

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

In the Matter of)
)
 B J)
)
_____)

OAH No. 12-0723-APA
Agency No.

DECISION

I. Introduction

B J applied for Interim Assistance benefits. The Division of Public Assistance (division) denied her application based on its determination that the Social Security Administration (SSA) was unlikely to find that she is disabled under federal regulations. Ms. J requested a hearing to challenge that determination.

A hearing was held on November 26, 2012. Ms. J participated by telephone, as did the division’s representative, Ms. Terri Gagne. Based on the evidence presented at the hearing, and on the exhibits in the record, Ms. J is likely to be found disabled by the SSA.

II. Facts

Ms. J’s current physician, Dr. Boston, completed the division’s AD 2 form, which is titled Preliminary Examination for Interim Assistance. On the first page, Dr. Boston checked the box for

Stroke (cerebral vascular accident) more than 3 months in the past and continued marked difficulty in walking or using a hand or arm.^[1]

The listed diagnoses were seizure disorder and CVA.² Dr. Boston indicated that Ms. J was not expected to recover, and that her condition was expected to last 12 months or more.³

According to Dr. Boston’s medical notes, the stroke initially caused numbness on the left side of her face and right hand; the stroke now affects the left side of her face and left hand. “She still has residual weakness in the left hand and loss of grip.”⁴ His records also note an atrial septal defect⁵ and an ongoing issue with anxiety.⁶ Older medical records indicate that Ms. J suffered her first stroke in 1994 and a second stroke in 1997.⁷

¹ Exhibit 2.24 (dated March 26, 2012).
² Exhibit 2.25.
³ Exhibit 2.25.
⁴ Exhibit 2.26. This is consistent with Ms. J’s testimony at the hearing.
⁵ Exhibit 2.26. Ms. J testified that this refers to a heart defect she has.

Ms. J testified about her seizures, but also stated that the medicine she has recently been prescribed has helped a lot. At first the seizures disappeared entirely, but then started to come back. The seizures have subsided again after the dosage for her medicine was increased.

In 2008, the Social Security Administration found Ms. J to be disabled due to somatoform disorder, personality disorder, and a history of substance abuse.⁸ Ms. J testified that she lost her eligibility for SSA disability payments because, during a routine review of her case, she was unable to send in the required documentation in a timely manner. Thus, she is not currently receiving SSA disability payments, but she has reapplied.

III. Discussion

Interim Assistance is a benefit available to individuals while they are waiting for the SSA to approve their application for Supplemental Security Income.⁹ Among other requirements, to receive Interim Assistance an applicant must be “likely to be found disabled by the Social Security Administration.”¹⁰ Ms. J has the burden of proof on this issue.¹¹

The SSA uses a five-step evaluation process in making its disability determinations. For Alaska’s interim assistance determinations, however, only the first three of these steps are considered.¹²

Under the SSA evaluation process, 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.¹³ 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.¹⁴ This finding is made regardless of the applicant’s medical condition, age, education, or work experience.¹⁵

⁶ Exhibit 2.51 (based on the fax header printed on the bottom of each page, this page appears to have been marked out of order and should actually have been the next page after exhibit 2.26).

⁷ E.g. Exhibit 2.70.

⁸ Exhibit 2.42.

⁹ 7 AAC 40.170(b); 7 AAC 40.375.

¹⁰ 7 AAC 40.180(b)(1).

¹¹ 2 AAC 64.290(e).

¹² See *In re M.H.*, OAH No. 12-0688-APA (Comm’nr Health & Social Services 2012).

¹³ 20 CFR §416.920(a)(4).

¹⁴ 20 CFR §416.920(a)(4)(i).

¹⁵ 20 CFR §416.920(b).

At step two, the SSA considers the severity of the applicant's impairment. 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.¹⁶ 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 the Listing of Impairments adopted by the SSA.¹⁷ If it does, the applicant is disabled.¹⁸

There are situations, however, where the SSA will begin making disability payments before it determines whether the applicant is disabled:

We may make a finding of presumptive disability or presumptive blindness if the evidence available at the time we make the presumptive disability or presumptive blindness finding reflects a high degree of probability that you are disabled or blind. . . . For other impairments, a finding of disability or blindness must be based on medical evidence or other information that, though not sufficient for a formal determination of disability or blindness, is sufficient for us to find that there is a high degree of probability that you are disabled or blind.^[19]

By regulation, certain medical conditions warrant a finding of presumptive disability without the need for any medical records.²⁰ For a person with any one of the conditions listed in this regulation, it is presumed that there is a high degree of probability that he or she is disabled or blind.

The concept of presumptive disability is incorporated into Alaska's interim assistance regulations:

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

(1) a medical review by the department as to whether the applicant is likely to be found disabled by the Social Security Administration, including whether the applicant's impairment meets

(A) the SSI program's presumptive disability criteria under 20 C.F.R. 416.934, as revised as of April 1, 2005, and adopted by reference, or

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

¹⁷ See 20 CFR §404, Subpart P, Appendix 1 (hereafter "Appendix 1").

¹⁸ 20 CFR §416.920(a)(4)(iii).

¹⁹ 20 CFR §416.933. Payments may be made for a presumptive disability for up to six months. 20 CFR §416.932.

²⁰ 20 CFR §416.934.

(B) Social Security Administration disability criteria for the listings of impairments described in 20 C.F.R. 404, subpart P, appendix 1, as revised as of April 1, 2005, and adopted by reference[.²¹]

Thus, when an applicant gets to the third step of the evaluation process, an applicant is entitled to interim assistance benefits while waiting for the SSA to make its determination if the applicant meets either the presumptive criteria adopted by reference in subsection (1)(A) or the criteria in the listings adopted by reference in subsection (1)(B).

There is no need to consider whether Ms. J's impairments, individually or in combination, meet the criteria in the listings of impairments if she meets the criteria for a presumptive disability.

The division has agreed that Ms. J meets the first two steps of the evaluation process; she is not working and she has a severe impairment that meets the durational requirement.²² Her doctor has stated that Ms. J suffered a stroke more than three months ago and continues to have "marked difficulty in walking or using a hand or arm."²³ This finding coincides with one of the presumptive disabilities found in the 2005 version of 20 CFR §416.934.²⁴ Because she meets the presumptive disability criteria, Ms. J is eligible to receive interim assistance benefits as long as she meets all other eligibility criteria and until the SSA makes its disability determination.

IV. Conclusion

Ms. J's doctor has confirmed that Ms. J suffered a stroke more than three months ago and continues to have marked difficulties in the use of a hand or arm. Accordingly, she meets the criteria of a presumptive disability under the Social Security Administration's regulations, entitling her to receive interim assistance benefits. The division's determination is reversed.

Dated this 28th day of November, 2012.

Signed _____
Jeffrey A. Friedman
Administrative Law Judge

²¹ 7 AAC 40.180(b) (emphasis added).

²² Exhibit 2.86.

²³ Exhibit 2.24. Nothing in the medical records suggests that Dr. Boston's determination that she continues to have difficulty using a hand or an arm is incorrect.

²⁴ 20 CFR §934(e) (2005 version).

Adoption

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

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

DATED this 13th day of December, 2012.

By: Signed
Name: Jeffrey A. Friedman
Title: Administrative Law Judge

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