

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-408
)
 Claimant.) DPA Case No. [REDACTED]
 _____)

FAIR HEARING DECISION

STATEMENT OF THE CASE

[REDACTED] (Claimant) applied for Interim Assistance on September 29, 2010 (Exs. 2.0 – 2.9). The State of Alaska Division of Public Assistance (DPA or Division) denied her application on November 17, 2010 (Ex. 4). The Claimant requested a fair hearing, to contest the Division’s denial of her Interim Assistance application, on December 13, 2010 (Exs. 5 - 6).

The Claimant’s hearing began as scheduled on January 5, 2011 before Hearing Examiner Jay Durych. The Claimant participated by telephone, represented herself, and testified on her own behalf. [REDACTED] of the [REDACTED] Independent Living Center also participated by telephone, assisted in representing the Claimant, and testified on her behalf. Public Assistance Analyst [REDACTED] attended the hearing in person to represent and testify on behalf of the Division. [REDACTED], the Division’s Interim Assistance Medical Reviewer, participated in the hearing by phone and testified on behalf of the Division. Due to the amount of testimony, the hearing could not be completed on January 5th. Accordingly, an additional hearing was scheduled for February 9, 2011.

The Claimant failed to appear for the hearing of February 9, 2011. Accordingly, the record was closed and the case was taken under advisement. However, on or about February 17, 2011 the Claimant contacted the Division, explained that she had missed the hearing due to a death in her family, and requested that a new hearing be scheduled. The Division did not oppose the Claimant’s request. Accordingly, on March 2, 2011 the record was re-opened and a new hearing was scheduled for April 6, 2011.

The Claimant’s hearing resumed as scheduled on April 6, 2011. The same persons participated as had previously participated in the January 5, 2011 hearing, and in the same capacities. All testimony and exhibits submitted by the parties were admitted into evidence. At the end of this second hearing the record was closed and the case became ripe for decision.

ISSUE

Was the Division correct to deny the Claimant's application for Interim Assistance benefits dated September 29, 2010, based on the assertion that the Claimant was not disabled according to the applicable regulations?

SUMMARY OF DECISION

The Claimant is not currently working. Her degenerative joint disease (DJD) and related back pain, her chronic obstructive pulmonary disease (COPD) and related fatigue, and her Hepatitis C and related neuropathy, are well documented in her medical records and qualify as "severe impairments" according to the applicable regulations.

The Claimant also has a mental impairment – depression. The Claimant's medical records document two Global Assessment of Functioning or GAF scores of 50 or below. Persons with GAF scores of 50 or below are generally considered unable to work. Further, regardless of whether the Claimant's depression qualifies as "severe" when viewed in isolation, its effect must be considered *in combination with* the Claimant's severe physical impairments.

The Claimant's DJD, COPD, and Hepatitis C-related neuropathy, and depression all satisfy the 12-month durational requirement. Further, although none of the Claimant's impairments, standing alone, satisfy the Social Security Administration's Listing of Impairments, the *combined effect* of the Claimant's severe impairments meets or exceeds the level of severity required by those Listings. Accordingly, the Claimant is disabled based on the combined effect of her severe impairments.

The Claimant testified that her severe impairments prevent her from performing her prior work as a nurse, and no evidence was presented to contradict this testimony. In addition, no evidence was presented to show that the Claimant is capable of performing any other work. Finally, the evidence indicates that the Claimant would be disabled by the combination of her severe impairments even in the absence of her alcohol addiction. Accordingly, the Claimant is considered disabled pursuant to the Social Security Administration's criteria as adopted by the State's Interim Assistance program.

FINDINGS OF FACT ¹

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

I. Educational and Vocational History.

1. The Claimant was born in 1955 (Ex. 3.241) and was 55 years old at the time of the hearings held in this case (Claimant hearing testimony).

¹ All of the medical reports in the record (approximately 250 pages total), and all of the testimony in the record (approximately 2.5 hours total), 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.

2. The Claimant earned an associate degree in nursing (Ex. 3.46). She is a Registered Nurse (R.N.) (Ex. 3.30, Claimant testimony). She worked as a nurse for a period of about 20 years, from approximately 1988 – 2008 (Claimant testimony).

