

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

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

In the Matter of:)
)
 [REDACTED],) OHA Case No. 10-FH-121
)
 Claimant.) DPA Case No. [REDACTED]
)
 _____)

FAIR HEARING DECISION

STATEMENT OF THE CASE

[REDACTED] (Claimant) applied for Interim Assistance (IA) benefits on January 12, 2010 (Ex. 1). The State of Alaska Division of Public Assistance (DPA or Division) denied the Claimant's application on April 20, 2010 (Ex. 5). The Claimant requested a fair hearing contesting the denial on April 28, 2010 (Ex. 6.1).

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

Hearings were held as scheduled on May 20, 2010 and June 23, 2010 before Hearing Examiner Jay Durych. The Claimant participated by telephone at each hearing, represented himself, and testified on his own behalf. Public Assistance Analyst [REDACTED] appeared in person at each hearing to represent and testify on behalf of the Division. All testimony and exhibits submitted by the parties were admitted into evidence. At the end of the second hearing the record was closed and the case was submitted for decision.

ISSUE

The Claimant originally applied for Interim Assistance (IA) benefits based on a *Preliminary Examination for Interim Assistance* form dated February 9, 2010 in which Dr. [REDACTED], M.D. diagnosed the Claimant with osteoarthritis of the hip and hypertension (Exs. 4.3 – 4.4). However, at the hearings of May 20, 2010 and June 23, 2010 the Claimant also asserted the additional impairments of left knee pain and carpal tunnel syndrome in his hands / wrists (Claimant testimony).

The only impairments asserted by the Claimant at the time of the Division's initial processing of his application were right hip pain and hypertension (*See* Exs. 4.2 – 4.4). Further, the medical records

submitted to this Office do not address the Claimant's alleged left knee pain or carpal tunnel syndrome, but rather focus on his right hip pain and hypertension. Accordingly, the Claimant's left knee pain and/or carpal tunnel syndrome cannot be addressed in this decision. Therefore, the issue to be determined in this decision is:

Was the Division correct when, on April 20, 2010, it denied the Claimant's application for Interim Assistance benefits dated January 12, 2010 on the grounds that the Claimant's right hip pain and hypertension ¹ were not disabling?

SUMMARY OF DECISION

The Claimant is not currently working. His degenerative joint disease (DJD) of the right hip qualifies as a "severe impairment" based on the applicable regulations. His DJD also satisfies the durational requirement. The Claimant's DJD does not satisfy the specific criteria of the Social Security Administration's applicable Listing of Impairments. The Claimant's DJD does, however, prevent the Claimant from performing his prior physical work, and the Division failed to prove that the Claimant can still perform sedentary work. Accordingly, the Division was not correct when on April 20, 2010 it denied the Claimant's application for Interim Assistance benefits dated January 12, 2010.

FINDINGS OF FACT ²

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

I. Relevant Procedural Facts.

1. The Claimant was born on [REDACTED], 1961 (Ex. 4.2) and was 48 years old at the time of the hearings held in this case (Claimant hearing testimony).
2. The Claimant applied for Interim Assistance (IA) benefits on January 12, 2010 (Ex. 1). The Claimant had previously applied to the United States Social Security Administration (SSA) for Supplemental Security Income (SSI) benefits (Claimant testimony). His SSI application was initially denied by SSA on April 9, 2010 (Ex. 5). However, the Claimant is represented by counsel with regard to his application for SSI, and his counsel appealed the SSA's initial denial of his application (Claimant testimony). The Claimant is currently awaiting his hearing with SSA. *Id.*
3. On February 9, 2010 Dr. [REDACTED], M.D. completed a *Preliminary Examination for Interim Assistance* form on behalf of the Claimant (Exs. 4.3 – 4.4). That form states in relevant part that the Claimant's diagnosis is osteoarthritis of the hip and hypertension, and that the Claimant could be expected "to recover well *if hip replacement surgery could be obtained*" [Emphasis added].

¹ Because it was possible to decide this case based on the Claimant's degenerative joint disease of the right hip (with associated pain), it was not necessary to determine whether the Claimant's hypertension is also disabling.

² All of the medical reports in the record were reviewed and considered during the preparation of this decision. However, some of the medical records were cumulative, and some were less relevant than others. Accordingly, not every exhibit is specifically referenced in this decision.

