includes “balance disorder.” Thus, the Claimant has presented medical evidence showing that he suffers from balance problems in addition to hearing loss.

In summary, the Claimant has carried his burden and proven, by a preponderance of the evidence, that his hearing loss and associated balance problems significantly limit his ability to perform “basic work activities” as defined by 20 CFR 416.921(b). Accordingly, the Claimant’s hearing loss and associated balance problems are considered medically severe impairments pursuant to 20 CFR 416.920(c).

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”).

The Claimant himself did not testify as to the duration of his hearing loss and balance disorder. However, the Claimant’s wife testified that her husband has had a hearing problem for at least 5-6 years and that in 1998 or 1999 Anchorage Audiology told the Claimant that he had auditory nerve deafness.

The Division denied the Claimant’s application in part on the basis that one of the Claimant’s two Form AD-2s (*Preliminary Examination for Interim Assistance*) indicated that, with surgery, his hearing problem was expected to resolve or be in remission within two (2) months of the date the Claimant’s doctor signed the Form AD-2 (see Exs. 2.2 – 2.4). However, the Division did not dispute the Claimant’s wife’s hearing testimony that the Claimant’s hearing problems had already existed for 5-6 years as of that date.

As noted above, the 12 month duration requirement of 20 CFR 416.909 is retrospective as well as prospective. Further, the Claimant’s second Form AD-2 (*Preliminary Examination for Interim Assistance*) indicates that the Claimant is not expected to recover from his hearing loss and balance disorder (Ex. 5.2).

Accordingly, the Claimant has proven, by a preponderance of the evidence, that his hearing and balance impairments meet the 12 month durational requirement of 20 CFR 416.909. The next step is

to determine whether the Claimant's impairments meet or equal the criteria of the Social Security Administration's applicable "Listing of Impairments."

IV. Do the Claimant's Impairments Meet or Equal the Criteria of the Social Security Administration's Relevant Listings of Impairments?

The next step is to decide whether the Claimant's hearing and balance impairments meet the criteria of the Social Security Administration's relevant Listing of Impairments.

A. Burden of Proof.

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

B. The Relevant Listings.

The regulations constituting the federal Social Security Administration's Listing of Impairments are located at 20 CFR Pt. 404, Subpart P, Appendix 1. The Claimant's hearing and balance impairments are categorized generally under "Category of Impairments, Special Senses and Speech" (20 CFR Part 404, Subpart P, Appendix 1, Section 2.00). The specific categorization of the Claimant's impairments is under Section 2.07 ("Disturbance of labyrinthine-vestibular function") and Section 2.08 ("Hearing impairments (hearing not restorable by a hearing aid).") The requirements of these two listings are as follows:

2.07 Disturbance of labyrinthine-vestibular function (including Ménière's disease), characterized by a history of frequent attacks of balance disturbance, tinnitus, and progressive loss of hearing. With both A and B: (A) Disturbed function of vestibular labyrinth demonstrated by caloric or other vestibular tests; and (B) Hearing loss established by audiometry.²⁷

⁷ The explanatory material for this listing, set forth at 20 CFR Part 404, Subpart P, Appendix 1, Section 2.00, further delineates the requirements of this listing as follows:

2. Vertigo associated with disturbances of labyrinthine-vestibular function, including Ménière's disease. These disturbances of balance are characterized by an hallucination of motion or loss of position sense and a sensation of dizziness which may be constant or may occur in paroxysmal attacks. Nausea, vomiting, ataxia, and incapacitation are frequently observed, particularly during the acute attack. It is important to differentiate the report of rotary vertigo from that of "dizziness" which is described as lightheadedness, unsteadiness, confusion, or syncope.

Ménière's disease is characterized by paroxysmal attacks of vertigo, tinnitus, and fluctuating hearing loss. Remissions are unpredictable and irregular, but may be longlasting; hence, the severity of impairment is best determined after prolonged observation and serial reexaminations.

The diagnosis of a vestibular disorder requires a comprehensive neuro-otolaryngologic examination with

2.08 Hearing impairments (*hearing not restorable by a hearing aid*) manifested by: (A) Average hearing threshold sensitivity for air conduction of 90 decibels or greater and for bone conduction to corresponding maximal levels, in the better ear, determined by the simple average of hearing threshold levels at 500, 1000 and 2000 hz. (see 2.00B1); or (B) Speech discrimination scores of 40 percent or less in the better ear . . . [Italics added].⁸

The Claimant clearly suffers from a significant hearing loss and from some level of balance disorder (see Findings of Fact at paragraphs 4, 5, 7, and 10). However, the sparse medical evidence provided in this case does not satisfy the rather specific requirements of Sections 2.07 and/or 2.08 as set forth above. In particular, there is no medical documentation of a “history of frequent attacks of balance disturbance” as required by Section 2.07. Further, to qualify under Section 2.08 a claimant’s hearing impairment must “not [be] restorable by [use of] a hearing aid.” In this case both doctors indicated

a detailed description of the vertiginous episodes, including notation of frequency, severity, and duration of the attacks. Pure tone and speech audiometry with the appropriate special examinations, such as Bekesy audiometry, are necessary. Vestibular functions is assessed by positional and caloric testing, preferably by electronystagmography. When polytomograms, contrast radiography, or other special tests have been performed, copies of the reports of these tests should be obtained in addition to appropriate medically acceptable imaging reports of the skull and temporal bone. Medically acceptable imaging includes, but is not limited to, x-ray imaging, computerized axial tomography (CAT scan) or magnetic resonance imaging (MRI), with or without contrast material, myelography, and radionuclear bone scans. “Appropriate” means that the technique used is the proper one to support the evaluation and diagnosis of the impairment.

