BEFORE THE STATE OF ALASKA
COMMISSIONER OF HEALTH AND SOCIAL SERVICES

In the Matter of:	)	
	)	OAH Case No. 12-0688-APA
M.H.	)	Former OHA Case No.
	)	DPA Case No.

COMMISSIONER'S DECISION

After due deliberation, for the reasons specified below, and in accordance with AS 44.64.060(e)(3) and AS 44.64.060(e)(5), the Commissioner of the State of Alaska Department of Health and Social Services rejects the Administrative Law Judge's interpretation of Interim Assistance regulation, 7 AAC 40.180, and revises the disposition of the case as set forth below. In all other material respects, except where inconsistent with this Decision, the July 11, 2012 proposed Decision is adopted.

I. Interpretation of Interim Assistance Regulations.

This case raises an important policy question about the proper interpretation of Alaska's Interim Assistance regulations. The Administrative Law Judge (ALJ) concluded, at pages 3-4 and 11-14 of the proposed decision, that that the criteria which must be satisfied in order to qualify for Interim Assistance are equivalent to 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 (CFRs). Accordingly, the ALJ concluded that the Department must follow the complete 5-step SSI disability analysis, including steps 4 and 5.[1]

The Department is mindful that the ALJ's proposed decision followed the interpretation of the Interim Assistance regulations previously applied by the Department's former Office of Hearings and Appeals, and the interpretation adopted by the Director of the Division of Public Assistance in the Director's Appeal decision issued on October 7, 2011 in OHA Case No. 11-FH-188. However, under the hearing procedures in effect prior to July 1, 2012, there was no mechanism allowing the Commissioner direct review of the decisions of the OHA or of Division directors. Now that new hearing procedures allow a direct administrative review of proposed

[1] Step 4 of the SSI disability analysis involves determining whether the applicant's severe impairment prevents him from performing his previous relevant work. If it is determined that an applicant cannot perform his past relevant work, then the disability analysis proceeds to Step 5, where the applicant's age, education, training, work history, and job skills are examined to determine whether the applicant is capable of performing other work.

decisions at the Commissioner level, it is appropriate that the Department clarify the proper interpretation of its Interim Assistance regulations.

Appealing the denial of an SSI application through the Social Security Administration (SSA) can take several years.[2] The purpose of Alaska's Interim Assistance (IA) Program is to alleviate the hardship on SSI applicants during this lengthy period. This is done by providing a limited cash benefit to applicants the Department finds are likely to be found disabled by the SSA and thus eligible for SSI.

The Interim Assistance Program's primary regulation is 7 AAC 40.180. The intent of that regulation is to allow the Department to make a fast and relatively inexpensive prediction of whether an applicant will ultimately be found to be disabled by the SSA. As such, 7 AAC 40.180 should not be construed as adopting or incorporating the entire 5-step SSI disability analysis. Rather, 7 AAC 40.180 incorporates *only* the SSA's presumptive disability criteria (set forth at 20 C.F.R. 416.934), and steps 1, 2, and 3 of the SSI disability analysis.[3]

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 SSA's "Listing of Impairments." However, 7 AAC 40.180 *does not* require the Department to follow the analyses used in steps 4 and 5 of the SSI disability analysis.[4] In particular, 7 AAC 40.180 does not require the Department to present evidence through a vocational expert, and does not place any burden on the Department to prove, (as SSA is required to do at step 5 of its analysis), that there is particular work in the national economy that the applicant is able to perform.[5]

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[2] *See* Moore v. Beirne, 714 P.2d 1284, 1286 (Alaska 1986).

[3] The Social Security Administration's SSI disability analysis involves a 5 step sequential evaluation. 7 CFR § 416.920(a)(4). The first three steps of the SSA's evaluation are (1) whether the claimant is presently engaged in substantial gainful activity, (2) whether the claimant has a severe impairment or combination of impairments (the duration of the impairment is an aspect of this severity requirement), and (3) whether the claimant's impairment meets or equals any impairment listed in the regulations as being so severe as to preclude substantial gainful activity. These are the only steps of the SSA's analysis which are incorporated into Alaska's Interim Assistance analysis.