3. The Claimant previously owned four assisted living facilities in Anchorage (Claimant testimony). From 1992 to 2005 the Claimant worked as an administrator and trainer / educator at these assisted living facilities (Claimant testimony; Ex. 3.30). From 2006 to 2008 the Claimant worked as director of a Personal Care Assistant program (Ex. 3.30). From January 2008 to March 2008 the Claimant worked as a nurse for the Department of Corrections (Ex. 3.30). From March 2008 to April 2008 the Claimant worked as a home health nurse / nurse educator (Ex. 3.30; Claimant testimony). Later in 2008 the Claimant worked with terminally ill patients in a hospice. *Id.* The Claimant has not worked since that time (i.e. she has not worked for at least two years) (Claimant testimony).

II. Physical Impairments.²

4. The Claimant broke her leg, arm, and wrist in accidents when she was 14 – 15 years old (Ex. 3.184). In particular, during this period she fractured a leg in five places in a skiing accident (Ex. 3.46). She has also been involved in automobile accidents in which she was unrestrained and struck the windshield (Ex. 3.46).

5. Medical records indicate that the Claimant has had back pain and neck pain for 20 years (Ex. 21.1). The Claimant takes Acetaminophen, Flexeril, Ibuprofen, and Oxycodone for arthritic and other joint-related pain (Ex. 3.45).

6. An MRI of the Claimant's lumbar spine taken on February 19, 2004 indicates that, as of that date, the Claimant had prominent disk bulges at L4-L5 and L5-S1, which could cause compression of the left S1 nerve root, and mild degenerative changes of the posterior facets at L5-S1 (Ex. 3.173).

7. The Claimant suffered a head injury in 2006 (Ex. 3.46). The Claimant had pancreatitis in 2008 (Ex. 3.231). In 2009 the Claimant was diagnosed as suffering from sacroiliitis, chronic obstructive pulmonary disease (COPD), chronic back pain, osteoarthritis of the knee, and Hepatitis C (Exs. 3.183, 3.200, 3.224, 3.236).

8. The Claimant's COPD has caused her to have shortness of breath and frequent coughing (Claimant testimony). The Claimant takes Advair, Discuss, and ProAir for her COPD (Ex. 3.46).

9. In January 2010 the Claimant was diagnosed as suffering from peripheral neuropathy (Ex. 3.206). The neuropathy is believed to be caused by the Claimant's Hepatitis C (Ex. 3.155). At this time the Claimant was also diagnosed with possible carpal tunnel syndrome.

10. At a medical examination conducted on February 1, 2010 (Exs. 3.161 – 3.165):

a. The Claimant complained of back pain, neck pain, joint pain, leg pain when walking; numbness, pain, and weakness in both arms; numbness, pain, and weakness in both legs; and

² Some medical abbreviations used in the medical reports quoted herein have been spelled-out to promote clarity.

blurred vision (Exs. 3.162 – 3.163). She stated that walking, standing, and sitting made the leg pain worse (Ex. 3.161). She also stated that writing and typing hurt her hands, and that she drops both heavy and light objects due to the pain and numbness in her hands and arms (Ex. 3.161).

b. The Claimant was diagnosed as having migraine headaches and ulnar neuropathy at the elbow (Ex. 3.164).

c. The Claimant had symptoms of bilateral radiculopathy at L5-S1 (Ex. 3.165) and radicular syndrome of the legs (Ex. 3.164).

11. An MRI of the Claimant's lumbar spine taken on February 3, 2010 indicates that, as of that date, the Claimant had a mild broad-based disk bulge and mild facet joint hypertrophy at L3-L4; moderate loss of disk height, endplate irregularity, broad-based disk bulge, moderate facet joint hypertrophy, mild-to-moderate bilateral neural foraminal narrowing, and moderate central canal stenosis at L4-L5; and mild disk dessication and loss of disk height, mild facet joint hypertrophy, mild broad-based disk bulge, and mild neural foraminal narrowing, at L5-S1 (Exs. 3.70 – 3.71, 3.169 – 3.170, 21.11 - 21.12).

12. A medical report dated February 23, 2010 stated that an EMG of the Claimant's forearm had revealed ulnar nerve dysfunction, and that the neurologist was recommending surgical relocation of her ulnar nerves (Ex. 3.130).

