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

In the Matter of:	)	
	)	OAH Case No. 12-0684-APA
V X	)	Former OHA Case No.
	)	DPA Case No.
_____	)	

FAIR HEARING DECISION

I. Introduction

After V X applied for Interim Assistance in mid-2011, two disability adjudicators employed by the Division of Public Assistance (DPA or Division) concluded that the documentation he had submitted regarding his allegedly disabling conditions did not establish eligibility for the program, and the Division issued a denial of his application. Mr. X timely requested a Fair Hearing, which was held before the undersigned (following a postponement at Mr. X's request) on March 14 and 21, 2012, with post-hearing briefing continuing until April 16, 2012.

At the hearing, Mr. X had the burden to show eligibility for Interim Assistance. He did not carry that burden.

II. Facts

V X is a 57-year-old No Name resident. He applied for Interim Assistance on June 30, 2011.[1] His application was subsequently supported by a psychiatric examination by N M, M.D., diagnosing (1) "major depression, recurrent" and (2) "disorder of written expression."[2] Dr. M further noted that Mr. X was "chronically depressed; unable to work competitively." She indicated that she did not expect Mr. X to recover from these conditions.[3] At the time of this evaluation, Dr. M was treating Mr. X on an ongoing basis for "Major Depressive Disorder, Recurrent, Mild."[4]

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1 Exhibit 2.

2 Exhibit 3.5. There appears to be a third diagnosis on the form, but it is illegible and no additional diagnosis that would correspond to the note was recorded in the contemporaneous Veterans Administration record (Exhibit 3.22ff.). Mr. X does not claim a third diagnosis as part of the disabling condition identified by Dr. M. Claimant's Initial Post-Hearing Brief at 3.

3 Exhibit 3.5.

4 Exhibits 3.22, 3.26, 3.27.

Mr. X's application for Interim Assistance was denied in December of 2011 based on the evaluation of the Division's medical reviewer, John Laux, on the basis that Mr. X was unlikely to be approved for Social Security disability.[5] There is no record of the reasoning behind Mr. Laux's evaluation. The application was reevaluated by Mr. Laux's replacement as medical reviewer, Laura Ladner, who concluded that denial was justified because Mr. X could still do work he has done in the past, such as work as a no name tester.[6]

As a young man, Mr. X served in the army, including a tour in Alaska.[7] In 1977 he was diagnosed with mild paranoid schizophrenia and improper use of a number of drugs,[8] but the schizophrenia diagnosis is not reflected in later records. He remained in the military until at least 1982.[9]

Mr. X received an associate's degree in electronics in Oklahoma, and he worked there successfully for 18 years doing electrical maintenance for a newspaper. Following a divorce around the year 2000, he moved back to Alaska to be as far away as possible, settling in a rustic cabin near No Name. He lived in the cabin for about seven years. He reports that he supported himself primarily through subsistence.[10]

While living in the cabin, roughly halfway through his time there, he obtained one job, a full-time position testing no names at a no name plant on No Name. The job entailed putting X or bark no names in a shaker to separate them by sizes, and then weighing them before and after baking. The work was mostly sedentary and did not require heavy lifting. Mr. X did not have difficulty doing it. He worked with one other person. He quit the job after three to four months because he felt his supervisor treated him and his coworkers unfairly.[11]

In about 2007, Mr. X was arrested and charged for felony cannabis possession, a charge that was eventually resolved through a suspended imposition of sentence (SIS).[12] As part of this resolution, he was required to reside in the VA's Domiciliary Residential

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5 Ladner testimony; *see* Exhibits 5, 6.
6 Ladner testimony; Exhibit 12.
7 Exhibit A-1.
8 Exhibit A-5.
9 Exhibit A-10.
10 X testimony.
11 *Id.;* Ex. 3.10.
12 The details of the criminal charge and its resolution were not explored at the hearing. In 2007, felony possession of cannabis entailed possession of at least four ounces or 25 plants. *See* AS 11.71.040(a)(3).

