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

In the Matter of:)
)
 [REDACTED],) OHA Case No. 10-FH-113
)
 Claimant.) DPA Case No. [REDACTED]
)
 _____)

FAIR HEARING DECISION

STATEMENT OF THE CASE

[REDACTED] (Claimant) applied for Interim Assistance (IA) benefits on July 9, 2009 (Exs. 2.0 – 2.9). The Division of Public Assistance (DPA or Division) denied the application on March 26, 2010 (Ex. 8). The Claimant requested a fair hearing contesting the Division’s denial of his IA application on April 1, 2010 (Ex. 9).

This Office has jurisdiction to resolve this dispute pursuant to 7 AAC 49.010.

The Claimant’s hearing began as scheduled on May 18, 2010 before Hearing Examiner Jay Durych. The Claimant attended the hearing in person, represented himself, and testified on his own behalf. The Claimant’s friend, [REDACTED], attended the hearing in person, assisted in representing the Claimant, and also testified on the Claimant’s behalf. [REDACTED], a Public Assistance Analyst with the Division, appeared in person to represent and testify on behalf of the Division. The parties’ testimonies were received, and all exhibits tendered by the parties were admitted into evidence.

At the hearing of May 18, 2010 the Claimant produced certain medical records (marked and admitted as Exs. C-1 through C-5) which had not previously been provided to the Division’s Medical Reviewer. In addition, medical records had previously been requested from the State of Alaska Department of Corrections (DOC), but that agency had not yet produced all of the documents requested. Accordingly, the hearing was continued to allow more time to obtain medical records from DOC, and to allow the Division’s Medical Reviewer to examine any and all medical records not previously reviewed.

The hearing reconvened on June 23, 2010. The same persons were present as appeared at the first hearing, acting in the same capacities. The parties reported that the documents previously requested from DOC had still not been received. The Claimant was given the option of either (1) staying the case pending additional efforts to obtain the requested medical records from DOC; or (2) submitting

the case for decision based on the existing record. The Claimant chose to have the case decided without further delay. Accordingly, the record was closed and the case was submitted for decision.

ISSUE

Was the Division correct when, on March 26, 2010, it denied the Claimant's application for Interim Assistance benefits dated July 9, 2009, based on the assertion (Ex. 8) that "the medical review . . . did not substantiate . . . that [the Claimant was] not able to engage in any and all types of work activity"?

SUMMARY OF DECISION

The Claimant is not currently working. His diabetes and degenerative joint disease (DJD) are "severe impairments" according to the applicable regulations, and both his diabetes and DJD satisfy the durational requirement. The Claimant's diabetes and DJD prevent the Claimant from performing his prior physical work. Accordingly, based on his age, education, and work history, the Claimant is considered disabled pursuant to the Social Security Administration's medical-vocational guidelines.

FINDINGS OF FACT ^{1 2}

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

I. Education, Vocational History, and Substance Abuse.

1. The Claimant was born on [REDACTED], 1952 (Ex. 7.283) and was 58 years old at the time of the hearings held in this case.
2. The Claimant has a GED (Ex. 7.368). He can read and write English adequately (Ex. 7.063).
3. The Claimant is not currently employed and has not worked for some time (Ex. 2.2, Claimant testimony). He has previously worked as a crab fisherman, welder's helper, and construction laborer (Ex. 7.079). The Claimant's most recent work (within the last 13 years) was pipefitting, operating heavy equipment, and dirt work (Ex. 7.148). This was heavy, physical work (Claimant testimony). The Claimant can no longer perform this heavy, physical work due to his impairments. *Id.*
4. The Claimant has a long history of alcohol abuse / dependence, cocaine use / dependence, and heroin use (Exs. 7.142, 7.144, 7.146, 7.148, 7.153). However, the Claimant's drug and alcohol abuse / dependence is currently in remission (Ex. C-1).

II. Physical Impairments.

5. On July 28, 2009 [REDACTED], M.D. completed a Preliminary Examination for Interim Assistance (Form AD-2) on behalf of the Claimant (Ex. 7.443 – 7.444, 7.019 – 7.020). Dr. [REDACTED]

¹ Some medical abbreviations used in the medical reports quoted herein have been spelled-out to promote clarity.

² The Claimant's file with the Office of Hearings and Appeals contains approximately 450 pages of medical records and releases. All of these records were reviewed during the preparation of this decision. However, in the interest of brevity, only the most relevant documents are quoted or discussed in this decision.

diagnosed the Claimant as suffering from degenerative joint disease (DJD) and diabetes. *Id.* Dr. [REDACTED] further indicated that the Claimant was not expected to recover from these conditions. *Id.*³

A. Diabetes.

6. The Claimant has suffered from uncontrolled insulin-dependent diabetes mellitus for over five (5) years (Claimant testimony; *see also* specific exhibits referenced in these Findings of Fact at Paragraphs 7 - 10, below).

7. A medical report dated December 30, 2005 indicates that the Claimant's then-treating physician wrote that the Claimant's HbA1c "is out of control and he continues to have recurrent [foot and hand] infections, which are going to lead eventually to some serious morbidity" (Ex. 7.173).