[4] Steps 4 and 5 of the SSA's disability analysis, set forth at 7 CFR § 416.920(a)(4), require the determination of whether the claimant's residual functional capacity leaves him unable to perform his past relevant work (step 4), and whether the claimant is unable to perform any other work existing in significant numbers in the national economy (step 5). These steps of the SSA's analysis *are not* incorporated into Alaska's Interim Assistance analysis.

[5] Pursuant to 7 AAC 40.180(c)(4), it is still necessary to consider whether "the applicant can perform any other work, including sedentary work." However, as indicated in the first sentence of 7 AAC 40.180(c), this

Accordingly, the undersigned, by delegation from the Commissioner of Health and Social Services, and in accordance with AS 44.64.060(e)(5), deletes Sections III(C)(2) and III(C)(3) at pages 11-14 of the ALJ's proposed decision, and modifies and amends the ALJ's interpretation of Interim Assistance regulation 7 AAC 40.180 as set forth above.

II. Factual Findings.

All factual findings contained in the ALJ's proposed decision are adopted.

III. Disposition.

The ALJ's proposed decision correctly concluded that Mr. H' impairments do not meet or equal any of the listings in the SSA's "Listings" at 20 C.F.R. Part 404, Subpart P, Appendix 1. As clarified above, this is where the ALJ's analysis, under 7 AAC 40.180, should have ended.

Mr. H is not currently engaged in substantial gainful activity, and he has a severe impairment which is expected to last for a continuous period of at least 12 months. However, his impairment does not satisfy the specific criteria of the SSA's applicable listing(s). Accordingly, Mr. H is not disabled under 7 AAC 40.180 and is thus not entitled to receive Interim Assistance benefits.

The undersigned, by delegation from the Commissioner of Health and Social Services, and in accordance with AS 44.64.060(e)(3), revises the ALJ's disposition of the case as set forth above. This Decision and the ALJ's July 11, 2012 decision document, as modified above, constitute the final decision of the Commissioner in this case.

APPEAL RIGHTS

This decision is the final administrative action in this proceeding. 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 20th day of August, 2012.

By: *Signed*
Ree Sailors, Deputy Commissioner
Department of Health and Social Services

information is to be considered in the context of determining whether an applicant's impairment meets the criteria set out in 7 AAC 40.180 (b)(1)(B) (i.e. whether the impairment satisfies the criteria of one of the SSA's Listing of impairments described in 20 C.F.R. 404, Subpart P, Appendix 1).

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

In the Matter of:	)	
	)	
M.H.,	)	OAH Case No. 12-0688-APA
	)	Former OHA Case No.
Applicant for Interim Assistance.	)	DPA Case No.
_____	)	

[PARTIALLY REJECTED PROPOSED]
DECISION

I. Introduction

M.H. applied for Interim Assistance on December 7, 2011.[6] He provided the Division of Public Assistance (Division) with an AD2 form, which is a report titled Preliminary Examination for Interim Assistance signed by a health care professional.[7] The Division denied Mr. H's application.[8] Mr. H requested a Fair Hearing on January 17, 2012.[9] A more detailed denial notice was mailed to Mr. H on March 1, 2012.[10]

A Fair Hearing was held on March 21, 2012. The parties agreed to a post-hearing briefing schedule which has now been completed. Based on the evidence and the arguments presented, Mr. H qualifies to receive Interim Assistance.

II. Facts

Mr. H is a 36 year old high school graduate who came to Alaska in 1998. He has mostly worked in the food industry, working in various positions including dishwasher, waiter, host, and food preparation. He also worked for a short time at the front desk of No Name (a hotel), and did cleaning and driving for No Name (also a hotel). At the time of his application Mr. H was living in No Name, Alaska.[11] On the date of the hearing he was homeless and living with a friend in Anchorage.

In approximately 2002 Mr. H was violently assaulted. He was tied up, attacked, and his assailant threatened to kill him. He suffered a breakdown in 2009. He was hospitalized

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6 Exhibit 2.
7 Exhibit 3.5 – 3.6.
8 Exhibit 5. It is unclear from the record when his application was denied as the date on this denial is *after* Mr. H' request to appeal the denial.
9 Exhibit 4.0 – 4.1.
10 Exhibit 10.
11 Unless otherwise noted, the factual findings come from Mr. H' testimony.

at the No Name Institute (NNI) for a week, and had follow-up treatment at No Name Health Services.