Rehabilitation Treatment Program for about nine months.[13] Thereafter, he spent about a year in Compensated Work Therapy, working at the Domiciliary front desk and as a hall monitor.[14]

Mr. X currently lives in No Name housing for which he must pay $50 per month. For the last year and a half he has worked with No Name Services. His position is titled "administrative assistant." The work entails some alphabetical filing (with which he has no difficulty), some limited computer tasks, and a little bit of telephone coverage. To accomplish the computer work, he has been given a special setup with only three icons. He reports that he has difficulty working the phones. He is scheduled for 20 hours per week but usually works only about 15. He is paid minimum wage.[15]

Mr. X commutes to work by bus without difficulty, and also uses the bus to make occasional trips to the store. He cooks for himself, but does not use a microwave because it has too many buttons. He has a continuing relationship with his son and takes an interest in his son's welfare.[16] For recreation, he watches movies from the collection of his friend C and plays slow games on an X-box.[17]

Mr. X has a number of physical health problems that are corroborated in medical records. The most significant are:

-- cardiac/circulatory problems including one prior silent heart attack;

-- degenerative disc disease, some of which may have been addressed through a cervical fusion done in 2009;

-- hand pain associated with osteoarthritis and possible cervical radiculopathy;

-- long-term cannabis dependence, possibly in early remission in 2010; renewed use as of August 2011;

-- occasional ventricular tachycardia;

-- dizzy spells or lightheadedness of unclear cause (not correlated with the tachycardia), occurring daily.

Additional health issues include poor dentition (addressed through oral surgery in 2011), smoking, shoulder pain, and lower leg and foot pain (rarely mentioned to medical providers,

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13 X testimony.
14 Exhibits 3.39, 3.44.
15 *Id.*
16 *E.g.*, Ex. 3.84.
17 Exhibits 3.39, 3.44.

but which he reported at hearing limits him to a few minutes of standing or walking at a time).[18]

Mr. X's depression was noted in 2007 when he was first admitted to the Domiciliary.[19] At that time, his cognition and memory were found to be intact, but there was concern about his lifestyle and his adjustment to grief about his divorce.[20] He was considered mentally able to return to work, notwithstanding the depression.[21] The depression has been treated continuously since that time, and treatment has included citalopram and mirtazipine, but the depression has remained chronic.[22]

The "disorder of written expression" noted on Dr. M's disability form is not documented in the medical records.

Mr. X continues to use cannabis,[23] despite a strong recommendation from his psychiatrist that he stop.[24] His psychiatrist believes it may be having an impact on his mood and motivation.[25]

III. Discussion

A. Evaluation for Interim Assistance

Interim Assistance is a benefit available to individuals while they are waiting for the Social Security Administration (SSA) to rule on their application for Supplemental Security Income.[26] Among other requirements, to receive Interim Assistance an applicant must be "likely to be found disabled by the Social Security Administration."[27] The person seeking to obtain benefits has the burden of proving that he or she is likely to be found disabled by the SSA.[28]

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18 Exhibit 3.
19 Exhibit 3.41.
20 *Id.*
21 *Id.*
22 Exhibit 3.
23 Exhibits 3.18, 3.64, 3.71.
24 Exhibit 3.64 (Aug. 29, 2011).
25 Exhibit 3.73.
26 7 AAC 40.170(b); 7 AAC 40.375.
27 7 AAC 40.180(b)(1).
28 *See State v. Decker*, 700 P.2d 483, 485 (Alaska 1985) (burden of proof is on party seeking a change in the status quo); 7 AAC 40.050(a) (applicant must "demonstrate his eligibility for assistance").

The SSA uses a five-step evaluation process in making its disability determinations.[29] Each step is considered in order, and if the SSA finds the applicant disabled at any step, it does not consider subsequent steps.[30]

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.[31]

At step two, the SSA considers the severity of the applicant's impairment. 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.[32] In order to be considered disabled, the impairment or combination of impairments must be severe, and must be expected to result in death or must have lasted or be expected to last at least 12 months.[33] If the impairment is not severe under this definition, then the applicant is not disabled.

At step three, the SSA looks at whether the impairment meets or equals one of the listings adopted by the SSA.[34] If it does, the applicant is disabled, and the SSA does not look at steps four and five.[35]

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.[36] If the applicant is able to perform past relevant work, the applicant is not disabled. If the applicant is unable to perform past relevant work, the evaluation proceeds to the fifth step.