4. An Interim Assistance Medical Review Denial Form completed by DPA Medical Reviewer [REDACTED] (RN, BSN, MPA) dated April 19, 2010 (Ex. 4.2) states in relevant part as follows:

Denied based on the medical evidence which did not substantiate the client's allegation that he was unable to engage in any and all types of work activities due to osteoarthritis of the hip and hypertension [The Claimant's medical records] do not detail [the Claimant's] functional limitations. Consequently, it is impossible to say that the client's impairment is severe enough to prevent him from engaging in self care. As a result, it is likely that [the Claimant] could engage in some type of sedentary work.

5. The Division denied the Claimant's IA application on April 20, 2010 (Ex. 5).

II. The Claimant's Physical Impairments.

6. A diagnostic imaging report dated December 15, 2009 (Ex. 4.12) states in relevant part that the Claimant has "[s]evere degenerative changes of the right hip related to abnormal configuration of the femoral head, likely related to the patient's history of Perthes disease."

7. A medical report by Dr. [REDACTED], D.O. dated December 15, 2009 (Exs. 4.10 – 4.11) states in relevant part as follows:

Chief Complaint: Right hip Pain.

History: [The Claimant] reports a history of Legg-Calve-Perthes disease. He has had right hip pain for years but it has increased over the past couple of months. It is in the lateral hip and anterior thigh but now over the past couple of weeks he has had pain in the medial thigh. For several months he has had intermittent numbness of his feet

* * * * *

Exam: Range of motion of the hip causes pain on abduction and flexion

Radiograph: X-ray of the right hip per the radiologist shows severe degenerative changes of the right hip related to abnormal configuration of the femoral head likely related to the patient's history of Legg-Calve-Perthes disease

8. A medical report by Dr. [REDACTED], M.D. dated December 18, 2009 (Exs. 4.7 – 4.9 and 4.25 – 4.27) states in relevant part as follows:

Chief Complaint: Hip Pain.

History of the Present Illness: [The Claimant] returns . . . complaining of pain in his right hip He . . . states the pain medication prescribed doesn't help much. He has had pain in the lateral hip and anterior thigh which has gotten worse over the last several months and now [he] has pain in the medial thigh as well. He has intermittent numbness of both feet

Past Medical History: Legg–Calve–Perthes disease and was on crutches for 3 years from the ages of 4 – 7

Current Medications: Vasotec 20 mg. daily, oxycodone 5/325 mg. (he took the last of those yesterday and said they did not help his pain much)

* * * * *

Social History: [G]radually worsening pain in his right hip has caused him to be unable to work for the last several months.

* * * * *

Objective: Legs: The right heel is 1½ inches short to the left. The patient has significant pain on abduction and flexion and has decreased range of motion on abduction and adduction and flexion

Ancillary Studies: None today. Radiographs were reviewed. These show severe degenerative changes about the right hip with abnormal configuration of the femoral head felt likely to be related to his history of Legg-Calve-Perthes disease with secondary remodeling of the acetabulum.

Consultation: Dr. [REDACTED] . . . after reviewing his x-rays pointed out that [due to] the patient’s extensive disease . . . a total hip replacement might need to be done *I think the patient is genuine in his pain* I also wrote a prescription for amitriptyline . . . for chronic pain control [Emphasis added].

Discharge Diagnosis: (1) Chronic pain right hip with acute exacerbation. (2) Hypertension.

9. A medical report by Dr. [REDACTED], M.D. dated January 4, 2010 (Exs. 4.20 – 4.21) states in relevant part as follows:

. . . . E.R. records were reviewed and reflect significant degenerative changes in his right hip. I impressed upon [the Claimant] the importance of . . . a surgical intervention . . . as this will be the definitive solution. He may benefit from intra-articular injections in the meantime, as finances [for] surgery are not readily available Will attempt to gain pain control with tramadol and hopefully injection therapy

10. A medical report by Dr. [REDACTED], M.D. dated January 11, 2010 (Exs. 4.5 – 4.6, 4.23 – 4.24) states in relevant part as follows:

History: [The Claimant] returns to the emergency department after two prior visits for persistent pain in the right hip He was seen on 12/15 and 12/18 with hip films remarkable for severe degeneration of the right hip associated with abnormal configuration of the femoral head without fractures The patient states he is unemployed at this time due to his hip pain

* * * * *

Exam: [The Claimant] received indomethacin prescription The patient was told that . . . clearly pain medications are inadequate and that surgery is indicated

11. A medical report by Dr. [REDACTED], M.D. dated January 19, 2010 (Exs. 4.18 – 4.19) states in relevant part as follows:

History of Present Illness: Hip/Thigh: He presents for two week follow-up on hip pain. He tried the tramadol with no effect. He has been taking OTC ibuprofen He was unable to see orthopedics due to cost.