Mr. H testified that he has not looked for work since 2009 because he is not capable of working. He suffers from depression, lack of energy, and dizziness. He has seizures, and has suffered two grand mal seizures in his lifetime. Mr. H also has flashbacks and anxiety associated with the 2002 assault. He does not socialize with friends and goes out only when he has to. He has lost confidence and self esteem. He also suffers from auditory and visual hallucinations. He no longer feels capable of working in jobs that involve customer service or customer contact. He has trouble concentrating and jobs that involve stress can trigger his seizures. He experiences severe fear and anxiety at unpredictable times.

Mr. H takes several different medications that help him manage his symptoms, but the medications do not eliminate the symptoms.

Mr. H has served short jail sentences for shoplifting and other misdemeanors. He served approximately nine months in jail in 2011 for a felony burglary conviction.

In October of 2011 Mr. H spent a week at the No Name Center because of his depression and suicidal ideations. He was admitted to NNI again in January of 2012 after a suicide attempt. According to his medical records, Mr. H has a severe major depressive disorder with psychotic features.[12]

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 (SSI).[13] Among other requirements, to receive Interim Assistance an applicant must be "likely to be found disabled by the Social Security Administration."[14] The person seeking to obtain benefits has the burden of proving that he or she is likely to be found disabled by the SSA.[15]

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[12] Exhibits 3.6 & 3.18.

[13] 7 AAC 40.170(b); 7 AAC 40.375.

[14] 7 AAC 40.180(b)(1).

[15] *State v. Decker*, 700 P.2d 483, 485 (Alaska 1985) (burden of proof is on party seeking a change in the status quo).

The SSA uses a five-step evaluation process in making its disability determinations.[16] Each step is considered in order, and if the SSA finds the applicant either disabled or not disabled at any step, it does not consider subsequent steps.[17] 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.[18] This finding is made regardless of the applicants' medical condition, age, education, or work experience.[19]

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] The impairment must also have already lasted for a continuous period of at least twelve (12) months, or be expected to last for a continuous period of at least twelve (12) months. [21] 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.[22] If the impairment meets or equals the listing, the applicant is considered disabled per se.[23] Otherwise, the applicant is not considered disabled.

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 ability to perform his or her past relevant work.[24] If the applicant is able to perform his or her past relevant work, the applicant is not disabled.

Finally, at step five, the SSA looks at the applicant's capacity for work, age, education, and work experience to determine whether the applicant can perform other work

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16 20 CFR §416.920.

17 20 CFR §416.920(a)(4).

18 20 CFR §416.920(a)(4)(i).

19 20 CFR §416.920(b).

20 20 CFR § 416.920(c); 20 CFR § 416.921(a).

21 20 CFR § 416.909. 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 C.F.R. § 416.920(a)(4)(ii), treats the durational requirement as part of the "step two" severity analysis.

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

23 20 CFR § 416.920(a)(4)(iii).

24 20 CFR § 416.920(a)(4)(iv).

in the national economy.[25] At this stage, however, the burden of proof shifts from the applicant to the agency.[26] If the applicant is not capable of performing other work, he or she is disabled.[27]

B. Procedural Issues

1. Standard of Review

The Division argues that the Hearing Officer should review the Division's findings under the reasonable basis test, and "merely seek to determine whether the agency's decision is supported by the facts and has a reasonable basis in law."[28] This would be the standard applied after a final decision is made by the agency and an appeal is made to the Superior Court.[29] At this stage, however, the agency is still in the process of applying its expertise and reaching its final decision. During this internal appeal process, the Hearing Officer[30] may independently weigh the evidence and reach a different conclusion than the Division staff even if the original decision is factually supported and has a reasonable basis in the law.[31]

2. Notice

Mr. H argues that he was provided inadequate notice of the reasons for the denial of his application when he was first informed that his application had been denied. Mr. H concedes that the second notice was adequate, but seeks a formal ruling on whether the first notice complied with the Division's legal obligations. Assuming the initial notice was inadequate, the proper remedy would be to issue a revised notice prior to holding the

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[25] 20 CFR § 416.920(a)(4)(v).