Finally, at step five, the SSA looks at whether the applicant can perform other work in the national economy.[37] Answering this question requires the application of the Social Security medical vocational guidelines that include the evaluation of the applicant's residual

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29 20 CFR §416.920.
30 20 CFR §416.920(a)(4).
31 20 CFR §416.920(a)(4)(i).
32 20 CFR § 416.908.
33 20 CFR § 416.920(a)(4)(ii); 20 CFR §416.909.
34 *See* 20 CFR § 404, Subpart P, Appendix 1 (hereafter "Appendix 1").
35 20 CFR § 416.920(a)(4)(iii) and (d).
36 20 CFR § 416.920(a)(4)(iv).
37 20 CFR § 416.920(a)(4)(v).

functional capacity, age, education, English literacy, and previous work experience.[38] If the applicant is not capable of performing other work, he or she is disabled.[39]

B. Procedural Issues

1. Standard of Review

At this stage, the agency is still in the process of applying its expertise and reaching its final decision. During this internal appeal process, the recommending Administrative Law Judge, and the Commissioner who will make the final decision, may independently weigh the evidence and reach a different conclusion than the Division staff. This is the case even if the original decision is factually supported and has a reasonable basis in the law.

The Division has suggested the contrary, contending that the hearing authority (in this case, the Commissioner[40]) "should 'merely seek to determine whether the agency's decision is supported by the facts and has a reasonable basis in law,' even if the reviewing entity does not agree with the ultimate determination."[41] Such a deferential standard of review is not supportable in the context of internal agency review. While the Commissioner may *choose* to give weight to the judgments and policy directions proposed by his staff, as the department's chief executive he is never *obliged* to do so.[42] Moreover, new and different evidence has been collected in this proceeding that was not available to the Division's reviewers. This necessitates a fresh look at the merits of the case. Accordingly, no deference will be given to factual determinations made by the Division prior to hearing.

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[38] *See* 20 CFR Pt. 404, Subpt. P, App. 2, § 201.

[39] 20 CFR § 416.920(a)(4)(v).

[40] Because this case is being decided after the effective date of Executive Order 116, the function of hearing authority has been assumed by the Commissioner. *See* Standing Order No. 2012-01, ¶ 1-c (June 21, 2012).

[41] Division's First Post-Hearing Brief at 4, quoting *Tesoro Alaska Petroleum Co. v. Kenai Pipe Line Co.*, 746 P.2d 896, 903 (Alaska 1987).

[42] *See, e.g., In re Alaska Medical Development – Fairbanks, LLC,* OAH No. 06-0744-DHS, Decision & Order at 5-6 & n.70 (issued April 18, 2007; adopted by Commissioner of Health & Social Services in relevant part, Decision After Remand, Oct. 9, 2007) (http://aws.state.ak.us/officeofadminhearings/Documents/DHS/DHS060744.pdf); *In re Rockstad*, OAH No. 08-0282-DEC, Decision & Order at 5 (Commissioner of Environmental Conservation, adopted Nov. 17, 2008) (http://aws.state.ak.us/officeofadminhearings/Documents/DEC/DEC080282.pdf). *Tesoro*, cited by the Division, is not applicable because it discusses only the standard of review when the judicial branch is reviewing decisions made by the executive branch.

2. Notice

The notice denying an application for Interim Assistance must "detail the reasons for the proposed adverse action," including identification of the statute, regulation, or policy on which the decision rests.[43] In this case, three notices were provided prior to the hearing.

The first notice indicated that the application could not be granted because supporting medical records had not been received.[44] This notice is moot, as the application was taken back under advisement thereafter when records arrived, and Mr. X's appeal does not relate to this preliminary denial.[45]

The second notice told Mr. X that "THE CURRENT APPLICATION DOES NOT APPEAR LIKELY TO BE APPROVED FOR SOCIAL SECURITY DISABILITY BASED ON THE AVAILABLE DOCUMENTATION."[46] It cited two regulations, 7 AAC 40.070 and 7 AAC 40.170.[47] The first of these regulations is relevant to the decision only in the sense that it promises an eligibility determination; it is not a basis for denial. The second regulation indicates that an applicant in Mr. X's situation must be determined to be "disabled under 7 AAC 40.180."[48] That regulation (which, unaccountably, was not directly cited in the notice, but which would be found by anyone following up the reference to 7 AAC 40.170), indicates that SSI disability criteria must be met to receive interim assistance.

Two days before the hearing began the Division supplemented this notice with a new notice elaborating as follows:

> AFTER REVIEW OF YOUR MEDICAL RECORDS, WE HAVE DETERMINED THAT YOU ARE NOT LIKELY TO MEET THE DISABILITY CRITERIA UNDER THE SOCIAL SECURITY ADMINISTRATION. YOUR MENTAL HEALTH IMPAIRMENT, MAY PREVENT YOU FROM DOING COMPLEX JOB TASKS, BUT IS NOT NOT [*sic*] AT THE LEVEL THAT WOULD PREVENT YOU FROM DOING WORK TASKS THAT REQUIRE ONLY 1-2 STEPS. YOUR PHYSICAL IMPAIRMENTS MAY PREVENT YOU FROM DOING WORK THAT REQUIRES HEAVY LIFTING AND PROLONGED STANDING AND WALKING, BUT SHOULD NOT PREVENT YOU

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43 7 AAC 49.070.