* * * * *

Current Medications: Oxycodone . . . 1 tablet every 4-6 hours . . . Tramadol . . . Lisinopril

12. A medical report by Dr. [REDACTED], M.D. dated February 9, 2010 (Exs. 4.16 – 4.17) states in relevant part as follows:

History of Present Illness: Hip/Thigh: He presents for follow-up on hip pain. He has . . . signed a pain contract. He has been compliant with the oxycodone therapy and states that it does help his pain. The 10mg dose is not quite sufficient to relieve most of his pain

III. The Claimant's Functional Abilities and Limitations.

13. When the Claimant was in kindergarten he was diagnosed with Legg-Calve-Perthes disease,³ which affected his right hip (Claimant testimony). He had to use crutches from that point until the 3rd grade. *Id.* Since then he has always walked with a limp. *Id.*

14. The Claimant was in a motorcycle accident circa 2002 and injured his left knee (Claimant testimony). It took him about two years before he could walk on that knee again. *Id.*

15. The Claimant's hip pain has gotten worse over the last five years, and particularly since August 2009 (Claimant testimony). The Claimant does not think he could walk a mile without stopping. *Id.* He occasionally uses a cane (once or twice a week) when his hip pain is at its worst. *Id.* He can stand

³ Legg-Calve-Perthes (LEG-kahl-VAY-PEER-tuz) disease is a childhood condition which usually occurs in boys 2 - 12 years old. See Mayo Clinic website at <http://www.mayoclinic.com/health/legg-calve-perthes-disease/DS00654> (date accessed August 11, 2010). Legg-Calve-Perthes disease typically affects one hip, but sometimes it develops in both hips. *Id.* There are many theories about the cause of this disease, but little is actually known. See MedLine Plus online medical dictionary at <http://www.nlm.nih.gov/medlineplus/ency/article /001264.htm>, a service of the U.S. National Library of Medicine and the National Institutes of Health (date accessed August 11, 2010). The disease is associated with an inadequate blood supply to part of the hip joint. *Id.* Without enough blood to the area, the bone dies. *Id.* The ball of the hip collapses and becomes flat. *Id.* The blood supply returns over several months, bringing in new bone cells. *Id.* The new cells gradually replace the dead bone over 2 - 3 years. *Id.* Symptoms or side-effects of the disease include shortening of the affected leg, knee pain, stiffness and limited range of motion in the affected joint, and osteoarthritis / DJD later in life. *Id.*

for about 20 minutes before he has to sit down. *Id.* He can usually sit for about 30 minutes before it becomes too painful. *Id.* Sometimes his hip does not hurt when he is sitting, but sometimes it hurts no matter what position he is in. *Id.* Lifting is somewhat difficult for the Claimant because his legs are shaky due to the hip pain. *Id.* However, he can lift 5-10 pounds repetitiously, and believes that he could probably lift “100 pounds once or twice if I had to.” *Id.*

16. The Claimant can still take care of himself, but it is getting more difficult (Claimant testimony). For example, it takes him quite a while to put on his right sock because his right hip problem prevents his right leg from bending. *Id.*

17. Since January 2010 the Claimant sees a doctor about every two months. *Id.* Dr. [REDACTED] is his regular doctor. *Id.* At the time of the June 23, 2010 hearing the Claimant was taking a blood pressure medication once a day and oxycodone (for pain) three times a day. *Id.* The oxycodone helps but does not eliminate the pain completely; he hurts every day. *Id.*

IV. The Claimant’s Educational and Vocational History.

18. The Claimant is a high school graduate but has no postsecondary education or training (Claimant hearing testimony). He can understand, speak, and read English, but he cannot spell very well. *Id.*