[21] *See* 20 CFR § 416.920(a)(4)(v); *Bowen v. Yuckert*, 482 U.S. 137, 144 (1987); *Kail v. Heckler*, 722 F.2d 1496, 1498 (9th Cir.1984); *Embrey v. Bowen*, 849 F.2d 418, 422 (9th Cir.1988); *Smolen v. Chater*, 80 F.3d 1273, 1289 (9th Cir. 1996); *Tackett v. Apfel*, 180 F.3d 1094, 1099 (1999); *Bustamante v. Massanari*, 262 F.3d 949, 953–954 (9th Cir. 2001); *Valentine v. Commissioner, Social Security Administration*, 574 F.3d 685, 689 (9th Cir.2009).

[27] 20 CFR § 416.920(a)(4)(v).

[28] Division's Post-Hearing Brief, page 5, *quoting Tesoro Alaska Petroleum Co. v. Kenai Pipe Line Company*, 746 P.2d 896, 903 (Alaska 1987).

[29] In *Simpson v. State, Commercial Fisheries Entry Commission*, 101 P.3d 605, 609 (Alaska 2004) the Alaska Supreme Court stated:

> In reviewing administrative decisions, we have recognized at least four principal standards of review. "These are the 'substantial evidence test' for questions of fact; the 'reasonable basis test' for questions of law involving agency expertise; the 'substitution of judgment test' for questions of law where no expertise is involved; and the 'reasonable and not arbitrary test' for review of administrative regulations." [Footnotes omitted].

[30] And the Commissioner (or his delegee) if this matter is appealed further.

[31] This is especially true where the applicant has the opportunity to introduce additional facts at an evidentiary hearing. There would be no point to an evidentiary hearing if the new evidence from that hearing could not be used along with the previously considered evidence to re-evaluate the factual findings. *See In re Parker*, 969 A.2d 322 (N.H. 2009) and *Albert S. v. Department of Health and Mental Hygiene*, 891 A.2d 402, 416 (Md. Ct. Spec. App. 2006).

hearing.[32] That is what occurred here. Since there is no claim that Mr. H did not have adequate time to prepare for the hearing after receiving the revised notice, the question of whether the initial notice was adequate is moot.[33]

3. Adequate Investigation

Next, Mr. H argues that the Division failed to conduct an adequate investigation prior to reaching its determination. He notes that the most significant evidence the Division had was the AD2 form certifying that Mr. H was disabled:

> If [the division] had questions about the certification, the reviewers should have asked the [advanced nurse practitioner] and the doctor for clarification At the very least, they should have told Mr. [H] himself that they needed but did not have evidence about the way his condition affected his ability to work.[34]

Mr. H goes on to say:

> After the initial intake interview, DPA staff did not either interview Mr. [H] about his job history or seek out any information about his past employment, beyond the information he provided. They did not ask him any questions about his daily activities or social functioning or concentration, persistence, and pace. They did not ask him any questions about his past employment. Accordingly, there was no real evidence before them to contradict ANP Jones and Dr. [M]'s conclusions, and in particular there was a lack of up-to-date information about Mr. H's most recent admission to [No Name Institute] and the [No Name] Center, and about the extent to which his life had or had not stabilized.[35]

An applicant for Interim Assistance must make him or herself available for an interview.[36] The Division then conducts that interview unless it determines it would be unreasonable to require the applicant to be interviewed.[37] In either case, the applicant "must furnish adequate evidence to demonstrate his eligibility for assistance."[38]

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

[33] The Alaska Supreme Court has held that a claim "is moot if it is no longer a present, live controversy, and the party bringing the action would not be entitled to relief, even if it prevails." *Fairbanks Fire Fighters Association, Local 1324 v. City of Fairbanks*, 48 P.3d 1165, 1167 (Alaska 2002).

[34] Applicant's Post-Hearing Brief at 6.

[35] *Id.*

[36] 7 AAC 40.050(a).

[37] *Id.* If the Division determines that it would be unreasonable to require the applicant to be interviewed, the applicant may provide written statements to demonstrate eligibility.