13. An MRI of the Claimant's cervical spine taken on March 8, 2010 indicates that, as of that date, the Claimant had moderate degenerative changes of the middle and lower cervical spine (Exs. 3.66 – 3.67, 3.167, 21.9 – 21.10). Also in March 2010 the Claimant was diagnosed with arthritis (Ex. 3.153).

14. At a medical appointment on March 16, 2010 the Claimant complained of balance problems and of running into things (Ex. 3.153).

15. The Claimant began using a TENS unit for pain control in or about April 2010 (Ex. 3.188). She had previously tried epidural injections for her back pain, but the injections were not effective (Ex. 3.155). She had also previously taken oxycodone for pain (Ex. 3.140). One of the Claimant's physicians has stated that the Claimant will probably need to take narcotics on a long-term basis for chronic pain (Ex. 3.136).

16. Dr. ██████████, M.D. has been the Claimant's primary treating physician. On May 7, 2010 Dr. ██████████ completed a DPA Form AD-2 ("Preliminary Examination for Interim Assistance") on behalf of the Claimant (Exs. 3.72 – 3.73). At this time Dr. ██████████ diagnosed the Claimant as suffering from degenerative disk disease, depression, and hepatitis C. *Id.* She indicated that the Claimant was not expected to recover from these conditions. *Id.*

17. On August 11, 2010 the Claimant broke her right wrist (Exs. 3.16 – 3.18, 3.059). On August 17, 2010 the Claimant was seen by an orthopedic physician (Exs. 3.122 – 3.124). He recommended open reduction with internal fixation (Ex. 3.124). The Claimant underwent this surgery on August 19, 2010, and the repair was satisfactory (Exs. 3.13 – 3.15, 3.61 – 3.62, 3.119).

The Claimant's doctor also noted at this time that the Claimant had cubital tunnel syndrome (Exs. 3.14, 3.124).

18. Following her wrist surgery, which included a neuroplasty of the ulnar nerve at the elbow (Ex. 3.10), the Claimant reported to her doctor that the numbness in her right hand had improved but was still present (Ex. 3.117).

19. On October 4, 2010 Dr. [REDACTED] completed another DPA Form AD-2 ("Preliminary Examination for Interim Assistance") on behalf of the Claimant (Exs. 3.26 – 3.27). Dr. [REDACTED] diagnosed the Claimant as suffering from degenerative disk disease, major depression, COPD, and hepatitis C. *Id.* She indicated that the Claimant was not expected to recover from these conditions. *Id.*

20. X-rays of the Claimant's cervical and lumbar spine taken on January 13, 2011 indicate that, as of that date, the Claimant had mild to moderate degenerative changes at C3-C4; severe degenerative changes at C4-C5, C5-C6, and C6-C7; and moderate to severe degenerative changes at L4-L5 (Exs. 21.3, 21.5). The orthopedic physician reviewing the x-rays interpreted them as showing multi-level cervical spinal stenosis, and wrote that the Claimant "seems to have cervical myelopathy that is getting progressively worse and is quite serious" (Ex. 21.4). The doctor recommended posterior decompression or cervical laminoplasty surgery "in the near future." *Id.*

21. The orthopedic physician's observations of the Claimant on January 13, 2011 were in relevant part that the Claimant had difficulty walking heel-to-toe; that she was unable to stand on one leg; that she had dexterity problems with her hands; and that she had "significant balance and coordination problems" (Exs. 21.1 - 21.2).

III. Psychological Impairments.

22. The Claimant asserts psychological impairments in this case (Claimant testimony). 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 anxiety (categorized under SSA Impairment Listing No. 12.06).

23. Claimant was physically and sexually abused as a child and has suffered from depression since age nine (Exs. 3.46, 3.240). She has received psychiatric treatment since age 14 (Exs. 3.45, 3.135).

24. The Claimant attempted suicide in 1969 and again in 1985 and had to be hospitalized on both occasions (Ex. 3.45).

25. The Claimant has taken Zoloft, Paxil, and Prozac for depression at least since 2009 (Exs. 3.233, 3.240). As of February 23, 2010 the Claimant was also taking the psychiatric medications pristiq, seroquel, and trazodone (Ex. 3.130).