8. The Claimant has a five-year history of very high blood glucose levels:

<u>Date of Blood Test</u>	<u>Claimant's Glucose Level(mg/dl)</u>	<u>Normal Range (mg/dL)</u> ⁴
04-16-04 (Ex. 7.245)	404	71-124
11-29-04 (Ex. 7.244)	382	71-124
01-31-05 (Ex. 7.241)	376	62-98
12-30-05 (Ex. 7.236)	518	71-124
04-20-06 (Ex. 7.231)	412	71-124
04-04-07 (Ex. 7.224)	280	71-124
07-24-07 (Ex. 7.318)	216	75-110
07-25-07 (Ex. 7.335)	216	not specified
07-26-07 (Ex. 7.317)	199	75-110
07-27-07 (Ex. 7.317)	193	75-110
07-28-07 (Ex. 7.317)	185	75-110
07-29-07 (Ex. 7.316)	174	75-110
07-30-07 (Ex. 7.316)	158	75-110
07-31-07 (Ex. 7.316)	175	75-110
08-01-07 (Ex. 7.316)	201	75-110
08-02-07 (Ex. 7.330)	188	65-99
08-03-07 (Ex. 7.330)	170	65-99
09-19-07 (Ex. 7.296)	214	74-100
04-14-08 (Ex. 7.291)	393	65-99
07-04-08 (Ex. 7.425)	309	not specified
07-08-08 (Ex. 7.269)	185	65-99
07-21-08 (Ex. 7.211)	99	71-124
05-15-09 (Ex. 7.379)	233	65-99

³ Diabetes is categorized by the SSA as Impairment Listing No. 9.08. Degenerative Joint Disease (DJD) of the knees and lower back is categorized by the SSA under Impairment Listing Nos. 1.02 and 1.04.

⁴ Diabetes is typically diagnosed when fasting blood glucose levels are 126 mg/dL or higher (*See* MedLine Plus Medical Encyclopedia – a service of the U.S. National Library of Medicine and the National Institutes of Health, accessed online at <http://www.nlm.nih.gov/medlineplus/ency/article/003482.htm> on July 19, 2010). Normal value ranges may vary slightly among different laboratories.

9. The Claimant also has a five-year history of very high glycated hemoglobin (HbA1c) levels:⁵

<u>Date of Blood Test</u>	<u>Claimant's HbA1c Level</u>	<u>Normal HbA1c Range</u>
11-29-04 (Ex. 7.177)	14.3%	Not stated.
12-30-05 (Ex. 7.236)	16.2%	4.4% – 6.4%.
04-20-06 (Ex. 7.227)	13.9%	4.4% – 6.4%.
04-04-07 (Ex. 7.224)	10.0%	4.4% – 6.4%.
04-09-07 (Ex. 7.167)	10.0%	Not stated.
07-25-07 (Exs. 7.319, 7.335)	7.6%	Not stated.
07-08-08 (Ex. 7.270)	11.5%	Not stated.
07-21-08 (Ex. 7.208)	8.9%	4.4% – 6.4%.
05-15-09 (Ex. 7.380)	10.9%	Not stated.
07-17-09 (Ex. 7.246)	12.9%	4.4% – 6.4%.

10. A medical report dated June 18, 2009 (Ex. 7.057) states that the Claimant suffers from “Type II diabetes *with neuropathy*”⁶ [emphasis added].

B. Degenerative Disc Disease (DJD):

11. The Claimant injured his right knee on September 5, 2003 (Exs. 7.037). A medical report on the knee dated October 2, 2003 states in relevant part as follows (Exs. 7.037, 7.038):

Findings: There is a complex tear of the lateral meniscus with multiple tears involving the posterior horn, body, and anterior horn There is a probable small fragment that has been displaced in the intercondylar notch There is . . . degeneration within the medial meniscus without a surfacing tear There is chondromalacia, high grade within the lateral femorotibial compartment with marked thinning of the cartilage on both sides of the joint and reactive marrow stress phenomenon demonstrated in the tibia and femur There is low-grade chondromalacia within the medial femorotibial compartment and there are moderate-grade changes within the patellofemoral

⁵ HbA1c is a test that measures the amount of glycated hemoglobin in the blood (MedLine Plus Medical Encyclopedia – a service of the U.S. National Library of Medicine and the National Institutes of Health, accessed online on July 19, 2010 at <http://www.nlm.nih.gov/medlineplus/ency/article/003640.htm> and <http://www.nlm.nih.gov/medlineplus/ency/article/003482.htm>. Glycated hemoglobin is a substance in red blood cells formed when blood sugar (glucose) attaches to hemoglobin. *Id.* Once glycated (sugar-coated), the hemoglobin stays that way throughout the life span of the red blood cell, which is about 120 days. “Diabetes Blood Sugar Test Now Recommended For Diagnosis” (Article in USA Today, June 5, 2009). An HbA1c of 8 means that 8% of one’s hemoglobin molecules are glycated. *Id.* People who do not have diabetes typically have an HbA1c reading of 6 or less. *Id.* Higher HbA1c test results indicate diabetes. *Id.* The American Diabetes Association’s *2010 Standards of Medical Care in Diabetes* indicates that an HbA1c level of 6.5% or more is a criterion for the diagnosis of diabetes.

⁶ Peripheral neuropathy is caused by nerve damage. *See* Mayo Clinic website at <http://www.mayoclinic.com/health/peripheral-neuropathy/DS00131> (date accessed July 26, 2010). Diabetes is one of the most common causes of neuropathy. *Id.* The symptoms of neuropathy can include (1) the gradual onset of numbness and tingling in the feet or hands, which may spread upward into the legs and arms; (2) burning pain in the affected area; (3) sharp, jabbing or electric-like pains in the affected area; (4) extreme sensitivity to touch; (5) lack of coordination; and (6) muscle weakness or paralysis if motor nerves are affected. *Id.*

compartment There is a large joint effusion, and a Baker's cyst [T]here is a small loose body here measuring 3 mm in diameter

12. The Claimant had arthroscopic surgery in 2004 to repair a torn ligament in his right knee (Ex. 7.433). However, as of 2007 the knee was weak, painful, and would sometimes give way (Ex. 7.147).

13. A radiologic report on the Claimant's right and left hands dated April 19, 2007 (Ex. 7.203) indicates that, as of that date, he had mild DJD of some of the joints in his fingers and hands.

14. A radiologic report on the Claimant's thoracic spine dated April 19, 2007 (Ex. 7.202) indicates that, as of that date, he had mild DJD of the dorsal thoracic spine.