[38] *Id.*

Mr. H was interviewed by telephone.[39] In addition, the Division used a medical release provided by Mr. H to obtain additional records from No Name Health Services.[40] Mr. H has made several arguments for why policy or regulations should be changed to place the burden of conducting a more proactive investigation on the Division, but has cited no legal authority for the proposition that the Division currently has the burden of conducting any investigation. Instead, current law squarely places the responsibility on the applicant to provide "adequate evidence."

In addition, Mr. H had the opportunity to provide additional evidence during the hearing. To the extent the Division failed to fully investigate his medical condition and ability to work, Mr. H had an opportunity to supplement what the Division found through its own investigation. Mr. H had the opportunity to produce records from his more recent hospitalizations, and he had the opportunity to provide a detailed explanation of his past work history, daily activities, social functioning, concentration, persistence, and pace. He could have called his doctor or the advanced nurse practitioner as witnesses, or provided written statements from them about his current medical condition.

C. Disability

1. Step Three of the Five Step Analysis

The central question in this case is whether Mr. H is likely to be found disabled by the SSA. The five step process described above is used to answer that question. Mr. H testified on his own behalf to support his claim that he is disabled under this standard. The Division called a disability adjudicator, Laura Ladner, to explain why it found that Mr. H was not disabled. The record does not disclose whether Ms. Ladner has any medical training or training in either vocational rehabilitation or vocational evaluation. She has, however, worked as a disability adjudicator for about ten years in Idaho and Alaska, including work supervising and training others in this area. She also attended the Social Security Administration's disability hearing school.

The Division agrees that Mr. H is not currently engaged in substantial gainful activity, that his medical impairment is severe, and that it has lasted more than 12 months.

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[39] Exhibit 3.27.
[40] Exhibit 3.002.

Accordingly, the analysis in this case begins at step three. Step three compares Mr. H's impairment to the listings adopted by the SSA.[41]

The Division called Ms. Ladner to explain why it found that Mr. H is not disabled. At step three, she looked at whether Mr. H met or equaled the requirements of SSA listings 12.04, 12.06 and 12.09.

a. Affective Disorders

Listing 12.04 is for Affective Disorders, including depression. This listing looks for medical documentation of different combinations of symptoms.

> The required level of severity for these disorders 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:
>
> 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:
>
> a. Hyperactivity; or
>
> b. Pressure of speech; or
>
> c. Flight of ideas; or
>
> d. Inflated self-esteem; or
>
> e. Decreased need for sleep; or
>
> f. Easy distractibility; or
>
> g. Involvement in activities that have a high probability of painful consequences which are not recognized; or
>
> h. Hallucinations, delusions or paranoid thinking;

[41] Appendix 1.

or

3. Bipolar syndrome with a history of episodic periods manifested by the full symptomatic picture of both manic and depressive syndromes (and currently characterized by either or both syndromes);

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.

Ms. Ladner testified that Mr. H met a sufficient number of the A criteria,[42] and there does not appear to be any contention that Mr. H meets the C criteria. Accordingly, the question for this hearing is whether Mr. H meets at least two of the four B criteria.

At the time of its original decision, the Division had Mr. H's medical records and limited information from him about how his condition affected his life. Additional information was presented at the hearing. Mr. H testified about the restrictions in his daily living activities, social functioning, and maintaining concentration, persistence, and pace. These limitations are established if there are 'marked difficulties." For daily living activities, a marked limitation is defined:

by the nature and overall degree of interference with function. For example, if you do a wide range of activities of daily living, we may still find that you have a

[42] Testimony of Laura Ladner; Post Hearing Brief, page 13.

> marked limitation in your daily activities if you have serious difficulty performing them without direct supervision, or in a suitable manner, or on a consistent, useful, routine basis, or without undue interruptions or distractions.[43]

Mr. H' testimony did not meet his burden of proving that he has "serious difficulty" in performing cleaning, shopping, cooking, personal hygiene, and similar daily functions. His mental health condition clearly makes performing these tasks more difficult, but the evidence at the hearing did not show that the difficulty amounted to a marked limitation.