19. The Claimant worked on farm fences while in high school (Claimant hearing testimony). He has since worked various farm jobs. *Id.* He once worked in a large beef processing plant. *Id.* He has worked numerous factory jobs. *Id.* He once worked for Coca-Cola. *Id.* He has operated heavy equipment. *Id.* He has worked on oil wells and oil pipelines. *Id.* His most recent work was on the docks in fish canneries / fish packing plants in Alaska. *Id.* All of his work was fairly physical work. *Id.* The Claimant can no longer perform that type of work because of his hip problem. *Id.*

20. The Claimant last worked from approximately the middle of June to early August in 2009 (Claimant hearing testimony). He worked about 40 hours per week during this period. *Id.* After August 2009 he could no longer stand on his bad leg long enough to work. *Id.* He is not currently working. *Id.* His hip pain is slowly but continuously getting worse.

PRINCIPLES OF LAW

Burden of Proof; Standard of Proof.

This case involves an initial application for Interim Assistance benefits. When an application is denied, the applicant has the burden of proof⁴ by a preponderance of the evidence.⁵

⁴ “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).

⁵ 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 page 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) application. 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 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:

[By] basic work activities, we mean the abilities and aptitudes necessary to do most jobs. Examples [are] (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. Acceptable medical sources include licensed physicians and psychologists. 20 C.F.R. § 404.1513(a). The claimant's own statement of symptoms alone will not suffice. 20 C.F.R. § 416.908.

If the impairment is not severe, the applicant is not disabled. 20 CFR 416.920(a)(4)(ii). If an applicant is severely impaired, 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 already lasted for a continuous period of at least twelve (12) months, or can be expected to last for a continuous period of at least twelve (12) months.⁶ 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 specific criteria set forth in the Social Security Administration's Listing of Impairments.

Severe Impairment That Meets or Equals The 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 located 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). To meet a listing, an impairment must meet *all* of the listing's specified criteria. *Sullivan*, 493 U.S. at 530.

An impairment is medically equivalent to a listed impairment "if it is at least equal in severity and duration to the criteria of any listed impairment." 20 CFR 416.926(a). Medical equivalence must be based on medical findings. *Sullivan*, 493 U.S. at 531 ("a claimant . . . must present medical findings equal in severity to *all* the criteria for the one most similar listed impairment"). Responsibility for determining medical equivalence rests with the hearing officer. 20 CFR 926(e).

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 CFR § 404.1520(a)(4)(ii); 20 CFR § 416.923; 20 CFR § 416.911; 20 CFR § 416.906; *Loza v. Apfel*, 219 F.3d 378 (5th Cir. 2000).

⁶ 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 meets or medically equals the listing of impairments contained in the Social Security 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 perform his or her prior relevant work.

Capability of Performing Previous Relevant Work.

The next step is to determine whether the applicant's impairment prevents him or her from performing previous relevant work. If the applicant is not prevented from performing his or her previous relevant work, the applicant is not disabled. 20 CFR 416.920(a)(4)(iv). Otherwise, it is necessary to proceed to the next step in the analysis and determine whether the applicant can perform any other work.

Capability of Performing 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 (i.e. to determine whether the applicant is capable of performing any other jobs. 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). If the applicant is not capable of performing other work, he or she is disabled. 20 CFR 416.920(a)(4)(v).

ANALYSIS

Introduction.

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.⁷

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."

At the hearing the Claimant testified that he was not currently working. This testimony was not disputed by the Division. Accordingly, the Claimant has carried his burden and has proven, by a preponderance of the evidence, that he is not performing substantial gainful activity as defined by 20 CFR 404.1510.

⁷ As noted in footnote 1, above, because it was possible to decide this case based on the Claimant's degenerative joint disease of the right hip (with associated pain) alone, it is not necessary to determine whether the Claimant's hypertension is also disabling.