15. A radiologic report on the Claimant's right knee dated April 19, 2007 (Ex. 7.204) states in relevant part as follows:

. . . . There is much greater joint space narrowing seen of the lateral compartment of the right knee than seen on previous examination Impression: Progressing degenerative joint disease of the lateral compartment of the right knee now moderate in extent

16. A medical report dated May 4, 2007 (Ex. 7.152) states in relevant part that "veteran will require a job in which he can sit most of the time."

17. A radiologic report on the Claimant's right knee dated September 17, 2007 (Ex. 7.307) states in relevant part as follows:

Tricompartamental degenerative changes are seen with marginal osteophyte formation in all three compartments. In addition, there is subchondral sclerosis and irregularity of the articular surface with joint space narrowing in the lateral femoral tibial compartment Small joint effusion is present.

18. A radiologic report on the Claimant's right elbow dated September 19, 2007 (Ex. 7.298) states in relevant part as follows:

Impression: (1) Extensive edema within the olecranon and coronoid process of the ulna with associated cortical destruction of the olecranon, highly suggestive of osteomyelitis. (2) Associated soft tissue edema and joint effusion.

19. As of July 4, 2008 the Claimant had a history of chronic neck pain due to DJD (Ex. 7.430).

20. A letter from [REDACTED], M.D. dated May 17, 2010 (Ex. C-2) states in relevant part as follows:

[The Claimant] has been diagnosed with and suffers from severe degenerative disease in his knees and lower back. He also has poor control [of his] diabetes, and diabetic neuropathy, which is causing a lot of pain in his lower extremities when active or not.

These physical illnesses plus the mental ones (please refer to Dr. [REDACTED]'s letter) . . . make him permanently incapable of sustaining any type of employment.

21. The Claimant has chronic pain in both feet and in his right knee (Ex. 7.056). The Claimant rates the pain level at 4-5 on a scale of 1-10. *Id.* The pain is worse when he walks. *Id.*

III. Mental Impairments.

22. The Claimant has also been diagnosed with psychological impairments (Ex. C-1, Claimant testimony). The Claimant's psychological impairments have been classified differently by various physicians at various times. However, the Claimant's psychological impairments may fairly be characterized as consisting of depression (categorized under Social Security Administration (SSA) Impairment Listing No. 12.04), and Antisocial Personality Disorder (categorized under SSA Impairment Listing No. 12.08). *See* Ex. C-1.

23. The Claimant has been hit in the head with bottles, baseball bats, and crowbars (Ex. 7.147). On four of these occasions he lost consciousness. *Id.* He has mild memory problems. *Id.*

24. A medical report dated April 18, 2007 (Exs. 7.070, 7.149) states in relevant part as follows:

He has significant grief and loss issues. [O]ne brother was stabbed and died in his 30s. His mother died of a [heart attack] about the age of 45. His wife died of a brain tumor in 1987. [One of his children] died at 5 days old. [Another] brother [committed suicide] in his mid-30s.

25. The Claimant has been admitted to residential / in-patient psychiatric hospitals on at least four (4) occasions (Exs. 7.149, 7.067, 7.288, and 7.427). His first admittance was a 30-50 day involuntary commitment during the 1970s. (Ex. 7.149). His second admittance was in the 1980s (Ex. 7.067). His third admittance was to Providence Hospital on April 14, 2008 for severe depression and suicidal ideation (Ex. 7.288). His fourth admittance was to Alaska Psychiatric Institute on July 4, 2008 for severe depression and suicidal ideation (Ex. 7.427).

26. The Claimant has attained low Global Assessment of Functioning (GAF)⁷ scores on numerous occasions over the past six (6) years:

⁷ The "Global Assessment of Functioning" or "GAF" scale is a scale used to measure psychologic, social, and occupational functioning, ranging from 1 (lowest level of functioning) to 100 (highest level of functioning). *See* Mosby's Medical Dictionary, 8th Edition (Elsevier 2009).

According to the Diagnostic and Statistical Manual Of Mental Disorders: DSM-IV-TR (American Psychiatric Association, 2000) at pp. 32 - 37, the Global Assessment of Functioning (GAF) is a numeric scale (0 through 100) used by mental health clinicians and physicians to subjectively rate the social, occupational, and psychological functioning of adults (how well or adaptively one is meeting various problems-in-living). The DSM-IV-TR describes the significance of GAF scores as follows:

100-91 Superior functioning in a wide range of activities, life's problems never seem to get out of hand, is sought out by others because of his/her many positive qualities. No symptoms.

90-81 Absent or minimal symptoms (e.g., mild anxiety before an exam), good functioning in all areas, interested and involved in a wide range of activities, socially effective, generally satisfied with life, no more than everyday problems or concerns (e.g., an occasional argument with family members).

<u>Date: (m/d/y)</u>	<u>GAF score</u>	<u>Exhibit No.</u>
01-07-04	45	7.198
04-18-07	38	7.154
04-24-07	35	7.136
05-02-07	35	7.124
05-18-07	35	7.104
04-14-08	45	7.093
07-04-08	25	7.259, 7.267
07-15-08	40	7.257
07-16-08	50	7.082, 7.083
07-17-08	50	7.082, 7.083
07-24-08	21	7.066
07-09-09	45	7.054

27. As of June 29, 2009 the Claimant was diagnosed as suffering from “depression, not otherwise specified,” and cognitive disorder, not otherwise specified (Ex. 7.051).

28. A letter from [REDACTED], M.D. dated May 6, 2010 (Ex. C-1) states in relevant part:

[The Claimant] has been diagnosed with and suffers from the following disorders:

80-71 If symptoms are present, they are transient and expectable reactions to psycho-social stressors (e.g., difficulty concentrating after family argument); no more than slight impairment in social, occupational, or school functioning (e.g., temporarily falling behind in schoolwork).