26. In 2009 the Claimant was diagnosed as suffering from alcohol abuse, major depression, and sleep disturbances (Exs. 3.196, 3.200, 3.203, 3.209, 3.211, 3.213, 3.216, 3.220, 3.234, and 3.236).

27. A psychiatric report dated January 26, 2010 states in relevant part as follows (Ex. 3.49):

[The Claimant] is a . . . female whose Axis I condition [dysthymic and alcohol dependence] produces impairment in her activities of daily living to the degree that her GAF [Global Assessment of Functioning³] is less than 50. She also experiences persistent symptoms of depression. She therefore qualifies for adult SED [severely emotionally disturbed] status.

28. A psychiatric report dated January 27, 2010 (Ex. 3.47) assigned the Claimant a GAF score of 40.

29. At medical examinations conducted on February 1, 2010 and March 16, 2010 the Claimant complained of memory problems (Exs. 3.153, 3.163).

30. In March 2010 the Claimant was diagnosed with anxiety disorder (Ex. 3.153).

IV. Substance Abuse.

31. The Claimant had a period of polysubstance abuse during her teenage years and young adulthood (Ex. 3.184). During this period she used amphetamines, benzodiazepines, cocaine, hallucinogens, and narcotics (Ex. 3.184).

32. The Claimant has suffered from alcoholism since she was 12 years old (Ex. 3.184). She completed an inpatient alcohol treatment program in 1985 (Exs. 3.45, 3.210). She was sober from approximately 1996 – 2006, but then relapsed into alcohol abuse from approximately 2006 – 2009 (Exs. 3.45, 3.184).

33. On June 8, 2009 the Claimant was diagnosed as needing inpatient alcohol detoxification with immediate admission to a residential facility (Ex. 3.150). On July 21, 2009 the Claimant was admitted to the hospital for four days due to acute alcohol intoxication and withdrawal symptoms (Exs. 3.083 – 3.089, 3.181 – 3.186). Upon release from the hospital she was admitted to an inpatient

³ The “Global Assessment of Functioning” or “GAF” scale is a scale used to measure psychological, 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 in relevant part as follows:

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).

alcohol treatment facility for two to three weeks, but did not complete the program (Exs. 3.45, 3.81 – 3.82).

34. The Claimant participated in Alcoholic Anonymous in 2009 and 2010 (Exs. 3.190, 3.211). However, she suffered relapses in November – December 2009 (Ex. 3.208), February 2010 (Ex. 3.195), and July 2010 (Ex. 3.105).

35. On September 15, 2010 the Claimant was admitted to the hospital for three days due to a seizure which occurred due to alcohol intoxication and subsequent withdrawal (Exs. 3.5 – 3.12).

V. Functional Limitations.

36. The Claimant currently lives by herself in a cabin owned by a friend (Claimant testimony). She has neighbors who come over and check on her occasionally. *Id.*

37. The Claimant has a recurrent history of using a back brace (Ex. 21.2).

38. The Claimant has difficulty sleeping more than 1.5 hours at a time due to her pain (Ex. 3.45).

39. The Claimant was still taking oxycodone for pain at the time of the hearings in this case (Claimant testimony). She was still having numbness in her hands, and dropping things, at the time of the hearings. *Id.*

40. The Claimant has fatigue, fever, aches, and edema (Claimant testimony).

41. The Claimant cannot sit or stand for long periods of time (Ex. 3.28; Claimant testimony). She has trouble bending. *Id.* She can lift 10 – 15 pounds on an occasional basis, but would not be able to do that continuously all day. *Id.* Because of her back and leg pain she needs to lie down frequently. *Id.*

42. Because of her lack of stamina, her peripheral neuropathy, the attendant numbness and weakness in her hands, and her memory problems, the Claimant does not believe that she can perform the job duties she previously performed as a registered nurse (Claimant testimony).