II. Does The Claimant Have a Severe Impairment?

In order to avoid being found to be *not disabled* at this stage, the Claimant must prove that at least one of his impairments is “medically severe” pursuant to 20 CFR 416.920(c). A “severe impairment” is one that “significantly limits [a person’s] physical or mental ability to do basic work activities.” 20 CFR §§ 404.1520(c) and 416.920(c).⁸

The Claimant testified that he does not think he could walk a mile without stopping (Claimant testimony). He occasionally uses a cane (once or twice a week) when his hip pain is at its worst. *Id.* He can stand for about 20 minutes before he has to sit down. *Id.* He can usually sit for about 30 minutes before it becomes too painful. *Id.* Sometimes his hip does not hurt when he is sitting, but sometimes it hurts no matter what position he is in. *Id.* Lifting is somewhat difficult for the Claimant because his legs are shaky due to the hip pain. *Id.* However, he can lift 5-10 pounds repetitiously, and believes that he could probably lift “100 pounds once or twice if I had to.” *Id.*

The medical records support the Claimant’s testimony that his ability to perform basic work activities such as walking, standing, sitting, and lifting (20 CFR 416.921(b)) is limited because of his DJD of the right hip and the pain associated therewith. *See* Findings of Fact at Paragraphs 6 – 12, above.

Substantial weight must be given to the opinion, diagnosis and medical evidence of a medical provider 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). There is no evidence in the record to indicate that the Claimant’s most recent medical reports are biased or otherwise untrustworthy. In the absence of recent contradicting medical evidence, these medical reports must be accepted as credible.

Accordingly, the Claimant has carried his burden and proven, by a preponderance of the evidence, that his degenerative joint disease (DJD) of the right hip (categorized under SSA Impairment Listing No. 1.02) constitutes a “severe impairment” as defined by 20 CFR § 404.1520(c), 20 CFR § 416.920(c), and the judicial decisions interpreting those regulations. It is therefore necessary to proceed to the next step of the Social Security disability analysis and to determine whether the Claimant's impairment satisfies the twelve month durational requirement.

III. Does the Claimant Satisfy The Twelve Month Durational Requirement?

The next step is to decide whether or not the Claimant’s severe impairment has lasted, or can be expected to last, for a continuous period of at least 12 months (20 CFR 416.909). If the severe impairment does not satisfy this duration requirement, the applicant is deemed not to be disabled. 20 CFR 416.920(a)(4)(ii).

⁸ 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.

The Claimant testified that he has had hip pain for over five years (Claimant testimony). In addition, the earliest medical report in the record (a diagnostic imaging report dated December 15, 2009 - Ex. 4.12) states that, as of that date, the Claimant already had “[s]evere degenerative changes of the right hip” by that time (emphasis added). Thus, the medical evidence supports the Claimant’s testimony that he has suffered from degenerative joint disease of his right hip for years. Finally, the Claimant’s testimony on this issue was not contradicted by the Division. Accordingly, the Claimant satisfies the 12 month durational requirement. It is therefore necessary to proceed to the next step in the Social Security disability analysis and to determine whether the Claimant’s DJD “meets the Listings.”

IV. Does the Claimant’s Impairment Meet or Medically Equal the Requirements of “the Listings?”

The next step is to decide whether or not the Claimant’s severe impairment (hip pain) meets or medically equals the criteria of the Listing of Impairments contained in the Social Security regulations at 20 CFR Part 404, Subpart P, Appendix 1. The Claimant’s impairment can best be described as degenerative joint disease (DJD) of the right hip. The Social Security disability system classifies the Claimant’s degenerative joint disease of the right hip under the musculoskeletal listing. 20 CFR Part 404, Subpart P, Appendix 1, § 1.02. Section 1.02 provides in relevant part as follows:

1.02 Major dysfunction of a joint(s) (due to any cause): 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

The medical evidence pertaining to the Claimant’s DJD of the right hip may or may not satisfy the criteria contained in the first 6 lines of Section 1.02; this is difficult to determine without medical expertise. However, the Claimant’s functional limitations are not severe enough to satisfy the requirements of Section 1.02(A) (quoted above). Section 1.02(A) requires that the joint problem result in an “inability to ambulate effectively, as defined in [Section] 1.00B2b.” That regulation (20 CFR Part 404, Subpart P, Appendix 1, §§ 1.00(B)(2)(b)) gives the inability to walk without a walker, or two crutches, or two canes, as an example of an inability to ambulate effectively. *Id.* at Section 1.00(B)(2)(b)(2).

The Claimant’s ability to walk is clearly limited. *See* Findings of Fact at Paragraphs 13, 14, 15, and 20, above. However, his ability to walk has not yet deteriorated to the point where he must use two canes, two crutches, or a walker. Accordingly, the Claimant does not have “an extreme limitation of the ability to walk” as defined by 20 CFR Part 404, Subpart P, Appendix 1, §§ 1.00(B)(2)(b).