70-61 Some mild symptoms (e.g., depressed mood and mild insomnia) OR some difficulty in social, occupational, or school functioning (e.g., occasional truancy, or theft within the household), but generally functioning pretty well, has some meaningful relationships.

60-51 Moderate symptoms (e.g., flat affect and circumstantial speech, occasional panic attacks) OR moderate difficulty in social, occupational, or school functioning (e.g., few friends, conflicts with peers or co-workers).

50-41 Serious symptoms (e.g., suicidal ideation, severe obsessional rituals, frequent shoplifting) OR any serious impairment in social, occupational, or school functioning (e.g., no friends, unable to keep a job).

40-31 Some impairment in reality testing or communication (e.g., speech is at times illogical, obscure, or irrelevant) OR major impairment in several areas, such as work or school, family relations, judgment, thinking, or mood (e.g., depressed man avoids friends, neglects family, and is unable to work; child frequently beats up younger children, is defiant at home, and is failing at school).

30-21 Behavior is considerably influenced by delusions or hallucinations OR serious impairment in communication or judgment (e.g., sometimes incoherent, acts grossly inappropriately, suicidal preoccupation) OR inability to function in almost all areas (e.g., stays in bed all day; no job, home or friends).

20-11 Some danger of hurting self or others (e.g., suicidal attempts without clear expectation of death; frequently violent; manic excitement) OR occasionally fails to maintain minimal personal hygiene . . . OR gross impairment in communication (e.g., largely incoherent or mute).

10-1 Persistent danger of severely hurting self or others (e.g., recurrent violence) OR persistent inability to maintain minimal personal hygiene OR serious suicidal act with clear expectation of death.

[a] Depression, since age 35, with history of auditory hallucinations in past and history of [attempted suicide] and hospitalization in January 2010.

[b] Antisocial Personality Disorder – since childhood.

[c] Poly-substance dependence – alcohol, opium, and cocaine abuse, since age 13, currently in remission, but with a history of multiple relapses.

. . . . In my opinion he is permanently incapable of sustained employment

IV. Case Procedural History.

29. On December 31, 2009 the Division’s Medical Reviewer denied the Claimants IA application based on the Claimant’s “failure to provide medical evidence supporting the allegation that he was unable to engage in any and all types of work due to DJD and diabetes” (Exs. 4.1, 7.001, 7.024).

30. On January 12, 2010 the Division mailed to the Claimant a notice stating that his application for Interim Assistance had been denied because, “[a]t this time, you do not meet the eligibility criteria for interim assistance” (Ex. 5).

31. On March 10, 2010 the Division’s Medical Reviewer again denied the Claimants IA application based on the following rationale (Ex. 7.445):

. . . [T]he medical evidence . . . did not substantiate [the Claimant’s] allegation that he was unable to engage in any and all types of work activities due to DJD and diabetes. In addition, [the Claimant] alleged disability due to mental illness [Medical records] indicated that [the Claimant] has a substance abuse induced mood disorder, which does not meet the criteria. Consequently, it appeared likely that [the Claimant] could engage in some type of light or sedentary work requiring the performance of simple routine repetitive tasks.

PRINCIPLES OF LAW

Burden of Proof; Standard of Proof.

This case involves an application for Interim Assistance benefits. When an application is denied, the applicant has the burden of proof ⁸ by a preponderance of the evidence. ⁹

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

⁹ Preponderance of the evidence is defined as “[e]vidence which is of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not.” *Black’s Law Dictionary* at 1064 (West Publishing, 5th Edition, 1979).

The Interim Assistance Program; Use of SSA Disability Criteria.

Interim Assistance is a benefit provided by the State of Alaska to Adult Public Assistance applicants while they are waiting for the Social Security Administration (SSA) to approve their Supplemental Security Income (SSI) applications. AS 47.25.255; 7 AAC 40.170(a) and (b). The criteria which must be satisfied in order to qualify for Interim Assistance are set forth in 7 AAC 40.180.

The criteria which must be satisfied in order to qualify for Interim Assistance under 7 AAC 40.180 are equivalent to, and incorporate by reference, the criteria which must be satisfied in order to qualify for Social Security Supplemental Security Income (SSI) disability benefits pursuant to 42 USC 1381 - 1383f and Title 20 of the Code of Federal Regulations (CFR). Pursuant to 20 CFR 404.1505(a), “disability” is defined as “the inability to do any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months.”

The Social Security Administration’s SSI disability analysis involves a sequential multistep evaluation. *Briscoe ex rel. Taylor v. Barnhart*, 425 F.3d 345, 351-52 (7th Cir. 2005). This evaluation considers (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); (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; (4) whether the claimant's residual functional capacity leaves him unable to perform his past relevant work; and (5) whether the claimant is unable to perform any other work existing in significant numbers in the national economy. 20 C.F.R. §§ 404.1520, 416.920. A finding of disability requires an affirmative answer at either step three or step five, above.

Substantial Gainful Activity

The first step in the analysis is to determine whether the applicant is performing “substantial gainful activity” as defined by the applicable Social Security regulations. “[S]ubstantial gainful activity” means “work that (a) involves doing significant and productive physical or mental duties, and (b) is done (or intended) for pay or profit.” 20 CFR 404.1510.

The regulations state that work “may be substantial even if it is done on a part time basis . . .”. 20 CFR 404.1572(a). If the applicant is engaged in “substantial gainful activity” based on these criteria, then he is not disabled. 20 CFR 416.920(a)(4)(i). If, however, the Claimant is not performing “substantial gainful activity” as defined by the above-quoted regulations, it is necessary to proceed to the next step of the disability analysis and determine whether the Claimant has a severe impairment.

Severity of Impairments – In General.