VI. Relevant Procedural Facts.

43. The Claimant has applied to the United States Social Security Administration (SSA) for Supplemental Security Income (SSI) (Claimant testimony). Her application was initially denied and is currently in appeal status with the Social Security Administration. *Id.*

44. Mr. [REDACTED], the Division's Interim Assistance Medical Reviewer, reviewed the Claimant's medical records and concluded that the Claimant did not satisfy the Interim Assistance Program's disability requirements ([REDACTED] testimony). Mr. [REDACTED] has substantial experience in medical matters. Mr. [REDACTED] was an Army medic for four (4) years; he worked in an acute care psychiatric facility for five (5) years; he is a licensed Emergency Medical Technician; he holds a Bachelors Degree in Psychology; and he holds a Master's Degree in Public Health ([REDACTED] testimony).

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 proving that he or she is disabled⁴ by a preponderance of the evidence.⁵

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 or her 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 or she is not disabled. 20 CFR § 416.920(a)(4)(i).

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).

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 or combination of impairments.

Severity of Impairments.

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. Acceptable medical sources include licensed physicians and psychologists. 20 C.F.R. § 404.1513(a). An applicant'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 the impairment *is* severe, it is then necessary to proceed to the next step of the disability analysis and determine whether the Claimant’s impairment meets the 12-month durational requirement.

Durational Requirement.

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. This is referred to as the 12-month durational requirement. If the severe impairment *does not* satisfy this durational requirement, the applicant is not disabled. 20 CFR § 416.920(a)(4)(ii). If the severe impairment satisfies the durational requirement, then it is necessary to proceed to the next step of the disability analysis and determine whether the Claimant’s impairment or combination of impairments 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 or

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.

her 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 that manifests only some of these criteria, no matter how severely, does not qualify”).

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). 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 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.

If the applicant’s severe impairment meets or medically equals the listing of impairments contained in 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 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 severe impairment prevents him or her from performing his or her 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 that exists in the national economy” or, in other words, to determine whether the applicant is capable of performing 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).

Special Rules Applicable In Cases Involving Drug and Alcohol Addiction.

A review of the medical documentation in this case shows that the Claimant suffers from alcohol addiction in addition to her other impairments. The Social Security Administration (SSA) has promulgated regulations to address the situation where (as here) some portion of a claimant’s impairment results from alcohol addiction. The federal courts have issued decisions explaining how these regulations are to be applied.

In cases involving drug or alcohol addiction, the hearing officer must *first* determine whether the claimant is disabled using the standard five-step approach (described above). *Viers v. Astrue*, 582

F.Supp.2d 1109 (N.D. Iowa 2008). The five-step analysis is applied *without deducting or segregating out any effects that might be due to substance abuse. Id.*

If the hearing officer determines that the addicted claimant is disabled, the hearing officer must next consider whether the Claimant would still be disabled if the effects of the substance abuse *were absent. Viers v. Astrue*, 582 F.Supp.2d 1109 (N.D. Iowa 2008). The issue at this point is the level of impairment that would remain *if the substance abuse ceased*, and whether those remaining impairments are disabling. *Id.*

The hearing officer may then only deny benefits if the claimant's drug addiction or alcoholism is a contributing factor material to the determination of the claimant's disability. 20 C.F.R. § 416.935. A drug or alcohol addiction is a contributing factor if the claimant's remaining limitations would *not* be disabling in the absence of drugs or alcohol. *Id.* If, however, the claimant's other (i.e. non-drug or alcohol-related) limitations would still be disabling by themselves, the claimant must be found to be disabled regardless of his or her drug addiction or alcoholism. *Id.*, *see also Grogan v. Barnhart*, 399 F.3d 1257 (10th Cir. 2005).

ANALYSIS

Introduction.

As an applicant for Interim Assistance benefits, the Claimant has the burden of proving, by a preponderance of the evidence, that her 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.

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 she was not currently working, and that she had not worked since 2008. This testimony was not disputed by the Division. Accordingly, the Claimant has carried her burden and has proven, by a preponderance of the evidence, that she is not performing substantial gainful activity as defined by 20 CFR § 404.1510.

II. Does The Claimant Have a Severe Impairment or Combination of Impairments?

In order to avoid being found to be *not disabled* at this stage, the Claimant must generally prove that at least one of her impairments is medically severe pursuant to 20 CFR 416.920(c). However, a finding of disability may also be based on the *combined effect* of multiple impairments which, considered individually, are not of the requisite severity. *See* 20 CFR § 404.1523. The combined effect of all of a claimant's impairments must be considered, without regard to whether each alone is sufficiently severe. *See* 42 U.S.C. § 423(d)(2)(B).

