

Office of Hearings and Appeals
3601 C Street, Suite 1322
P. O. Box 240249
Anchorage, AK 99524-0249
Ph: (907)-334-2239
Fax: (907)-334-2285

**STATE OF ALASKA
DEPARTMENT OF HEALTH AND SOCIAL SERVICES
OFFICE OF HEARINGS AND APPEALS**

In the Matter of)	
)	
██████████,)	OHA Case No. 09-FH-662
)	
Claimant.)	Division Case No. ██████████
_____)	

FAIR HEARING DECISION

STATEMENT OF THE CASE

██████████ (Claimant) applied for Interim Assistance on November 20, 2009. (Ex. 1) The Division of Public Assistance (Division) denied the application on December 23, 2009. (Ex. 3) The Claimant requested a fair hearing contesting the denial on December 29, 2009. (Exs. 4.0 – 4.1)

This Office has jurisdiction over this case pursuant to 7 AAC 49.010.

Pursuant to Claimant's request, a hearing was held on February 9, 2010, March 17, 2010, and March 30, 2010.¹ The Claimant appeared telephonically, represented himself and testified on his own behalf. ██████████, Public Assistance Analyst with the Division, attended in person and represented the Division. ██████████, a registered nurse with the Division, attended telephonically and testified on behalf of the Division on March 30, 2010.

The record was held open until April 16, 2010 for the parties to submit additional documentation.²

¹ The February 9, 2010 hearing was presided over by Hearing Examiner Jay Durych. The case was subsequently reassigned to Hearing Examiner Larry Pederson, who presided over the March 17 and March 30, 2010 hearings.

² The Claimant's documentation was marked as Exhibit A. The Division's documentation was marked as Exhibit 16.

ISSUE

Was the Division correct to deny the Claimant's November 20, 2009 application for Interim Assistance benefits because the medical evidence allegedly did not support his disability claim?

SUMMARY OF DECISION

The Claimant has a combination of exertional and non-exertional limitations that limit his ability to perform a full range of sedentary work. Given those limitations, his limited education, and the fact that he is close to 50 years old, he has met his burden of proof and established that he is disabled according to Social Security criteria. As a result, the Division was therefore not correct when it denied the Claimant's November 20, 2009 application for Interim Assistance benefits.

FINDINGS OF FACT

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

1. The Claimant is currently 48 years old (birth date [REDACTED]). (Ex. 1) His high school education stopped while he was in the 11th grade; he does not have either a high school diploma or a GED. (Claimant testimony)
2. The majority of Claimant's work experience involved physical labor: heavy construction, landscaping, working on the docks, home, and home health care. (Claimant testimony) He has not worked in three years. *Id.*
3. The Claimant has a history of back injuries that date back a number of years. He injured his back in 1983 while working as a gardener. (Ex. A, p. 6) In 1985, a CT scan showed "spondylolysis³ & spondylolithesis⁴ of lumbar vertebrae." (Ex. A, p. 8) In 1997, his lumbar spine x-rays showed "slight lateral scoliosis⁵ in the lumbar spine and sacralization⁶ of the lowest lumbar vertebrae" and a CT scan showed "bulging intervertebral discs without neuro impingement." (Ex. A, p. 7)
4. On October 20, 1998, Dr. [REDACTED], an examining physician, diagnosed the Claimant with chronic back strain, anxiety, and post traumatic stress disorder. (Ex. A, p. 10). Dr. [REDACTED] concluded the Claimant required counseling for posttraumatic stress, that he was limited to sedentary work, which included only being allowed to lift a maximum of 10 pounds, and that he has "problems with prolonged standing, sitting, and lifting." (Ex. A, p. 9)

³ "Dissolution of a vertebra." *Dorland's Illustrated Medical Dictionary* 1567 (27th Edition 1988).

⁴ "Forward displacement of one vertebra over another, usually of the fifth lumbar over the body of the sacrum." *Dorland's Illustrated Medical Dictionary* 1567 (27th Edition 1988).