The second step in the analysis is to determine whether the applicant’s impairment is “severe” as defined by the applicable Social Security regulations. The Social Security Regulations define a severe impairment as one that *significantly* limits a person’s physical or mental ability to perform “basic work activities.” 20 C.F.R. 404.1521(a); 20 CFR 416.920(c); 20 CFR 416.921(a). 20 CFR 416.921(b) defines “basic work activities.” That regulation states in relevant part as follows:

When we talk about basic work activities, we mean the abilities and aptitudes necessary to do most jobs. Examples of these include - (1) physical functions such as walking, standing, sitting, lifting, pushing, pulling, reaching, carrying, or handling; (2) capacities for seeing, hearing, and speaking; (3) understanding, carrying out, and remembering simple instructions; (4) use of judgment; (5) responding appropriately to supervision, co-workers and usual work situations; and (6) dealing with changes in a routine work setting.

Evidence from acceptable medical sources is necessary to establish whether a claimant has a medically determinable impairment. 20 C.F.R. § 404.1513(a); see also 20 CFR 416.908. The claimant's own statement of symptoms alone will not suffice. 20 C.F.R. § 416.908. Acceptable medical sources include licensed physicians and psychologists. 20 C.F.R. § 404.1513(a). Substantial weight must be given to the opinion, diagnosis and medical evidence of these medical providers unless there is good cause to do otherwise. 20 C.F.R. § 416.1527(d); see also *Lewis v. Callahan*, 125 F.3d 1436, 1440 (11th Cir.1997).

If the impairment is not severe, the applicant is not disabled. 20 CFR 416.920(a)(4)(ii). If an applicant is severely impaired, then it is necessary to proceed to the next step of the disability analysis and determine whether the Claimant's impairment meets the 12 month durational requirement.

Duration.

The next step in the analysis is to determine whether the applicant's severe impairment has lasted for a continuous period of at least 12 months, or can be expected to last for a continuous period of at least twelve months.¹⁰ 20 CFR 416.909. If the severe impairment does not satisfy this duration requirement, the applicant is not disabled. 20 CFR 416.920(a)(4)(ii). If the severe impairment satisfies this duration requirement, then it is necessary to proceed to the next step of the disability analysis and determine whether the Claimant's impairment meets or equals the criteria set forth in the Social Security Administration's listing of impairments.

Severe Impairment That Meets or Equals a Listing.

The next step in the analysis is to determine whether the applicant's severe impairment meets or medically equals the listing of impairments contained in the Social Security regulations at 20 CFR Part 404, Subpart P, Appendix 1. The claimant bears the burden of establishing that his impairments satisfy the requirements of a listings impairment. *Tackett v. Apfel*, 180 F.3d 1094, 1098-1099 (9th Cir. 1999); *Sullivan v. Zebley*, 493 U.S. 521, 530-531, 110 S.Ct. 885, 107 L.Ed.2d 967 (1990).

A finding of disability may be based on the combined effect of multiple impairments which, if considered individually, would not be of the requisite severity. See 20 C.F.R. § 404.1520(a)(4)(ii); 20 C.F.R. § 416.923; 20 C.F.R. § 416.911; 20 C.F.R. § 416.906; and *Loza v. Apfel*, 219 F.3d 378, 393 (5th Cir. 2000).

¹⁰ Although the issue of duration is technically separate and distinct from the issue of severity, the Social Security Disability analysis, as set forth in federal regulation 20 CFR 416.920(a)(4)(ii), treats the durational requirement as part of the "step two" severity analysis.

If the applicant's severe impairment(s) meets or medically equals an applicable Listing as set forth in the SSA regulations located at 20 CFR Part 404, Subpart P, Appendix 1, then the applicant is deemed disabled and no further inquiry is required. 20 CFR 416.920(a)(4)(iii). However, if the severe impairment does not meet or medically equal the listing of impairments, then it is necessary to proceed to the next step in the analysis and determine whether the applicant can still perform his prior work.

Capability of Performing Previous Relevant Work

The next step is to determine whether the applicant's severe impairment prevents him from performing his previous relevant work. If the applicant is not prevented from performing his previous relevant work, the applicant is not disabled. 20 CFR 416.920(a)(4)(iv). If the applicant can no longer perform his previous work, it is then necessary to proceed to the final step in the analysis and determine whether the applicant can perform any other work.

Capability of Performing Other Work

The final step in the disability analysis is to determine whether the applicant is capable of performing any other work. Pursuant to 20 CFR 404.1545(a)(5)(ii), if it is determined that a claimant cannot perform his or her past relevant work, it is then necessary to decide whether the applicant "can make an adjustment to any other work" At this stage, however, the burden of proof shifts from the claimant to the agency. See 20 CFR 404.1562(c)(2); see also *Robinson v. Sullivan*, 956 F.2d 836, 839 (8th Cir. 1992); *Simmons v. Massanari*, 264 F.3d 751, 754-55 (8th Cir. 2001).

Whether an applicant is capable of performing other work 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).

ANALYSIS

Introduction; Basic Definition of Disability.

As an applicant for Interim Assistance benefits, the Claimant has the burden of proving, by a preponderance of the evidence, that his impairments satisfy the Social Security disability criteria (see Principles of Law, above). If they do, the Claimant is disabled by Social Security standards and is eligible for Interim Assistance benefits. If they do not, the Claimant is not disabled by Social Security standards and is not eligible for Interim Assistance benefits.

Pursuant to 20 CFR 404.1505(a), "disability" is defined as "the inability to do any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months."

I. Is the Claimant Performing Substantial Gainful Activity?

The first element of the disability analysis is whether the claimant is performing "any substantial gainful activity." Pursuant to 20 CFR 404.1510, "substantial gainful activity" means "work that (a)

involves doing significant and productive physical or mental duties, and (b) is done (or intended) for pay or profit.”

The Claimant is not currently working and has been unemployed for some time (Ex. 2.2, Claimant hearing testimony). The Division did not contest this assertion. Accordingly, the Claimant has met the first step of the Social Security disability analysis – he has proven, by a preponderance of the evidence, that he is not engaged in ”substantial gainful activity.” It is therefore necessary to proceed to the next step and to determine whether the Claimant is severely impaired.