A. The Claimant's Physical Impairments.

A severe physical impairment is defined as one that “significantly limits [a person’s] . . . ability to do basic work activities.”⁷ 20 CFR §§ 404.1520(c) and 416.920(c).

If the sole criterium for determining the severity of an impairment were the Claimant’s own testimony, she would clearly qualify as severely impaired pursuant to 20 § CFR 416.920(c) and 20 CFR § 416.921(b). However, for purposes of a disability determination, a claimant’s own statement of symptoms, by itself, will not suffice. 20 C.F.R. § 416.908. *Evidence from acceptable medical sources is necessary to establish the severity of an impairment.* 20 C.F.R. § 404.1513(a); *see also* 20 CFR § 416.908.

Dr. [REDACTED], M.D. is the Claimant’s primary treating physician. Dr. [REDACTED] diagnosed the Claimant as suffering from degenerative disk disease (DJD), chronic obstructive pulmonary disease (COPD), Hepatitis C, and depression (Exs. 3.26 – 3.27). Are these impairments – alone or in combination – medically severe?

1. The Claimant’s Degenerative Disk Disease.

There is substantial medical evidence in the record demonstrating that the Claimant’s degenerative disk disease (DJD) and resulting back pain is a severe impairment:

- a. X-rays of the Claimant’s cervical and lumbar spine taken on January 13, 2011 indicate that, as of that date, the Claimant had mild to moderate degenerative changes at C3-C4; severe degenerative changes at C4-C5, C5-C6, and C6-C7; and moderate to severe degenerative changes at L4-L5 (Exs. 21.3, 21.5). The orthopedic physician reviewing the x-rays interpreted them as showing multi-level cervical spinal stenosis, and wrote that the Claimant “seems to have cervical myelopathy that is getting progressively worse and is quite serious” (Ex. 21.4). The doctor recommended posterior decompression or cervical laminoplasty surgery “in the near future.” *Id.*
- b. The orthopedic physician’s observations of the Claimant on January 13, 2011 were in relevant part that the Claimant had difficulty walking heel-to-toe; that she was unable to stand on one leg; that she had dexterity problems with her hands; and that she had “significant balance and coordination problems” (Exs. 21.1 - 21.2).
- c. The medical evidence also shows that the Claimant has sought relief from her back pain (and other pain) in several different forms and over a long period of time. She began using a TENS unit for pain control in or about April 2010 (Ex. 3.188). She had previously tried epidural injections for her back pain, but the injections were not effective (Ex. 3.155).

⁷ As set forth on page 9 of the Principles of Law, 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.

She had also previously taken oxycodone for pain (Ex. 3.140). One of the Claimant's physicians has stated that the Claimant will probably need to take narcotics on a long-term basis for chronic pain (Ex. 3.136).

This medical evidence shows that the Claimant's DJD, related back pain, and consequent necessary use of narcotic pain killers, significantly limits the Claimant's ability to perform basic work activities, and is therefore a severe impairment as defined by 20 CFR §§ 404.1520(c) and 416.920(c).

2. The Claimant's Chronic Obstructive Pulmonary Disease.

In 2009 the Claimant was diagnosed as suffering from chronic obstructive pulmonary disease (COPD) (Exs. 3.183, 3.200, 3.224, 3.236). The Claimant's COPD has caused her to have shortness of breath and frequent coughing (Claimant testimony). This shortness of breath, and resulting fatigue, significantly limits the Claimant's ability to perform basic work activities. The Claimant's COPD is therefore also a severe impairment as defined by 20 CFR §§ 404.1520(c) and 416.920(c).

3. The Claimant's Hepatitis C and Related Neuropathy.

In January 2010 the Claimant was diagnosed as suffering from peripheral neuropathy (Ex. 3.206). One of the Claimant's doctors has opined that the neuropathy is probably caused by the Claimant's Hepatitis C (Ex. 3.155). The peripheral neuropathy was still causing numbness in the Claimant's hands, and causing her to drop things, at the time of the hearings (Claimant testimony). This inability to hold items significantly limits the Claimant's ability to perform basic work activities. The Claimant's Hepatitis C and related neuropathy is therefore also a severe impairment as defined by 20 CFR §§ 404.1520(c) and 416.920(c).