⁸ The explanatory material for this listing, set forth at 20 CFR Part 404, Subpart P, Appendix 1, Section 2.00, further delineates the requirements of this listing as follows:

1. Hearing impairment. Hearing ability should be evaluated in terms of the person's ability to hear and distinguish speech.

Loss of hearing can be quantitatively determined by an audiometer which meets the standards of the American National Standards Institute (ANSI) for air and bone conducted stimuli (i.e., ANSI S 3.6-1969 and ANSI S 3.13-1972, or subsequent comparable revisions) and performing all hearing measurements in an environment which meets the ANSI standard for maximal permissible background sound (ANSI S 3.1-1977).

Speech discrimination should be determined using a standardized measure of speech discrimination ability in quiet at a test presentation level sufficient to ascertain maximum discrimination ability. The speech discrimination measure (test) used, and the level at which testing was done, must be reported.

Hearing tests should be preceded by an otolaryngologic examination and should be performed by or under the supervision of an otolaryngologist or audiologist qualified to perform such tests.

In order to establish an independent medical judgment as to the level of impairment in a claimant alleging deafness, the following examinations should be reported: Otolaryngologic examination, pure tone air and bone audiometry, speech reception threshold (SRT), and speech discrimination testing. A copy of reports of medical examination and audiologic evaluations must be submitted.

that the Claimant's hearing problems could be corrected with a hearing aid (Exs. 2.4, 2.8, 5.2, and 18.00).

In summary, the Claimant failed to prove, by a preponderance of the evidence, that his hearing impairment or balance disorder meet or equal the requirements of 20 CFR Part 404, Subpart P, Appendix 1, Sections 2.07 and 2.08. Accordingly, it is necessary to proceed to the next question in the Social Security disability analysis and determine whether or not the Claimant's impairment prevents him from doing his past relevant work (20 CFR 404.1560(a)).

V. Can the Claimant Perform His Past Relevant Work?

The next issue, pursuant to 20 CFR 404.1560(a), is whether the Claimant's impairment prevents him from performing his past relevant work. The Claimant has the burden of proving, by a preponderance of the evidence, that his impairment prevents him from performing his past relevant work (*see* discussion in 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 past relevant work. *See* 20 CFR 404.1560(b)(2). Unfortunately, no such testimony exists in this case. The only evidence on this issue is the Claimant's own hearing testimony.

At the hearings of July 7, 2009 and September 1, 2009 the Claimant testified concerning his work history as follows:

- a. He has a bachelor's degree in [REDACTED]. However, he has not performed work in that area (working on radio station equipment such as turntables, compact disc players, and radio transmitters) since 1993.
- b. Since 1993 he has performed [REDACTED] work, operated heavy equipment, and worked as a cook.
- c. He last worked as a [REDACTED] circa 2005 – 2006.
- d. He last worked as a [REDACTED] on December 23, 2007.
- e. He last worked as a [REDACTED] a couple of weeks prior to the hearing of September 1, 2009. However, that work was unpaid, volunteer work.
- f. He is currently able to perform some work as long as that labor does not require working at any significant height. He cannot work at any significant height because he has a balance disorder which sometimes causes him to fall off of ladders. He is at risk of falling down wherever he is standing.

The Claimant's past relevant work thus consists of (a) working on [REDACTED] such as turntables, compact disc players, and radio transmitters); (b) [REDACTED]; (c) [REDACTED] and (d) working as a [REDACTED]. The Claimant did not assert that he could no longer perform this prior work. Rather, the Claimant stated that he was able to perform some work as long as that work did not require working at any significant height. Finally, while the Claimant inferred that some [REDACTED] work required working at heights, he did not assert that (a) working on radio station equipment such as turntables, compact disc players, and radio transmitters required working at heights; (b) that operating [REDACTED] required working at heights; or (c) that working as a [REDACTED] required working at heights.

In summary, the Claimant failed to prove, by a preponderance of the evidence, that his hearing loss and/or balance disorder prevent him from performing his previous relevant work. Because the Claimant's impairments do not prevent him from performing his previous relevant work, the Claimant is deemed not to be disabled pursuant to 20 CFR 416.920(a)(4)(iv).

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 impairments (hearing loss and balance disorder) are medically severe as defined by 20 CFR 416.920(c) and 20 CFR 416.921(b).
 - c. His impairments have 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).
2. The Claimant did not carry his burden and failed to prove, by a preponderance of the evidence, that:
 - a. His impairments (hearing loss and balance disorder) 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 2.07 and 2.08).
 - b. He is not capable of performing his past relevant work as required by 20 CFR 404.1560(a).
3. The Division was therefore correct when it denied, on or about April 14, 2009, the Claimant's application for Interim Assistance benefits submitted on or about March 12, 2009.

DECISION

The Division was correct when it denied, on or about April 14, 2009, the Claimant's application for Interim Assistance benefits submitted on or about March 12, 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 of the Division of Public Assistance. 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.


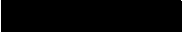
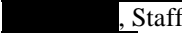
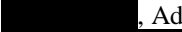
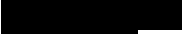

Dated this _____ day of October, 2009.

Jay Durych
Hearing Authority

CERTIFICATE OF SERVICE

I certify that on this _____ day of October 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

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

By _____
J. Albert Levitre, Jr.
Law Office Assistant I