II. Does the Claimant Have a Severe Impairment?

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). “Basic work activities” include “physical functions such as walking, standing, sitting, lifting.” 20 CFR 416.921(b).

A. The Claimant’s Diabetes (SSA Impairment Listing No. 9.08).

At issue is whether the Claimant’s diabetes significantly limits his ability to perform “basic work activities” (20 CFR 416.920(c)) such as “walking, standing, sitting, lifting” (20 CFR 416.921(b)). A letter from [REDACTED], M.D. dated May 17, 2010 (Ex. C-2) states in relevant part that “[the Claimant] has been diagnosed with and suffers from . . . poor control [of his] diabetes, and diabetic neuropathy, which is causing a lot of pain in his lower extremities when active or not.” The Claimant rates his pain level at 4-5 on a scale of 1-10 (Ex. 7.056).

In summary, the Claimant has significant, medically-documented pain in his feet and legs as a result of his diabetic neuropathy. This pain affects his ability to walk and stand. Accordingly, the Claimant has carried his burden and proven, by a preponderance of the evidence, that his diabetes (categorized under SSA Impairment Listing No. 9.08) constitutes a “severe impairment” as defined by 20 CFR § 404.1520(c), 20 CFR § 416.920(c).

B. The Claimant’s Degenerative Joint Disease (SSA Impairment Listing 1.00 et. seq.).

The Claimant’s medical records indicate that he has degenerative disc disease (DJD) affecting his right and left hands, right elbow, cervical spine, thoracic spine, and right knee. *See Findings of Fact at Paragraphs 19 – 29, above.* In order to avoid being found to be *not disabled* at this stage on the basis of his DJD, the Claimant must prove that his DJD is medically severe pursuant to 20 CFR 416.920(c). To do this, the Claimant must demonstrate that his DJD significantly limits his ability to perform basic work activities such as walking, standing, sitting, and lifting (20 CFR 416.921(b)).

The Claimant asserts that he has chronic pain in both feet and in his right knee (Ex. 7.056). The Claimant rates the pain level at 4-5 on a scale of 1-10. *Id.* The pain is worse when he walks. *Id.* These assertions are credible based on the Claimant’s medical records. *See Findings of Fact at Paragraphs 19 – 29, above.* In particular, a medical report dated May 4, 2007 (Ex. 7.152) states in relevant part that “veteran will require a job in which he can sit most of the time,” indicating that the nurse who authored that record believed that the Claimant has pain when walking or standing.

Accordingly, the Claimant has carried his burden and proven, by a preponderance of the evidence, that his degenerative joint disease (DJD) (categorized under SSA Impairment Listing No. 1.01) constitutes a “severe impairment” as defined by 20 CFR § 404.1520(c), 20 CFR § 416.920(c).

C. The Claimant’s Mental Impairments.

Based on the disposition of this case, it is not necessary to determine whether the Claimant’s mental impairments constitute a “severe impairment” as defined by 20 CFR §§ 404.1520(c), 416.920(c), and 416.921(b).

III. Do the Claimant’s Severe Impairments Meet the Durational Requirement?

The next step, pursuant to 20 CFR 416.909, is to decide whether or not the Claimant’s severe impairments (diabetes and DJD) have lasted, or can be expected to last, for a continuous period of at least 12 months. In this regard, it is important to note that the 12-month duration requirement of 20 CFR 416.909 is *retrospective* as well as *prospective*; it looks *back in time* as well as *forward in time* (i.e. the impairment “must have lasted or must be expected to last”).

The Claimant’s medical records indicate that he has suffered from diabetes for over five (5) years (see Findings of Fact at Paragraphs 6 – 10, above). Further, the Preliminary Examination for Interim Assistance (Form AD-2) completed by [REDACTED], M.D. on July 28, 2009 (Exs. 7.443 – 7.444, 7.019 – 7.020) indicates that the Claimant is not expected to recover from his diabetes. *Id.* Accordingly, the Claimant’s diabetes satisfies the durational requirement.

The Claimant’s medical records also indicate that he has suffered from DJD since 2004 (Ex. 7.206), or for over five (5) years now (see also Findings of Fact at Paragraphs 11 – 21, above). Further, the Preliminary Examination for Interim Assistance (Form AD-2) completed by [REDACTED], M.D. on July 28, 2009 (Exs. 7.443 – 7.444, 7.019 – 7.020) indicates that the Claimant is not expected to recover from his DJD. *Id.* Accordingly, the Claimant’s DJD also satisfies the durational requirement.

Finally, the record indicates that the Claimant has suffered from mental health issues since the 1970s (see Exs. 7.149, 7.067, 7.288, and 7.427; see also Findings of Fact at Paragraphs 23 – 29, above). Accordingly, the Claimant’s mental impairments also satisfy the durational requirement.

In summary, the Claimant has proven, by a preponderance of the evidence, that his diabetes, DJD, and mental impairments satisfy the 12-month durational requirement. The next step in the Social Security disability analysis requires a determination of whether the Claimant’s severe impairments meet the criteria of the Social Security Administration’s relevant listings of impairments.

IV. Do the Claimant’s Severe Impairments Meet or Medically Equal “the Listings?”

The next step is to decide whether or not the Claimant’s severe impairments meet or medically equal, (alone or in combination), the criteria of the Listing of Impairments contained in the Social Security regulations at 20 CFR Part 404, Subpart P, Appendix 1. The Claimant bears the burden of establishing, by a preponderance of the evidence, that his impairments satisfy the requirements of a “Listings” impairment. *Tackett v. Apfel*, 180 F.3d 1094, 1098-1099 (9th Cir.1999); *Sullivan v. Zebley*, 493 U.S. 521, 530-531, 110 S.Ct. 885, 107 L.Ed.2d 967 (1990); Principles of Law, above.