⁵ Abnormal curvature of the spine. *Dorland's Illustrated Medical Dictionary* 1497 (27th Edition 1988).

⁶ "Fusion of the fifth lumbar vertebra to the first segment of the sacrum." *Dorland's Illustrated Medical Dictionary* 1478 (27th Edition 1988).

5. On March 30, 2002, the Claimant reinjured his back which necessitated an emergency room visit. (Ex. A, p. 3)

6. In December 2007, the Claimant injured his ankle. (Ex. 2.34) As a result, he was diagnosed with a right ankle sprain and left low back sprain. (Ex. 2.35) His x-rays showed “chronic mild arthritic changes and bone spurring” on his right ankle. (Ex. 2.34) A subsequent review of his right ankle x-ray showed that he had a “non-displaced fracture” of his right ankle. (Ex. 2.24) The Claimant was still experiencing right ankle pain a year later, on November 11, 2008. (Ex. 2.22) A November 11, 2008 x-ray of his right ankle showed he had “mild osteoarthritis at the tibiotalar joint. No acute findings.” (Ex. 2.6)

7. On December 5, 2008, the Claimant was examined by Dr. [REDACTED], M.D., and diagnosed with “[d]isabling chronic back pain.” (Ex. 2.20) Dr. [REDACTED]’s examination notes state as follows:

BACK: Range of motion for the back is quite limited with anterior flexion. Posterior extension appears to be normal and side to side also appears to be normal. The patient does have greatly reduced rotation of the torso, both left and right. He has greater discomfort over the midline of the lumbar spine than he does over the bilateral lateral aspects of his spine. He also has some discomfort in the lower cervical vertebrae at approximately C6/C7 to palpation of midline. Patient ambulates with a stiffened altered gait.

(Ex. 2.20)

8. On December 6, 2008, a radiologist review of the Claimant’s x-ray states as follows:

There is a pars defect⁷ at L5. This appears to be chronic. This is probably bilateral although this could not be confirmed without oblique views. There is mild anterolisthesis of L5 of approximately 5 mm. There is mild diffuse degenerative disk disease.

(Ex. 2.5) The radiologist concluded there was “L5 spondylolisthesis.” *Id.*

9. The Claimant was subsequently examined by Dr. [REDACTED] on January 6, 2009, July 23, 2009, August 20, 2009, and September 16, 2009. (Exs. 2.11 – 2.18) During each of these visits, the Claimant stated his pain level was a 7 or 8 out of 10 (10 being the highest level). *Id.* Dr. [REDACTED] assessed the Claimant as experiencing chronic pain, hypertension, and depression during these examinations. *Id.* The Claimant was prescribed pain medications during each of these examinations. *Id.*

10. Dr. [REDACTED] completed a Preliminary Examination for Interim Assistance Form (AD #2) on the Claimant’s behalf on December 2, 2009. He diagnosed the Claimant with chronic back pain, ankle fracture, hypertension, and depression. (Ex. 2.4) Dr. [REDACTED] indicated that the Claimant’s depression “could likely improve with treatment” but that his other conditions were not expected to improve. *Id.*

⁷ Structural defect. *Dorland’s Illustrated Medical Dictionary* 1233 (27th Edition 1988).

11. Dr. ██████ recorded the Claimant's description of his ability to walk as follows:
 - a. On January 6, 2009, the Claimant told Dr. ██████ he could walk "approximately a block." (Ex. 2.17)
 - b. On July 23, 2009, the Claimant told Dr. ██████ he could walk "approximately one block." (Ex. 2.15)
 - c. On September 16, 2009, the Claimant told Dr. ██████ he could ride his bicycle approximately three blocks to the store and back, but that he could not walk that far. (Ex. 2.11)