Mr. H testified about the restrictions in his social functioning. Social functioning:

> refers to [the] capacity to interact independently, appropriately, effectively on a sustained basis with other individuals. . . . You may demonstrate impaired social functioning by, for example, a history of altercations, evictions, firings, fear of strangers, avoidance of interpersonal relationships, or social isolation.[44]

Based on Mr. H' testimony, he avoids interpersonal relationships and has become socially isolated. Although this was not noted as a problem in his 2009 psychiatric evaluation, the question for this hearing is whether he currently has restrictions in his social functioning. Mr. H did testify that he has a long term relationship with his domestic partner, but being able to sustain a relationship with one person does not preclude a finding that he avoids interpersonal relationships in general, or preclude a finding that he is socially isolated.

Because of his depression and anxiety, Mr. H does not go out unless he has to. He no longer socializes with friends as he had in the past. His testimony linking these changes in behavior to his mental health issues was credible. Accordingly, Mr. H has met his burden of proving marked difficulties in maintaining social functioning.

Mr. H also has difficulties with concentration, persistence, and pace. This refers to the ability "to sustain focused attention and concentration sufficiently long to permit the timely and appropriate completion of tasks commonly found in work settings."[45] Difficulty in this area is usually shown through observations in the work setting.[46] Since Mr. H has not worked since 2009, however, that is not possible in this case. The testimony he provided suggests that he does have some difficulty in this area, but his testimony was not

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43 Appendix 1, 12.00(C)(1).
44 Appendix 1, 12.00(C)(2).
45 Appendix 1, 12.00(C)(3).
46 *Id.*

sufficiently specific to meet his burden of proving that he does have marked inability to sustain focused attention and concentration to timely complete tasks.

Finally, Mr. H has had several episodes of decompensation:

> *Episodes of decompensation* are exacerbations or temporary increases in symptoms or signs accompanied by a loss of adaptive functioning, as manifested by difficulties in performing activities of daily living, maintaining social relationships, or maintaining concentration, persistence, or pace. Episodes of decompensation may be demonstrated by an exacerbation in symptoms or signs that would ordinarily require increased treatment or a less stressful situation (or a combination of the two). Episodes of decompensation may be inferred from medical records showing significant alteration in medication; or documentation of the need for a more structured psychological support system (e.g., hospitalizations, placement in a halfway house, or a highly structured and directing household); or other relevant information in the record about the existence, severity, and duration of the episode.
>
> The term *repeated episodes of decompensation, each of extended duration* in these listings means three episodes within 1 year, or an average of once every 4 months, each lasting for at least 2 weeks. If you have experienced more frequent episodes of shorter duration or less frequent episodes of longer duration, we must use judgment to determine if the duration and functional effects of the episodes are of equal severity and may be used to substitute for the listed finding in a determination of equivalence.[47]

Mr. H testified to several hospitalizations at NNI and the No Name Center. These occurred over the course of more than two years and lasted approximately one week each time. This is not sufficient to meet the definition of repeated episodes of extended duration (quoted above). While hospitalizations are not the only events that can qualify as an episode of decomposition, Mr. H has not provided evidence of other events to qualify under this factor.

In summary, because Mr. H has not established that he meets at least two out of the four B criteria, he does not meet the listing for affective disorders.

b. Anxiety Related Disorders.

The listing for Anxiety Related Disorders is Section 12.06. This listing is also divided into A, B, and C criteria. Again, there is no claim that Mr. H meets the C criteria. The B criteria are identical to the B criteria for listing 12.04.[48] As discussed above, Mr. H

[47] Appendix 1, 12.00 Mental Disorders.
[48] Appendix 1, 12.06

only meets one of the four criteria, which is not sufficient to meet the requirements of this listing.

c. Substance Addiction Disorders

Ms. Ladner evaluated Mr. H under listing 12.09, Substance Addiction Disorders. This listing applies to symptoms associated with the regular use of substances that affect the central nervous system. Mr. H testified that he had not been abusing drugs or alcohol since 2009. Thus, this listing does not apply.

d. Step Three Summary

Mr. H' condition does not meet or equal any of the listings in the SSA's regulations at 20 C.F.R. Part 404, Subpart P, Appendix 1. Accordingly, it is necessary to proceed to the next step in the analysis and determine whether the applicant can perform his or her prior relevant work.