A. The Claimant's Diabetes.

The Social Security disability system classifies the Claimant's diabetes under the Endocrine System listing. 20 CFR Part 404, Subpart P, Appendix 1, § 9.08. Section 9.08's requirements for a finding of disability due to diabetes are as follows:

- A. Neuropathy demonstrated by significant and persistent disorganization of motor function in two extremities resulting in sustained disturbance of gross and dexterous movements, or gait and station (see 11.00C); or
- B. Acidosis¹¹ occurring at least on the average of once every 2 months documented by appropriate blood chemical tests (pH or pCO₂ or bicarbonate levels); or
- C. Retinitis proliferans; evaluate the visual impairment under the criteria in 2.02, 2.03, or 2.04.

A medical report dated June 18, 2009 (Ex. 7.057) indicates that the Claimant suffers from peripheral neuropathy in his feet. However, there are no medical reports in the record indicating that the Claimant has neuropathy to the degree required for a finding of disability under § 9.08(A).

The record also contains evidence that the Claimant routinely has very high blood sugar levels, and that these have not been well controlled. *See Findings of Fact at Paragraphs 6 – 9, above.* However, the record does not contain the specific test results for the specific blood tests (pH or pCO₂ or bicarbonate levels) which the regulations require for proof of diabetic ketoacidosis under § 9.08(B).

Finally, there are no medical reports in the record indicating that the Claimant has diabetes-related visual impairment to the degree required for a finding of disability under § 9.08(C).

Accordingly, the Claimant's diabetes does not meet the specific requirements of 20 CFR Part 404, Subpart P, Appendix 1, Section § 9.08. It is therefore necessary to proceed to the next step of the analysis and determine whether the Claimant's diabetes prevents him from performing his prior work.

B. The Claimant's Degenerative Joint Disease (DJD).

The Social Security disability system classifies the Claimant's DJD of the left knee under the musculoskeletal listing. 20 CFR Part 404, Subpart P, Appendix 1, § 1.02. Section 1.02 provides in relevant part as follows:

¹¹ Diabetic ketoacidosis (also referred to as DKA, ketoacidosis or simply acidosis) is a potentially life-threatening complication of diabetes mellitus. *See* Mayo Clinic website at <http://www.mayoclinic.com/print/diabetic-ketoacidosis/DS00674/DSECTION=all&METHOD=print> (date accessed July 19, 2010). It occurs when the body cannot use sugar (glucose) as a fuel source because the body has no insulin or not enough insulin, and fat is used instead (see Mayo Clinic article, above). Blood glucose levels rise (usually higher than 300 mg/dL) because the liver produces glucose to try to combat the problem. *Id.* However, the cells cannot pull in that glucose without insulin. *Id.* Due to the shortage of insulin, the body switches to burning fatty acids. *Id.* The byproducts of fat metabolism are ketones and acids. *Id.* These ketones and acids build up in the blood. *Id.* Thus, diabetic ketoacidosis is indicated by high ketone levels in the urine. *Id.* "The end stage of untreated diabetes . . . begins with diabetic ketoacidosis." *See* expert medical testimony in *Hennessey v. Secretary of Dept. of Health and Human Services*, 2009 WL 1709053 (Fed. Cl. 2009).

1.02 Major dysfunction of a joint(s) . . . Characterized by gross anatomical deformity (e.g., subluxation, contracture, bony or fibrous ankylosis, instability) and chronic joint pain and stiffness with signs of limitation of motion or other abnormal motion of the affected joint(s), and findings on appropriate medically acceptable imaging of joint space narrowing, bony destruction, or ankylosis of the affected joint(s). With: A. Involvement of one major peripheral weight-bearing joint (i.e., hip, knee, or ankle), resulting in inability to ambulate effectively, as defined in 1.00B2b

In order for the Claimant to meet or medically equal the criteria set out in the musculoskeletal listing, 20 CFR Part 404, Subpart P, Appendix 1, Section 1.06(B) requires the Claimant to demonstrate that he is unable “to ambulate effectively, as defined in 1.00B2b.” Section 1.00B2b states as follows:

(1) Definition. Inability to ambulate effectively means an extreme limitation of the ability to walk . . . Ineffective ambulation is defined generally as having insufficient lower extremity functioning (see 1.00J) to permit independent ambulation without the use of a hand-held assistive device(s) that limits the functioning of both upper extremities

(2) [E]xamples of ineffective ambulation include, but are not limited to, the inability to walk without the use of a walker, two crutches or two canes, the inability to walk a block at a reasonable pace on rough or uneven surfaces, the inability to use standard public transportation, the inability to carry out routine ambulatory activities, such as shopping and banking, and the inability to climb a few steps at a reasonable pace with the use of a single hand rail

The evidence in the record clearly indicates that walking is painful for the Claimant. However, the Claimant’s difficulties with walking do not rise to the level required by Sections 1.00B2b and 1.06B (quoted above) because the Claimant is able to walk without the use of a walker, two crutches, or two canes. Accordingly, the Claimant’s impairment does not meet the requirements of 20 CFR Pt. 404, Subpart P, Appendix 1, Section 1.06. It is therefore necessary to proceed to the next step of the analysis and determine whether the Claimant’s DJD prevents him from performing his prior work.

C. The Claimant’s Mental Impairments.

Based on the disposition of this case, it is not necessary to determine whether the Claimant’s mental impairments meet or medically equal the relevant criteria of the Listing of Impairments contained in the Social Security regulations at 20 CFR Part 404, Subpart P, Appendix 1.