12. The Claimant testified about his conditions and how they affected him:
 - a. He has experienced depression for approximately 20 years. He has also been diagnosed with schizophrenia, post traumatic stress disorder, obsessive compulsive disorder, and attention deficit disorder. He is not currently being treated for depression.
 - b. He experiences constant pain, which is getting worse. The pain does not let him sleep. He can only sit for approximately 3 minutes without having to move around. He can stand for approximately 45 minutes. He then has to lie down and put a pillow between his legs.
 - c. His doctor has told him not to lift more than 5 pounds.
 - d. Repetitive bending and stooping aggravate his lower back.
 - e. He has a pinched nerve, sciatica, and arthritis.
 - f. He does not use a cane to walk. He can walk for about one-half a block. He uses crutches once or twice per week.
 - g. He does his own grocery shopping.

13. Ms. ██████ is a registered nurse employed by the Division, who reviews medical information for state Interim Assistance determinations. Ms. ██████ testified about the Claimant's various health conditions as follows:
 - a. There is insufficient evidence to determine if the Claimant's depression is severe.
 - b. The Claimant's physical impairments are not severe because he can perform sedentary work.

- c. The Claimant's conditions did not meet or equal the Social Security disability listings of impairments.
- d. The Claimant is not disabled because he can perform sedentary work.

PRINCIPLES OF LAW

This case involves an application for Interim Assistance benefits. When an application is denied, the applicant has the burden of proof⁸ by a preponderance of the evidence.⁹

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

In order to qualify for Interim Assistance, the applicant must satisfy the Social Security Supplemental Security Income disability requirements as set forth in the Social Security regulations. 7 AAC 40.180(b)(1). The Social Security regulations set out a very specific multistep process that must be followed in order to determine whether someone is disabled:

1. Is the applicant performing substantial gainful employment as defined by the applicable Social Security regulations? If so, the applicant is not disabled. 20 CFR 416.920(a)(4)(i). If the applicant is not performing substantial gainful employment, then the applicant must satisfy the next question.
2. Is the applicant's impairment severe? A severe impairment is one that "significantly limits [a person's] physical or mental ability to do basic work activities." 20 CFR 416.920(c). Medical evidence is required to establish an applicant's impairment. 20 CFR 416.908. If an applicant has multiple impairments, the combined effect of all the impairments must be considered in determining whether an applicant is severely impaired. 20 CFR 416.923. 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 the applicant must satisfy the next question.
3. Has the applicant's severe impairment lasted for a continuous period of at least 12 months, or can it be expected to last for a continuous period of at least twelve months? 20 CFR 416.909. If the severe impairment does not satisfy this duration requirement, the applicant is not disabled. 20 CFR

⁸ "Ordinarily the party seeking a change in the status quo has the burden of proof." *State, Alcohol Beverage Control Board v. Decker*, 700 P.2d 483, 485 (Alaska 1985).

⁹ Preponderance of the evidence is defined as follows:

Evidence 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 1064 (5th Ed. 1979).

416.920(a)(4)(ii). If the severe impairment satisfies this duration requirement, the applicant must satisfy the next question.

4. Does the applicant's severe impairment meet or medically equal the listing of impairments contained in the Social Security regulations located at 20 CFR Pt. 404, Subpt. P, App. 1? If it does, the applicant is disabled and no further inquiry is required. 20 CFR 416.920(a)(4)(iii). If the severe impairment does not meet or medically equal the listing of impairments, then the applicant must satisfy the next question.

5. Does the applicant's severe impairment prevent him from doing his previous relevant work? This involves an evaluation of the applicant's residual functional capacity. 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, the applicant must satisfy the next question.

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

In determining whether a person can perform other work, the Social Security regulations define the characteristics of different levels of work:

Light work involves lifting no more than 20 pounds at a time with frequent lifting or carrying of objects weighing up to 10 pounds. Even though the weight lifted may be very little, a job is in this category when it requires a good deal of walking or standing, or when it involves sitting most of the time with some pushing and pulling of arm controls. To be considered capable of performing a full or wide range of light work, you must have the ability to do substantially all of these activities.