2. Step Four

Mr. H's past work was primarily in positions that required working with the public. Ms. Ladner agreed that Mr. H would not be able to return to that type of work.[49] Accordingly, it is necessary to proceed to the next step in the disability analysis and determine whether he can perform any other work.

3. Step Five

If it is determined that an applicant cannot perform his or her past relevant work, it is then necessary to proceed to the final step in the disability analysis and decide whether the applicant is capable of performing any other work.[50] The hearing officer must determine whether the applicant retains a particular exertional capacity; decide whether the applicant has acquired transferable skills; identify specific jobs that the applicant can perform with the restrictions the applicant has been found to have; and verify that the jobs the applicant can do exist in significant numbers in the regional or national economies.[51] However, the hearing officer cannot provide this vocational evidence; the evidence must be in the record.[52]

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[49] Testimony of Laura Ladner; Post-Hearing Brief, page 15. Ms. Ladner testified that she skipped step four when making her original decision because she had very limited information about Mr. H' past work history.

[50] 20 CFR § 416.920(a)(4)(v), 20 CFR § 416.960(c).

[51] *Haddock v. Apfel*, 196 F.3d 1084 (10th Cir. 1999).

[52] *Wilson v. Califano*, 617 F.2d 1050, 1053-1054 (4th Cir. 1980).

Significantly, at this stage of the SSA's disability analysis the burden of proof shifts from the applicant to the agency.[53] Courts have stated that the rationale for this shifting of the burden at "Step 5" is to effectuate Congress' intent that any doubts be resolved in favor of applicants in SSI cases.[54]

To meet its burden at "step 5," the agency must show (1) that the applicant's impairment still permits certain types of activity necessary for other occupations; (2) that the applicant's experience is transferable to other work; and (3) that specific types of jobs exist in the national economy which are suitable for an applicant with these capabilities and skills.[55] It is not the applicant's burden to develop vocational evidence at step five.[56]

The preferred method for an agency to carry its burden at step five is through the testimony of a vocational expert.[57] However, the Division historically has not had a vocational expert on staff to address the issue of whether an applicant can still perform any work.

In many circumstances, a decision on whether an applicant is disabled can be made, even in the absence of expert vocational testimony, by using the Social Security Administration's Medical-Vocational Guidelines.[58] These guidelines, known as "the Grids," are fact-based generalizations about the availability of jobs for people of varying ages, educational backgrounds, and previous work experience, with differing degrees of exertional impairment.[59] The Grids "are used to evaluate the claimant's age, education, past work experience, and RFC [residual functional capacity] in order to determine whether that claimant is disabled."[60]

It is well established, however, that "the Grids" do not apply if the applicant has a significant non-exertional impairment.[61] Non-exertional impairments include mental impairments, sensory impairments, and impairments involving environmental limitations.[62]

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[53] 20 C.F.R. § 416.960(c)(2); *see also Bowen v. Yuckert*, 482 U.S. 137, 144 (1987); *Embrey v. Bowen*, 849 F.2d 418, 422 (9th Cir. 1988); *Smolen v. Chater*, 80 F.3d 1273, 1289 (9th Cir. 1996); *Tacket v. Apfel*, 180 F.3d 1094, 1099 (9th Cir. 1999); *Bustamante v. Massanari*, 262 F.3d 949, 953–954 (9th Cir. 2001); *Valentine v. Commissioner of Social Security Administration*, 574 F.3d 685, 689 (9th Cir. 2009).

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

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

[56] *Thomas v. Sullivan*,987 F.2d 1482, 1491 (10th Cir. 1993).

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

[58] Located at 20 CFR, Part 404, Subpart P, Appendix 2.

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

[60] *Poole v. Astrue*, 2010 WL 2231873 (W. D. Ark. 2010).

[61] *See*, for example, *Cole v. Secretary of Health and Human Services*, 820 F.2d 768, 771 (6th Cir. 1987), *Payan v. Chater*, 959 F. Supp. 1197 (C.D. Cal. 1996).