Because the Claimant has not established “an extreme limitation of the ability to walk,” he does not meet or medically equal the applicable criteria for the musculoskeletal category of the Listing of Impairments. It is therefore necessary to proceed to the next step in the disability analysis and to determine whether the Claimant’s impairment prevents him from performing his prior work.

V. Does The Claimant's Impairment (DJD) Prevent Him From Performing His Previous Work?

The next step is to determine whether the Claimant's severe impairment (DJD) prevents him from performing his previous relevant work. If the Claimant is not prevented from performing his previous relevant work, then he is not disabled. 20 CFR 416.920(a)(4)(iv). If, however, the Claimant can no longer perform his past work, it is then necessary to proceed to the final 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 still 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 own hearing testimony.

All of the Claimant's prior work was fairly physical work (see Findings of Fact at Paragraph 19, above). The Claimant testified that he can no longer perform that type of work because of his hip problem. *Id.* This assertion is credible based on the functional limitations described by the Claimant (see Findings of Fact at Paragraphs 13, 14, 15, and 20, above). In turn, the Claimant's testimony regarding his functional limitations is credible based on the medical evidence confirming the severity of his DJD (see Findings of Fact at Paragraphs 6 - 12, above). Finally, the Division never asserted that the Claimant *could* still perform his prior work; the Division asserts only that the Claimant can still perform *sedentary work* (see Findings of Fact at Paragraph 4, above).

Accordingly, the Claimant has carried his burden and proven, by a preponderance of the evidence, that he can no longer perform his prior physical work. It is therefore necessary to proceed to the final step in the Social Security disability analysis and to determine whether the Claimant can perform any work.

VI. Do The Claimant's Impairments 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.

A. The Burden of Proof Shifts to the Division.

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). To meet this burden, the agency must show: (1) that the claimant's impairment still permits certain types of activity necessary for other occupations and that the claimant's experience is transferable to other work; and (2) that specific types of jobs exist in the national economy which are suitable for a claimant with these capabilities and skills. *Decker v. Harris*, 647 F.2d 291, 294 (2nd Cir. 1981). It is not the claimant's burden to produce or develop vocational evidence at step five. *See Thompson v. Sullivan*, 987 F.2d 1482, 1491 (10th Cir. 1993).

B. "The Grids" Can Be Applied in Some, But Not All, Cases.

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,” 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.” *Poole v. Astrue*, 2010 WL 2231873 (W. D. Ark. 2010).

“If [a claimant's] impairments are exertional (affecting the ability to perform physical labor), the Commissioner [in this case the Division] may carry [its] burden by referring to the medical-vocational guidelines or ‘grids,’ which 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.” *Holley v. Massanari*, 253 F.3d 1088, 1093 (8th Cir.2001).

If the Claimant’s impairment was purely exertional, Rule 201 of “the Grids” would apply (“ Maximum sustained work capability limited to sedentary work as a result of severe medically determinable impairment(s)”). The specific sub-rule that would apply is Rule 201.21. According to that rule, where (as here) a claimant is age 45 - 49, 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 *not* to be disabled.

“The Grids” cannot, however, be mechanically applied in all cases. *See Asher v. Bowen*, 837 F.2d 825, 827-28 (8th Cir.1988). Specifically, the Grids cannot be applied where a person suffers from *nonexertional impairments* that significantly impact that person's ability to perform the full range of work (such as sedentary or light work). *See Foreman v. Callahan*, 122 F.3d 24, 25 (8th Cir.1997). Nonexertional limitations are those that affect a claimant's ability to meet the demands of jobs *other than* the strength demands, that is, demands other than sitting, walking, lifting, carrying, pushing or pulling. *See Burnside v. Apfel*, 223 F.3d 840, 844 (8th Cir. 2000), citing 20 C.F.R. § 404.1569(a).⁹

In this case, the Claimant has testified that his DJD of the right hip causes him significant pain. *See Findings of Fact at Paragraphs 15, 16, 17, and 20, above.* The medical evidence supports the Claimant’s testimony. *See* medical report dated December 18, 2009 (Exs. 4.7 – 4.9 and 4.25 – 4.27). Pain has long been considered a nonexertional impairment. *E.g., Baker v. Barnhart*, 457 F.3d 882, 894 (8th Cir.2006); *Haley v. Massanari*; 258 F.3d 742, 747 (8th Cir.2001); *Cline v. Sullivan*, 939 F.2d 560, 565 (8th Cir.1991); *Prince v. Bowen*, 894 F.2d 283, 287 (8th Cir.1990). Accordingly, the Claimant’s pain qualifies as a nonexertional impairment. For this reason, the Claimant’s case cannot be decided using “the Grids.”