4. Summary – The Claimant Has Severe Physical Impairments.

In summary, the medical records provide an objective medical basis for the Claimant's assertion that her ability to do basic work activities such as walking, standing, sitting, and lifting (20 CFR 416.921(b)) is significantly limited because of her osteoarthritis or degenerative joint disease (DJD), chronic obstructive pulmonary disease (COPD), and her Hepatitis C and the weakness and numbness associated therewith. The Division did not submit evidence contradicting this, focusing instead on whether the Claimant's impairments satisfy the Listing of Impairments. Accordingly, the Claimant has carried her burden and proven, by a preponderance of the evidence, that her DJD, COPD, and her Hepatitis C-related neuropathy, each individually constitute "severe impairments" as defined by 20 CFR § 404.1520(c), 20 CFR § 416.920(c).

B. The Claimant's Mental Impairments.

The Claimant's three *physical* impairments have each been found to be medically severe at this stage of the disability analysis (see above). Accordingly, based on the disposition of this case, it is not necessary to determine whether the Claimant's *mental or psychological* impairments (depression and anxiety) are *individually* medically severe. However, it is clear that the Claimant's psychological impairments, when considered *in conjunction with* the Claimant's physical impairments (discussed above), constitute a *severe combination of impairments*. See 20 CFR § 404.1523, discussed above. The combined effect of all of the claimant's impairments must be

considered without regard to whether each alone is sufficiently severe. *See* Principles of Law at page 10, above.

III. Do the Claimant's Impairments Satisfy The Twelve Month Durational Requirement?

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

The Division did not submit evidence on the durational requirement, focusing instead on whether the Claimant's impairments satisfy the Listing of Impairments. However, medical records indicate that the Claimant has had back pain and neck pain for 20 years (Ex. 21.1). Medical records also indicate that the Claimant has had chronic obstructive pulmonary disease (COPD) and Hepatitis C since early 2009 or before (Exs. 3.183, 3.200, 3.224, 3.236). The Claimant applied for Interim Assistance on September 29, 2010. Thus, the Claimant suffered from each of her three physical impairments for 18 months or more prior to her date of application.

In addition, the Claimant has received psychiatric treatment since age 14 (Exs. 3.45, 3.135). Accordingly, even though the Claimant's depression may not, standing alone, meet the severity requirement (see discussion in Section II, above), it meets the durational requirement. Accordingly, the Claimant's depression can be considered, with regard to the *combined effect* of the Claimant's impairments, in all subsequent steps of the disability analysis (see discussion in Section II, above).

Accordingly, the Claimant satisfies the twelve (12) month durational requirement as to each of her physical impairments, and as to her depression. It is therefore necessary to proceed to the next step in the Social Security disability analysis and to determine whether any of the Claimant's impairments "meet 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 impairments meet or medically equal the criteria of the relevant Listing of Impairments contained in the Social Security regulations at 20 CFR Part 404, Subpart P, Appendix 1. Each of the Claimant's three severe impairments – DJD, COPD, and Hepatitis-related neuropathy falls within a separate Listing. Accordingly, each of the three impairments must be analyzed separately.

A. The Claimant's Degenerative Disk Disease / Back Pain Does Not Meet the Listing.

The Social Security disability system classifies the Claimant's degenerative disk disease and associated back pain under the "Musculoskeletal" listing. *See* 20 CFR Part 404, Subpart P, Appendix 1, § 1.00 *et. seq.* Specifically, the Claimant's degenerative disk disease and associated back pain is analyzed under Section 1.04.⁸

⁸ Section 1.04 requires in relevant part as follows:

While the Claimant's history of DJD / back pain is substantial, there are no medical reports in the record indicating that the Claimant's back pain satisfies the specific requirements of Section 1.04. Accordingly, the Claimant's back pain does not satisfy the clinical requirements of the Social Security Administration's applicable "listing."

