

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

In the Matter of)	
)	OAH No. 12-0751-APA
K T)	Agency No.
_____)	

DECISION

I. Introduction

K T applied for Interim Assistance (IA) benefits. The Division of Public Assistance (division) denied her application based on its determination that she is not likely to be approved for Social Security disability benefits. Ms. T requested a hearing to contest that decision.

A hearing was held on November 9, 2012. Ms. T appeared by telephone and represented herself. The division was represented by Public Assistance Analyst Terri Gagne, who also appeared by telephone. Based on the evidence in the record, Ms. T is not eligible to receive Interim Assistance.

II. Facts

Ms. T has been diagnosed with Type I diabetes mellitus, traumatic brain injury, and a seizure disorder.¹ The division agreed that Ms. T is not currently employed, has a severe impairment, and that this impairment has lasted for more than twelve months.

Ms. T testified that she seems to have seizures when her schedule is changed. For example, when she was working she tended to be employed in positions where she might be called in to work unexpectedly, or her lunch break might be moved. This could at times trigger a seizure. In the past, it was thought that her seizures were related to hypoglycemia; however, she has had a more recent seizure that was not associated with her blood sugar level.² The seizures may be related to the brain injury she received in an earlier car accident.³

Ms. T also testified that during a seizure she will lose consciousness. When she wakes up, she may find that she has bitten her tongue, or she will have bruises. As of the

¹ Exhibit 2.44.
² Exhibit 2.36.
³ Exhibit 2.13.

date of the hearing, she had not had a seizure since July of 2012. She was recently prescribed anti-seizure medication, but the medicine has not yet arrived.

III. Discussion

A. *The Interim Assistance Program*

Interim Assistance is a benefit available to individuals while they are waiting for the Social Security Administration (SSA) to approve an application for Supplemental Security Income.⁴ Among other requirements, to receive Interim Assistance an applicant must be “likely to be found disabled by the Social Security Administration.”⁵ Ms. T has the burden of proof on this issue.⁶

The SSA uses a five-step evaluation process in making its disability determinations. For Alaska’s interim assistance determinations, however, only the first three of these steps are considered.⁷

Under the SSA evaluation process, each step is considered in order, and if the SSA finds the applicant either disabled or not disabled at any step, it does not consider subsequent steps.⁸ The first step in this process looks at the applicant’s current work activity. If the applicant is performing “substantial gainful activity,” the SSA will find that the applicant is not disabled.⁹ This finding is made regardless of the applicant’s medical condition, age, education, or work experience.¹⁰

At step two, the SSA considers the severity of the applicant’s impairment. In order to be considered disabled, the impairment or combination of impairments must be severe, and must be expected to result in death or must have lasted or be expected to last at least 12 months.¹¹ If the impairment is not severe under this definition, then the applicant is not disabled.

At step three, the SSA looks at whether the impairment meets or equals the Listing of Impairments adopted by the SSA.¹² If it does, the applicant is disabled.¹³

⁴ 7 AAC 40.170(b); 7 AAC 40.375.

⁵ 7 AAC 40.180(b)(1).

⁶ 2 AAC 64.290(e).

⁷ See *In re M.H.*, OAH No. 12-0688-APA (Comm’nr Health & Social Services August 20, 2012); <http://aws.state.ak.us/officeofadminhearings/Documents/APA/APA120668.pdf>.

⁸ 20 CFR §416.920(a)(4).

⁹ 20 CFR §416.920(a)(4)(i).

¹⁰ 20 CFR §416.920(b).

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

¹² See 20 CFR § 404, Subpart P, Appendix 1.

In this case, the division agrees that Ms. T meets the requirements of the first two steps in this process. Thus, the issue in dispute is whether she meets or exceeds one or more of the Listings.

B. The Division Must Rely on the April 1, 2005 Version of the Listings

Before determining whether Ms. T's impairment meets or exceeds the Listings, there must first be a determination as to which version of the Listings should be used. The applicable regulation says the division must base its determination on "the listings of impairments described in 20 C.F.R. 404, subpart P, appendix 1, as revised as of April 1, 2005, and adopted by reference."¹⁴ Ms. Gagne stated that the division interprets the underlined section of this regulation to mean that it cannot rely on versions of this appendix prior to April 1, 2005, but that it can use more recent revisions. While the desire to use the most recent version of the listings is understandable, the division's interpretation is hard to square with the actual language used in this regulation. The regulation doesn't just say "as revised," it says "as revised as of April 1, 2005."