C. Because “The Grids” Cannot Be Applied Here, The Division Must Present Vocational Evidence to Carry Its Burden.

When a claimant is limited by a nonexertional impairment, such as pain or mental incapacity, the SSA and the DPA may not rely on “the Grids” and must instead present testimony from a vocational expert to support a determination of no disability. *See Haley v. Massanari*, 258 F.3d 742, 747-48 (8th Cir.2001); *Vincent v. Apfel*, 264 F.3d 767, 769 (8th Cir.2001); *Baker v. Barnhart*, 457 F.3d 882, 894-95 (8th Cir.2006); *see also Ellis v. Barnhart*, 392 F.3d 988, 996 (8th Cir.2005); Social Security Ruling 83-47C, 1983 WL 31276 (S.S.A.1983) (“[I]f the nonexertional limitation restricts a claimant's

⁹ “Nonexertional capacity considers any work-related limitations and restrictions that are not exertional. .” SSR 96-9p, 1996 WL 374185 at 5 (Soc. Sec. Admin. July 2, 1996). Therefore, a nonexertional limitation is an impairment-caused limitation affecting such capacities as mental abilities, vision, hearing, speech, climbing, balancing, stooping, kneeling, crouching, crawling, reaching, handling, fingering, and feeling. *Id.* Environmental restrictions are also considered to be nonexertional. *Id.*

performance of a full range of work at the appropriate [RFC] level, nonexertional limitations must be taken into account and a nonguideline determination made.”).

The Division asserts that the Claimant can still perform sedentary work (Ex. 4.2). However, the Division presented no evidence that the Claimant's impairment still permits the types of activity necessary for other occupations; that the Claimant's experience is transferable to other work; or that specific types of jobs exist in the national economy which are suitable for the Claimant. Accordingly, the Division has failed to present the evidence necessary to meet its burden of proof at this step of the disability analysis (see regulation and cases cited in preceding paragraph).¹⁰ Because the Division failed to prove that the Claimant can still perform sedentary work, the Claimant is deemed to be disabled.

CONCLUSIONS OF LAW

1. 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 physical impairment, degenerative joint disease (DJD) of the right hip (categorized under SSA Impairment Listing No. 1.02), constitutes a “severe impairment” as defined by 20 CFR §§ 404.1520(c), 416.920(c), and 416.921(b).
 - c. His impairment has 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).
2. The Claimant failed to prove, by a preponderance of the evidence, that his impairment meets or medically equals the requirements of the Social Security Administration’s applicable Listing of Impairments (20 CFR Part 404, Subpart P, Appendix 1, § 1.02).
3. The Claimant carried his burden and proved, by a preponderance of the evidence, that he is not capable of performing his past relevant work (20 CFR 416.920).
4. The Division failed to carry its burden and did not prove, by a preponderance of the evidence, that the Claimant is capable of performing sedentary or any other work (20 CFR 404.1545).
5. The Division was therefore not correct when on April 20, 2010 it denied the Claimant’s application for Interim Assistance benefits dated January 12, 2010.

DECISION

The Division was not correct when on April 20, 2010 it denied the Claimant’s application for Interim Assistance benefits dated January 12, 2010.

¹⁰ Neither the Division’s Hearing Representative nor its Medical Reviewer can be faulted for this, however, because (unlike the federal Supplement Security Income (SSI) Program), the Interim Assistance Program does not currently provide the parties or this Office with a vocational expert, who would normally present this important evidence.

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
P.O. 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 12th day of August, 2010.

(signed)

Jay Durych
Hearing Authority

CERTIFICATE OF SERVICE

I certify that on this 12th day of August 2010 true and correct copies of the foregoing were sent to the Claimant via U.S.P.S. mail, and to the remainder of the service list by e-mail, as follows:

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

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

(signed)

By _____
J. Albert Levitre, Jr.
Law Office Assistant I