V. Does the Claimant’s Diabetes and/or DJD Prevent Him from Performing His Previous Work?

The next step is to determine whether the Claimant’s diabetes and/or DJD prevent him from performing his previous relevant work. If the Claimant is not prevented from performing his previous relevant work, he is not disabled. 20 CFR 416.920(a)(4)(iv). If, however, the Claimant can no longer perform his past relevant work, it is necessary to proceed to the next step in the disability analysis and determine whether the Claimant can perform any other work.

The testimony of a vocational specialist is normally used in Social Security disability cases to determine whether or not a claimant can perform his or her past relevant work. See 20 CFR 404.1560(b)(2). Unfortunately, no such testimony exists in this case. The only evidence on this issue is the Claimant's hearing testimony and his statements to his doctors contained in his medical records.

The Claimant has worked as a crab fisherman, welder's helper, and construction laborer (Ex. 7.079). The Claimant's most recent work (within the last 13 years) was pipefitting, operating heavy equipment, and dirt work (Ex. 7.148). This was heavy, physical work (Claimant testimony).

The Claimant asserts that he can no longer perform heavy, physical work due to his impairments. *Id.* Based on the medical evidence, the Claimant's testimony regarding his physical limitations is credible. Further, the Division never asserted that the Claimant *could* still perform his prior relevant work; the Division asserted only that the Claimant could still perform *light or sedentary work* (Ex. 7.445).

Accordingly, the Claimant has carried his burden and proven, by a preponderance of the evidence, that he can no longer perform his past relevant work. In order to determine whether the Claimant's diabetes and/or DJD is disabling, it is now necessary to proceed to the final step in the Social Security disability analysis: determining whether the Claimant can perform any work.

VI. Does The Claimant's Diabetes and/or DJD Prevent Him From Performing Any Work?

Pursuant to 20 CFR 404.1545(a)(5)(ii), if it is determined that a claimant cannot perform his or her past relevant work, it is then necessary to decide whether the applicant "can make an adjustment to any other work that exists in the national economy" or, in other words, to determine whether the applicant is capable of performing other jobs.

In many circumstances a decision on whether a claimant is disabled can be made using the Social Security Administration's medical-vocational guidelines (located at 20 CFR, Part 404, Subpart P, Appendix 2). These guidelines, known as "the Grids," seek to make the disability determination process more uniform by mandating a given result when certain factual prerequisites are satisfied.

Assuming for the sake of argument that the Claimant can still perform sedentary work, Rule 201 would apply. The specific sub-rule that applies is Rule 201.06. According to that rule, where (as here) a claimant is age 55 or older, is a high school graduate / GED holder, and has performed skilled or semi-skilled work (but those skills are not transferable), the claimant is deemed to be disabled.

Alternatively, assuming for the sake of argument that the Claimant can still perform light work, Rule 202 would apply. The specific sub-rule that applies is Rule 202.06. According to that rule, where (as here) a claimant is age 55 or older, is a high school graduate / GED holder, and has performed skilled or semi-skilled work (but those skills are not transferable), the claimant is deemed to be disabled.

In summary, "the Grids" compel a finding that the Claimant's diabetes and/or DJD are disabling by SSI standards. The Claimant is therefore deemed disabled according to the Social Security regulations and relevant case law. 20 CFR 416.920(a)(4)(v).

CONCLUSIONS OF LAW

1. The Claimant did not carry his burden and failed to prove, by a preponderance of the evidence:
 - a. That his diabetes meets or equals the requirements for Endocrine System Impairments located at 20 CFR Part 404, Subpart P, Appendix 1, § 9.08(B), and that he is disabled on this basis alone pursuant to 20 CFR 416.920(a)(4)(iii).
 - b. That his degenerative joint disease (DJD) meets or equals the requirements for Musculoskeletal Impairments located at 20 CFR Part 404, Subpart P, Appendix 1, Sections 1.02 and 1.04, and that he is disabled on this basis alone pursuant to 20 CFR 416.920(a)(4)(iii).
2. The Claimant carried his burden and proved, by a preponderance of the evidence, that:
 - a. He is not currently engaged in substantial gainful activity as defined by 20 CFR 404.1510.
 - b. His diabetes (SSA Impairment Listing No. 9.08) and his degenerative joint disease (DJD) (SSA Impairment Listing Nos. 1.02 and 1.04) constitute medically severe impairments as defined by 20 CFR 416.920(c) and 20 CFR 416.921(b).
 - c. His diabetes (SSA Impairment Listing No. 9.08) and his degenerative joint disease (DJD) (SSA Impairment Listing Nos. 1.02 and 1.04) have lasted or can be expected to last for 12 months or longer, and the Claimant therefore satisfies the twelve-month durational requirement of 20 CFR 416.909 and 20 CFR 416.920(a)(4)(ii).
 - d. The Claimant can no longer perform his prior work as a result of his diabetes and/or his degenerative joint disease (DJD) (SSA Impairment Listing Nos. 9.08, 1.02, and 1.04).
3. Because the Claimant can no longer perform his prior work, he is deemed disabled pursuant to the Social Security Administration's medical-vocational guidelines ("the Grids") (located at 20 CFR, Part 404, Subpart P, Appendix 2).
4. The Division was therefore not correct when on March 26, 2010 it denied the Claimant's application for Interim Assistance benefits dated July 9, 2009.

DECISION

The Division was not correct when on March 26, 2010 it denied the Claimant's application for Interim Assistance benefits dated July 9, 2009.

APPEAL RIGHTS

If for any reason the Claimant is not satisfied with this decision, the Claimant has the right to appeal by requesting a review by the Director. 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 2nd day of August, 2010.

(signed)

Jay Durych
Hearing Authority

CERTIFICATE OF SERVICE

I certify that on this 2nd day of August, 2010 true and correct copies of the foregoing document were sent to the Claimant via USPS mail, and to the remainder of the service list by e-mail, as follows:

Claimant – Certified Mail, Return Receipt Requested
[REDACTED], DPA Hearing Representative

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

(signed)

J. Albert Levitre, Jr.
Law Office Assistant I