44 Ex. 3.3.

45 *See* Ex.5. Mr. X's fair hearing request seems to have been prompted by preliminary notice of a subsequent denial on different grounds, later memorialized in Exhibit 6.

46 Ex. 6.

47 The notice also cited Adult Public Assistance Manual sections 410-8 and 426-2. The first contains no basis to grant or deny an application. The second contains *all* of the requirements for interim assistance, and thus is not helpful to a denied applicant in identifying which requirement he or she has failed to meet.

48 7 AAC 40.170(b).

FROM DOING WORK YOU HAVE DONE IN THE PAST, SUCH AS A NO NAME TESTER, AS YOU HAVE DESCRIBED IT.[49]

The third notice contained the same citations as the second notice. While this notice was delivered just before the hearing, it preceded the *end* of the hearing by about ten days, because this hearing was split between two dates separated by a week.

Mr. X argues that he was provided inadequate notice of the reasons for the denial of his application.[50] He does not, however, discuss what the remedy would be were the notices found to be inadequate.

At the outset, one should note that a determination that the notice to Mr. X was defective would not, at this stage, be of any discernible benefit to him. While there is authority establishing that inadequate notice of the reason for terminating benefits can prevent their termination until the notice defect is corrected,[51] there is no basis to confer a benefit in the first instance, on someone who has not met its requirements, simply because the government's explanation for denying it was not adequate. Accordingly, if the notice were found inadequate, the result would simply be delay while the notice problem was corrected and the issue made ready for another hearing. Mr. X has not indicated that he wants another hearing. He has not pursued the Division's offer to consent to reopening the record so he can submit additional evidence.[52]

Moreover, the collective result of the notices given in this case was sufficient to "detail the reasons" for the denial that the Division advocates. The purpose of such a notice is (i) to give the claimant an adequate basis on which to decide whether to appeal and (ii) to help the claimant know what issues to address at the hearing. The first purpose appears to have been served adequately, since Mr. X did make a decision to appeal. The second purpose was also served, in that Mr. X had extensive information about the reason for the denial well before the hearing concluded.[53] His counsel did not request additional time,

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[49] Ex. 12.

[50] Claimant's Initial Post-Hearing Brief at 6.

[51] *See Allen v. State*, 203 P.3d 1155, 1169 (Alaska 2009) (agency must issue proper notice before taking action to recoup food stamp overpayments).

[52] See Division's Second Post-Hearing Brief at 3.

[53] His counsel acknowledged that he understood the basis for the decision and had enough information to argue the merits of the denial. March 21 recording at 1:12:00 – 1:15:00.

In making this determination, the administrative law judge expressly rejects the contention of the Division's counsel (DPA's First Post-Hearing Brief at 5) that this tribunal and the commissioner may not consider whether an agency procedure, *as applied*, has been adequate to provide constitutional due process. *See, e.g., In re*

beyond the second session of the hearing, to develop his case further in response to the detailed third notice.

3. Adequacy of Prior Investigation

Mr. X argues that the Division did not investigate his claim adequately, failing to ask questions of his doctor or to interview him about his past employment.[54] However, as discussed above, this Office has reviewed this case *de novo;* at hearing Mr. X had the opportunity to point out any information the Division overlooked, and no deference has been given to the Division's past factual assessments. For that reason, Mr. X's criticisms of the Division's investigation process are moot and need not be evaluated.

C. Disability

1. Step One of the Five Step Analysis

The Division agrees that Mr. X is not currently engaged in substantial gainful activity, hence meeting the precondition for disability at step one.[55]

2. Step Two of the Five Step Analysis

As to step two, there is likewise no dispute that Mr. X's medical impairment is severe and that its duration has already exceeded 12 months. Accordingly, that precondition has also been met.[56]

3. Step Three of the Five Step Analysis

The SSA recognizes (in appendix 1 to subpart P of 20 C.F.R. Part 404) a list of specific impairments that, if met or equaled, are considered disabling.[57] Listing 12.04 is for Affective Disorders, including depression. For these disorders,

> The required level of severity . . . is met when the requirements in both A and B are satisfied, or when the requirements in C are satisfied.
>
> A. Medically documented persistence, either continuous or intermittent, of one of the following:
>
> 1. Depressive syndrome characterized by at least four of the following:

Holiday Alaska, Inc., OAH No. 08-0245-TOB (Commissioner of Commerce, Community & Econ. Dev., adopted 2009) (http://aws.state.ak.us/officeofadminhearings/Documents/TOB/TOB080245%20appeal%20pending.pdf) , at 7-9. In this case, however, no attempt has been made to lay a record showing constitutional infirmity in the notice process.