The Department of Law has issued a Drafting Manual for Administrative Regulations.¹⁵ Chapter 11 of that manual describes the process for adopting materials by reference. The manual notes that adoption by reference requires careful drafting. "To be legally valid, the regulation must clearly state that a particular dated version of the material is being adopted by reference."¹⁶ It is possible to adopt future changes in advance for some types of material.¹⁷ When doing so, the adopting regulation must include language such as "as amended" or "as amended from time to time."¹⁸ The example given in the manual is instructive here

In this section, "federal poverty guidelines" means the United States Department of Health and Human Services federal poverty guidelines for this state, established in 76 Fed. Reg. 3637 - 3638, revised as of January 20, 2011, as amended from time to time, and adopted by reference.^[19]

¹³ 20 CFR § 416.920(a)(4)(iii).

¹⁴ 7 AAC 40.180(b)(1)(B) (emphasis added).

¹⁵ http://law.alaska.gov/pdf/manuals/2009-AugManual_AdminRegs.pdf.

¹⁶ Drafting Manual, page 96.

¹⁷ However, the manual also indicates that the Alaska Supreme Court has not yet ruled on whether adoption of future amendments is valid. Drafting Manual, page 123.

¹⁸ Drafting Manual, page 99. There are other requirements discussed in the Drafting Manual, but for purposes of this decision, it is assumed that the Department complied with those requirements.

¹⁹ Drafting Manual, page 99.

This example states what is being adopted by reference, shows the revision date of the document being adopted, and then includes the “as amended” language. That is in contrast to the regulation at issue here which identifies the document being adopted, shows the revision date, *but does not* include any language to suggest that future versions of this document are also being adopted.

The plain meaning of the regulation at issue here does not indicate the intent to adopt any revisions to the Listings after April 1, 2005. In addition, assuming the Drafting Manual was referred to when this regulation was last revised, the decision not to use “as amended” or “as amended from time to time” signals an intentional decision not to include any revisions after April 1, 2005.²⁰

C. Listing for Diabetes Mellitus

Diabetes mellitus is covered by Listing 9.08.²¹ To meet the requirements of this listing, a person with diabetes mellitus must meet one or more of the following criteria:

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. Acidosis 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.^[22]

Ms. T did not present any evidence that she has any of these conditions. She has not met her burden of proving she meets or exceeds any of these criteria.²³

D. Listing for Traumatic Brain Injury

Brain injuries are evaluated according to the listings in 11.02, 11.03, 11.04, or 12.02.²⁴ Listing 11.02 looks at convulsive seizures caused by the injury. Among other requirements to meet this listing, the seizures must occur more than once a month despite

²⁰ Other regulations do include that language. For example, the regulation adopting the Current Procedural Terminology adopts that publication “as revised for 2010 (“CPT 2010”), as amended from time to time.” 7 AAC 160.900(a)(1).

²¹ References to the listings refer to the 1995 version of 20 C.F.R 404, subpart P, Appendix 1.

²² Listing 9.08.

²³ She may reapply at any time, and additional medical records or other evidence might establish eligibility at that time.

²⁴ Listing 11.18.

three months of prescribed treatment.²⁵ Ms. T's seizures are not occurring that often, and she has not yet started her treatment. She does not meet or exceed this listing.

Listing 11.03 looks at non-convulsive seizures. These must occur at least weekly despite three months of treatment.²⁶ Again, she does not meet or exceed this listing.

Listing 11.04 looks at the symptoms caused by a central nervous system vascular accident. To meet this listing, the applicant must experience sensory or motor aphasia resulting in ineffective speech or communication, or significant and persistent disorganization of motor function in two extremities.²⁷ The evidence in the record does not show Ms. T as having these symptoms.

Finally, Listing 12.02 covers organic mental disorders. The requirements to meet this listing are very detailed and extensive. The medical records in evidence, and Ms. T's testimony, do not suggest that she would meet this listing. More extensive psychological testing and reports might show otherwise, but at this time, Ms. T has not met her burden of proving she meets or exceeds this listing.

E. Seizure Disorder

Ms. T's seizure disorder would be covered under Listing 11.02 or 11.03. These were both discussed in connection with her traumatic brain injury and, as previously discussed, she does not meet the criteria for these listings.

IV. Conclusion

A person is eligible to receive interim assistance benefits if he or she is likely to be found disabled by the Social Security Administration. Ms. T has not met her burden of proving she is likely to be found disabled. Accordingly, she is not currently eligible to receive these benefits, and the division's determination is upheld.

Dated this 19th day of November, 2012.

Signed

Jeffrey A. Friedman
Administrative Law Judge

²⁵ Listing 11.02.

²⁶ Listing 11.03.

²⁷ Listing 11.04.

Adoption

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

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

DATED this 14th day of December, 2012.

By: Signed _____
Name: Ree Sailors
Title: Deputy Commissioner, DHSS

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