20 CFR 416.967(b).

Sedentary work involves lifting no more than 10 pounds at a time and occasionally lifting or carrying articles like docket files, ledgers, and small tools. Although a sedentary job is defined as one which involves sitting, a certain amount of walking and standing is often necessary in carrying out job duties. Jobs are sedentary if walking and standing are required occasionally and other sedentary criteria are met.

20 CFR 416.967(a).

The medical vocational guidelines for a 48 year old applicant who is limited to sedentary work, who does not have a high school diploma or a GED, with primarily unskilled work experience, normally direct a conclusion that the applicant is not disabled. 20 CFR Pt. 404, Subpt. P, App. 2, § 201.18. The medical vocation guidelines, located at 20 CFR Pt. 404, Subpt. P, App. 2, are not strictly applied when

an applicant has both exertional and non-exertional limitations that limit his ability to work. 20 CFR 416.969a(d).

Exertional limitations are “limitations and restrictions imposed by [an applicant’s] impairment(s) and related symptoms, such as pain, [that] affect only ... the ability to meet the strength demands of jobs (sitting, standing, walking, lifting, carrying, pushing, and pulling).” 7 CFR 416.969a(b). Non-exertional limitations are those that are not strength demanding such as difficulty functioning due to anxiety and depression, or difficulty concentrating, understanding, remembering, seeing, or hearing, or difficulty “reaching, handling, stooping, climbing, crawling, or crouching.” 7 CFR 416.969a(c).

In addition, if an applicant is close to age 50, and cannot perform the full range of sedentary work, the medical vocational guidelines are not strictly applied. *See* 20 CFR Pt. 404, Subpt. P, App. 2, § 201.00(h)(3).

ANALYSIS

It is necessary to review the evidence in this case and decide, using the multistep Social Security disability analysis, if the Claimant’s impairments satisfy the Social Security disability criteria. If they do, the Claimant is disabled by Social Security standards and eligible for Interim Assistance benefits. If they do not, the Claimant is not disabled by Social Security standards and not eligible for Interim Assistance benefits. Because this case involves an application for benefits, the Claimant has the burden of proof by a preponderance of the evidence.

The Preliminary Examination form completed by Dr. [REDACTED] diagnoses the Claimant with chronic back pain, ankle fracture, hypertension, and depression. The medical documents in the record corroborate these diagnoses. *See* Findings of Fact 7 – 10 above.

A. Current Employment.

The last time the Claimant worked was three years ago, i.e. he is currently unemployed. *See* Finding of Fact 2 above. He therefore satisfies the first step of the Social Security disability analysis. It is therefore necessary to proceed to the next step, and determine if he is severely impaired.

B. Severe Impairment.

The Division’s medical reviewer stated the Claimant was not severely impaired. A review of the medical evidence in this case demonstrates that the Claimant has persistent long standing back problems with chronic pain. Specifically, he has a pars (structural) defect in his lumbar spine at L5, with mild anterolisthesis and spondylolisthesis. *See* Finding of Fact 8 above. He also has a limited range of motion and an altered gait. *See* Finding of Fact 7 above. These are physical impairments that “significantly limit[s] [his] physical or mental ability to do basic work activities.” 20 CFR 416.920(c). The Claimant therefore satisfies the regulatory requirement that he experiences a severe physical impairment.

In addition to the chronic back pain, the Claimant also has a diagnosis of an ankle fracture and an x-ray showing mild osteoarthritis in the ankle. *See* Finding of Fact 6 above. While this, in and of itself, may not qualify as a severe physical impairment, it is an additional impairment that undoubtedly contributes to his overall severe physical impairment.

The Claimant has two other diagnoses, hypertension and depression. There is no information in the Claimant's medical records showing the physical and or mental/emotional effects of either of these two conditions and how they impact the Claimant's ability to work. Because there is a lack of medical information with regard to these two conditions, the Claimant has not demonstrated that these are themselves severe impairments or that they contribute to his overall severe impairment.