[54] Claimant's Initial Post-Hearing Brief at 7.

[55] Division's First Post-Hearing Brief at 10.

[56] *Id.*

[57] 20 CFR § 416.920(a)(4)(iii).

a. Anhedonia or pervasive loss of interest in almost all activities; or

b. Appetite disturbance with change in weight; or

c. Sleep disturbance; or

d. Psychomotor agitation or retardation; or

e. Decreased energy; or

f. Feelings of guilt or worthlessness; or

g. Difficulty concentrating or thinking; or

h. Thoughts of suicide; or

i. Hallucinations, delusions, or paranoid thinking; or

2. Manic syndrome characterized by at least three of the following:

[criteria omitted]

or

3. Bipolar syndrome [criteria omitted];

AND

B. Resulting in at least two of the following:

1. Marked restriction of activities of daily living; or

2. Marked difficulties in maintaining social functioning; or

3. Marked difficulties in maintaining concentration, persistence, or pace; or

4. Repeated episodes of decompensation, each of extended duration;

OR

C. Medically documented history of a chronic affective disorder of at least 2 years' duration that has caused more than a minimal limitation of ability to do basic work activities, with symptoms or signs currently attenuated by medication or psychosocial support, and one of the following:

1. Repeated episodes of decompensation, each of extended duration; or

2. A residual disease process that has resulted in such marginal adjustment that even a minimal increase in mental demands or change in the environment would be predicted to cause the individual to decompensate; or

3. Current history of 1 or more years' inability to function outside a highly supportive living arrangement, with an indication of continued need for such an arrangement.

Mr. X does not contend that he meets the C criteria. Accordingly, he is required to meet both the A and B criteria in order to qualify at step 3 and obviate further inquiry. Medical

reviewer Ladner contended at the hearing that he met neither set of criteria.[58] The A-2 and A-3 categories do not apply, leaving only the nine items under A-1 as a potential route to qualification.

Mr. X has not shown medically-documented persistence of at least four of the A-1 criteria. The medical records do not make a finding of persistent anhedonia or pervasive loss of interest (A-1-a), and indeed Mr. X continues to enjoy watching movies and retains apparent interest in a number of activities, including his work. In the medical records, there is no documented loss of appetite with weight loss (A-1-b), no documented psychomotor agitation or retardation (A-1-d), and no documented thoughts of suicide (A-1-h). With respect to hallucinations, delusions, or paranoid thinking (A-1-i), the only documentation comes from the 1970s, and the condition, if it was ever present, does not appear to have been persistent. Sleep disturbance (A-1-c) has been noted in the past but seems to be well controlled at this time,[59] and hence is likewise not persistent. As to difficulty concentrating or thinking (A-1-g), the medical tests to date do not document this condition despite Mr. X's subjective impression that they are present.[60] Accordingly, seven of the nine A-1 criteria have not been medically documented to be both present and persistent, and thus Mr. X has not demonstrated the required four of these criteria.

Mr. X also does not meet at least two of the B criteria. With regard to the first criterion (marked restriction of activities of daily living), he is able to cook, care for himself, groom appropriately, shop, and commute to a part-time job by public transportation. He does not have the "serious difficulty" with these activities required to support a finding of marked restriction.[61] On the second criterion (marked difficulty maintaining social function), he interacts appropriately at work, functions appropriately in the community as a shopper and commuter, and maintains at least one close non-family friendship and a close family relationship with his son. This background does not support a finding of "more than moderate" social difficulty that would be required for the second

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[58] Second hearing recording at 30:00 and following. The contention of Mr. X's counsel that Ms. Ladner testified only about the B criteria (Claimant's Responsive Post-Hearing Brief at 3) is simply mistaken.

The notices relating to the denial did not specifically discuss step 3, but by focusing on step 4 the third notice adequately informed a represented claimant that the Division would contend he had not qualified at step 3.

[59] Ex. 3.71.

[60] *E.g.*, Ex. 3.41, 3.73.