[62] *See Cole, supra*, 820 F.2d at 772; *see also Johnson v. Secretary*, 872 F.2d 810, 814 (8th Cir. 1989) (headaches are a non-exertional impairment); *Gray v. Apfel*, 192 F.3d 799, 802 (8th Cir. 1999) (pain, mental

In this case, the impairments on which the applicant's allegations of disability are primarily based - (i.e. his depression and anxiety) – are both mental impairments. As discussed above, mental impairments are non-exertional impairments, and the Grids cannot properly be applied where (as here) a significant portion of an applicant's disability is based on non-exertional impairments.

Mr. H testified that he has visual hallucinations two or three times per week. Just having someone raise their voice to him can cause anxiety or a paralyzing flashback to when he was attacked. He has difficulty concentrating, and his mood can go up and down. According to the Division, because of Mr. H' impairment,

> Mr. H will do best in a job that requires limited contact with the public. Ms. Lander also found that Mr. H may have limitations with sustained concentration due to audio and visual hallucinations that may be distracting and therefore may be limited to simple repetitive work. Additionally, based on his anxiety, and depression, Mr. H would likely do best in a position that is stable and does not require learning new tasks frequently and where he will be given additional time to learn new tasks.[63]

Ms. Ladner also testified that Mr. H will have barriers to work because of his prior substance abuse and criminal past. He will require an understanding supervisor or boss who is willing to hire him.

The Division concluded that there are numerous jobs in the national economy that do not involve contact with the public and involve simple, repetitive work.[64] However, in order to consider such other work, the work "must exist in significant numbers in the national economy (either in the region where you live or in several regions in the country)."[65] There was no evidence that any of the jobs specifically mentioned by the Division actually exist in significant numbers.[66] Nor was there testimony from a vocational specialist that Mr. H would actually be

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incapacity are non-exertional impairments); *Van Winkle v. Barnhart*, 55 Fed. Appendix 784 (8th Cir. 2003) (anxiety and depression are non-exertional impairments); *Case v. Barnhart*, 165 Fed. Appendix 492 (8th Cir. 2006) (depression is a non-exertional impairment).

63 Post-Hearing Brief at 15 – 16 (internal footnotes omitted).

64 Post-Hearing Brief at 16.

65 20 CFR 416.960(c).

66 There was no testimony that all jobs listed in the Dictionary of Occupational Titles actually exist in significant numbers in the national economy, or that that any specific job that Mr. H could perform actually exists in significant numbers. The Dictionary of Occupational Titles was last revised in 1991 and the Department of Labor replaced that publication with an online publication titled "O*NET". Dictionary of Occupational Titles (4th Ed., rev. 1991), Note to Prefatory Note (http://www.oalj.dol.gov/PUBLIC/DOT/REFERENCES/DOTPREF.HTM).

able to make an adjustment to that work considering his functional capacity, age, education, and work experience.

Where (as here) an applicant cannot perform the full range of work in a particular category due to non-exertional impairments such as a mental disorder, an agency must introduce testimony from a vocational expert as to the availability of jobs that a person with the applicant's profile could perform.[67] The Division did not do so.

In summary, the Division agreed that Mr. H can no longer perform his prior work; the burden of proof shifted to the Division, and the Division then failed to prove that Mr. H is capable of performing other work. Mr. H is therefore deemed disabled at step five of the disability analysis pursuant to the SSA's regulations and case law, which are incorporated into Alaska's Interim Assistance Program.

IV. Decision

Based on the additional evidence presented at the hearing, Mr. H has met his burden of proving that the Social Security Administration is likely to find him to be disabled. Accordingly, Mr. H is entitled to receive Interim Assistance.

Dated this 11th day of July, 2012.

Signed
Jay Durych
Administrative Law Judge

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

[67] *See*, for example, *Trent v. Secretary of Health and Human Services*, 788 F. Supp. 939 (E.D. Ky. 1992); *Gathright v. Shalala*, 872 F. Supp. 893 (1993); *Banks v. Apfel*, 144 F. Supp. 2d 752 (2001); *Johnson v. Barnhart*, 378 F. Supp. 2d. 274 (2005); *Baker v. Barnhart*, 457 F.3d 882, 888, 894-895 (8th Cir. 2006).