Because the Claimant has a severe physical impairment, it is necessary to proceed to the next step of the Social Security disability analysis and determine if his severe physical impairment has lasted or can be expected to last for a continuous period of a least 12 months. This Decision will only address the Claimant's severe impairments, being his chronic back problems and his ankle problems. It will not address his hypertension and depression because the Claimant has not proven they are severe impairments.

C. Duration.

The medical evidence in the record shows that the Claimant has experienced back problems, including spondylolysis of his lumbar spine, since 1985. *See* Finding of Fact 3 above. In addition, he injured his ankle in December 2007 and a November 11, 2008 x-ray showed osteoarthritis in his ankle. *See* Finding of Fact 6 above. Both of these conditions have lasted for longer than a period of 12 continuous months. They meet the durational requirement.

Because the Claimant's severe physical impairment has lasted for a period of longer than 12 continuous months, it is necessary to proceed to the next step of the Social Security disability analysis and determine if his severe physical impairment meets or medically equals the listing of impairments contained in the Social Security regulations located at 20 CFR Pt. 404, Subpt. P, App. 1.

D. Meeting or Equaling the Social Security Impairment Listings.

The Claimant's severe physical impairment consists of his medically documented back problems and his ankle fracture/osteoarthritis. The Social Security system classifies both of these conditions under the musculoskeletal category. In order for the Claimant to meet or medically equal the criteria set out in the musculoskeletal listing, he must have "an extreme limitation of the ability to walk" or "an extreme loss of function of both upper extremities." 20 CFR Pt 404, Subpart P, Appendix 1, §§ 1.00(B)(2)(b)(1) and 1.00(B)(2)(c).

An "extreme limitation of the ability to walk" includes the "inability to walk without the use of a walker, two crutches, or two canes" and "the inability to carry out routine ambulatory activities, such as shopping and banking." 20 CFR Subpt. P, App.1, § 1.00(B)(2)(b).

None of the evidence presented shows any limitations with regard to the Claimant's arms, shoulders, or hands. The evidence, however, does show that the Claimant has medical conditions that impair his ability to walk, specifically his back and his ankle fracture/osteoarthritis. Dr. [REDACTED] found that the Claimant walked with a stiffened altered gait in December 2008. *See* Finding of Fact 7 above.

The Claimant testified that he could only walk a half a block at hearing. This is not medical evidence, however. He also testified that he could stand for 45 minutes, which seems slightly inconsistent with his being able to only walk half of a block.

There is insufficient medical evidence in the record to demonstrate that the Claimant has "an extreme limitation of the ability to walk." As a result, he does not meet or medically equal the Social Security listing of impairments for the musculoskeletal category. It is therefore necessary to proceed to the next step of the Social Security disability analysis and determine if he can perform his previous relevant work.

E. Previous Relevant Work.

The Claimant's previous work experience involved physical labor: heavy construction, landscaping, working on the docks, home, and home health care. The medical evidence in this case showing his ankle fracture/osteoporosis and his back problems, with the attendant pain and limited range of motion, demonstrates that he cannot perform his previous relevant work which involved physical labor.

Because the Claimant cannot perform his previous relevant work, it is necessary to proceed to the next step in the Social Security disability analysis and determine whether he is capable of performing other work.

F. Performing Other Work.

The Division's medical reviewer stated the Claimant could perform sedentary work. Sedentary work involves mainly sitting, occasionally lifting or carrying articles like docket files, ledgers, and small tools, with occasional walking and standing, and lifting up to 10 pounds. *See* 20 CFR 416.967(a). This is clerical and office work.