[61] *See* 20 CFR Pt. 404, Subpt. P App. 1 at 12.00-C-1.

criterion.[62] He has made no contention that he meets the fourth criterion.[63] Thus, while evidence on the third criterion is more ambiguous,[64] it is clear that Mr. X has not demonstrated the required two of the B criteria.

4. Step Four of the Five Step Analysis

Step Four of the analysis is undertaken for individuals who do not qualify as disabled at Step Three. It entails evaluating Mr. X's residual functional capacity and then comparing it to his prior work to see if he can still perform that work. Mr. X retains the burden of proof at this step: he must show that he cannot do the prior work.

a. Residual Functional Capacity

Mr. X's ability to make small shopping purchases on his own indicates that he has the ability to lift less than 10 pounds occasionally. His description of his daily activities and recreation, as well as his current work, indicates an ability to sit without apparent physical limitation and to stand for short periods. While he subjectively reports that he has difficulty learning or retaining complex techniques, his mental testing is normal. He does not have difficulty with straightforward mental work such as alphabetizing files. He reports that working with others causes him some anxiety and stress, which he feels would limit him to no more than four hours of work of the kind he currently does. The perceived limitation from anxiety is only slightly borne out in the medical records; for example, he seems to have done "fairly well" with front desk and hall monitor work at the Domiciliary.[65] It may be, however, that Mr. X would do best in a position involving relatively little interaction with others and with the public.

b. Past Relevant Work

For purposes of Step Four, "past relevant work" is work Mr. X has done in the past 15 years that was substantial gainful activity and that he did for long enough to learn to do it.[66] To be found disabled, Mr. X has the burden to show that he no longer has the capacity to perform that work or that the work is no longer available.

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62 *See* 20 CFR Pt. 404, Subpt. P App. 1 at 12.00-C and C-2.

63 *See* Claimant's Initial Post-Hearing Brief at 8-9; Claimant's Responsive Post-Hearing Brief at 3.

64 Mr. X does seem to lack motivation and drive in some contexts, which his psychiatrist attributes to his depression with a possible contributing component from cannabis use. Ex. 3.73.

65 Ex. 3.45.

66 20 CFR § 416.960(b)(1).

About eight years ago, Mr. X worked full-time as a no name tester. Mr. X was paid $10.00 per hour, which qualifies the work as substantial gainful activity. The work was largely sedentary. Lifting was limited to picking up a one-pound bag of no names and putting it on a waste-high shelf 10 to 20 times per day. Mr. X learned to do the work and did it without difficulty.[67]

Mr. X has not shown that this work no longer exists, and he has not shown that his present condition would prevent him from doing it. The work is within his residual functional capacity.

IV. Conclusion

Because the evidence he has presented does not qualify Mr. X at Step Three and fails to exclude him from resuming his prior work at Step Four, Mr. X has not met his burden of proving that he is likely to meet the Social Security Administration's criteria for disability. Accordingly, Mr. X is not entitled to receive Interim Assistance.

Dated this 6th day of August, 2012.

Signed
Jay Durych
Administrative Law Judge

[67] Ex. 3.10; X testimony.

Non- Adoption Options

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

The administrative law judge (ALJ) reached the correct result. However, the ALJ's proposed decision in this case was issued on August 6, 2012, two weeks prior to the issuance of the Commissioner's Decision issued on August 20, 2012 in OAH Case No. 12-0688-APA. The Commissioner's Decision in OAH No. 12-0688-APA concluded that, in determining eligibility for Interim Assistance under 7 AAC 40.180, the regulation requires the determination of whether the applicant is performing substantial gainful activity, whether the applicant's impairment is severe, whether the applicant's impairment has lasted or is expected to last for more than 12 months, and whether the applicant's impairment satisfies the criteria contained in the Social Security Administration's "Listing of Impairments." That decision concluded, however, that 7 AAC 40.180 *does not* require the Department to follow the analyses used in steps 4 and 5 of the SSA's Supplemental Security Income disability analysis.

The ALJ's proposed decision correctly concluded that Mr. X's impairments do not meet or equal any of the listings in the SSA's Listing of Impairments at 20 C.F.R. Part 404, Subpart P, Appendix 1. This is where the ALJ's analysis, under 7 AAC 40.180, should have ended. Accordingly, the result reached in ALJ's proposed decision in this case is adopted, but for the reasons discussed at Section III (C)((1) – (3) at pages 9-12 of the decision. Section III (C)(4) of the decision is not adopted. The applicant is not eligible for Interim Assistance.

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

DATED this 28th day of August, 2012.

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

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