The Claimant's testimony regarding his physical limitations (pain, inability to sit, some limitations on walking, and bending and stooping) is supported by the medical evidence. The medical evidence demonstrates that the Claimant has a pars (structural) defect in his lumbar spine at L5, with mild anterolisthesis and spondylolisthesis. He has mild osteoarthritis in his right ankle. He has a limited range of motion and an altered gait. He experiences pain that his doctor has described as both chronic and disabling. He is prescribed narcotics for the pain. *See* Findings of Fact 6 - 10 above.

The medical vocational guidelines for a 48 year old applicant who is limited to sedentary work, who does not have a high school diploma or a GED, with primarily unskilled work experience, normally direct a conclusion that the applicant is not disabled. 20 CFR Pt. 404, Subpt. P, App. 2, § 201.18. However, the medical vocation guidelines, located at 20 CFR Pt. 404, Subpt. P, App. 2, are not strictly applied when an applicant has both exertional and non-exertional limitations that limit his ability to

work. 20 CFR 416.969a(d). Additionally, if an applicant is close to age 50, and cannot perform the full range of sedentary work, the medical vocational guidelines are not strictly applied. *See* 20 CFR Pt. 404, Subpt. P, App. 2, § 201.00(h)(3).

The Claimant has a combination of exertional and non-exertional limitations. The exertional limitations consist of his limitations on sitting, walking, and his chronic/disabling pain. The non-exertional limitations consist of his limited range of motion, i.e. his ability to bend and stoop. These exertional and non-exertional limitations affect his ability to complete a full range of sedentary work. In addition, the Claimant is close to age 50. He is currently 48 years, 7 and one-half months old (birth date [REDACTED]).¹⁰ Under these circumstances, it is not necessary to strictly follow the medical vocational guidelines.

Because the Claimant experiences chronic pain from his medically documented back conditions and has mild osteoarthritis in his right ankle, which limit his ability to sit and walk, and he has a limited range of motion, which limits his ability to bend and stoop, and given his age and limited education (he did not complete high school and does not have a GED), he is not capable of performing a full range of sedentary work. He therefore satisfies the last step in the Social Security disability analysis, and is disabled.

The Claimant has met his burden of proof by a preponderance of the evidence. He has established that he is disabled according to Social Security criteria. The Division was therefore not correct when it denied his November 20, 2009 application for Interim Assistance benefits.

CONCLUSIONS OF LAW

1. The Claimant experiences medically documented severe physical impairments, consisting of back conditions, chronic pain, and right ankle osteoarthritis, which have lasted or can be expected to last for 12 months or longer, that qualify him as severely impaired according to the Social Security disability regulations.
2. The Claimant's severe physical impairments do not meet or medically equal the Social Security listings of impairments.
3. The Claimant is not capable of performing his previous relevant work, being primarily physical labor.
4. The Claimant has a combination of exertional and non-exertional limitations that limit his ability to perform a full range of sedentary work. Given those limitations, his limited education, and the fact that he is close to 50 years old, he has met his burden of proof and established that he is disabled according to Social Security criteria.
5. The Division was therefore not correct when it denied the Claimant's November 20, 2009 application for Interim Assistance benefits.

¹⁰ The Claimant's age at the time of his November 20, 2009 application was 48 years and one month.

DECISION

The Division was not correct when it denied the Claimant's November 20, 2009 application for Interim Assistance benefits.

APPEAL RIGHTS

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

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

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


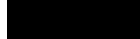
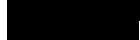
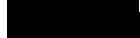
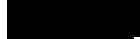


DATED this 3rd day of June, 2010.

/Signed/
Larry Pederson
Hearing Authority

Certificate of Service

I certify that on this 3rd day of June 2010, true and correct copies of the foregoing were sent to:

Claimant by U.S.P.S., Certified Mail
and to the following by e-mail:

, Public Assistance Analyst
, Director
, Policy & Program Development
, Staff Development & Training
, Administrative Assistant II
, Eligibility Technician I
, Chief of Field Services

J. Albert Levitre, Jr.
Law Office Assistant I