The Claimant's DJD / back pain likewise fails to satisfy the *functional* requirements of Section 1.04. Although the Claimant has difficulty walking very far, the Claimant did not assert that she cannot walk without the use of a walker, two crutches, or two canes (see Listing Section 1.00(B)(2)(b) ⁹ and Findings of Fact at Paragraphs 10(a) and 21, above). Accordingly, the Claimant's back pain does not meet the "inability to ambulate" requirement of Listings Sections 1.02 and 1.04.

B. The Claimant's Chronic Obstructive Pulmonary Disease (COPD) Does Not Meet the Listing.

The Claimant's Chronic Obstructive Pulmonary Disease (COPD) is analyzed under "Category of Impairments, Respiratory System" (20 CFR Part 404, Subpart P, Appendix 1, Section 3.00 *et. seq.*). Section 3.00 generally requires a series of spirometric tests (spirometry), and/or arterial blood gas studies (ABGS), in order to satisfy the requirements of the Listing. The Division's Medical Reviewer correctly noted that there are no such tests or studies in the record sufficient to satisfy

1.04 Disorders of the spine (e.g., herniated nucleus pulposus, spinal arachnoiditis, spinal stenosis, osteoarthritis, degenerative disc disease, facet arthritis, vertebral fracture), resulting in compromise of a nerve root (including the cauda equina) or the spinal cord. With:

- A. Evidence of nerve root compression characterized by neuro-anatomic distribution of pain, limitation of motion of the spine, motor loss (atrophy with associated muscle weakness or muscle weakness) accompanied by sensory or reflex loss and, if there is involvement of the lower back, positive straight-leg raising test (sitting and supine); or
- B. Spinal arachnoiditis, confirmed by an operative note or pathology report of tissue biopsy, or by appropriate medically acceptable imaging, manifested by severe burning or painful dysesthesia, resulting in the need for changes in position or posture more than once every 2 hours; or
- C. Lumbar spinal stenosis resulting in pseudoclaudication, established by findings on appropriate medically acceptable imaging, manifested by chronic nonradicular pain and weakness, and resulting in inability to ambulate effectively, as defined in 1.00B2b.

⁹ Listing Section 1.00(B)(2)(b), titled "What We Mean by Inability to Ambulate Effectively," provides in relevant part 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 . . . to permit independent ambulation without the use of a hand-held assistive device(s) that limits the functioning of both upper extremities
- (2) To ambulate effectively, individuals must be capable of sustaining a reasonable walking pace over a sufficient distance to be able to carry out activities of daily living [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

Section 3.00. Accordingly, the Claimant's COPD does not meet the specific requirements of the SSA's Listing for respiratory impairments.

C. The Claimant's Hepatitis C, and Related Neuropathy, Does Not Meet the Listing.

The Claimant's Hepatitis C is analyzed under "Category of Impairments, Digestive System" (20 CFR Part 404, Subpart P, Appendix 1, Section 5.05). *See* Section 5.0(D)(4)(a)(ii) ii ("We evaluate all types of chronic viral Hepatitis infections under 5.05 or any listing in an affected body system(s).")

The criteria of Section 5.05 are extremely technical.¹⁰ The Division's Medical Reviewer asserted that the severity of the Claimant's Hepatitis C did not meet the requirements of Section 5.05. A

¹⁰ In order for the Claimant to meet the criteria set out in Section 5.05, there must be evidence of:

A. Hemorrhaging from esophageal, gastric, or ectopic varices or from portal hypertensive gastropathy, demonstrated by endoscopy, x-ray, or other appropriate medically acceptable imaging, resulting in hemodynamic instability as defined in 5.00D5, and requiring hospitalization for transfusion of at least 2 units of blood. Consider under a disability for 1 year following the last documented transfusion; thereafter, evaluate the residual impairment(s). OR

B. Ascites or hydrothorax not attributable to other causes, despite continuing treatment as prescribed, present on at least two evaluations at least 60 days apart within a consecutive 6-month period. Each evaluation must be documented by: (1) Paracentesis or thoracentesis; or (2) Appropriate medically acceptable imaging or physical examination and one of the following: (a) Serum albumin of 3.0 g/dL or less; or (b) International Normalized Ratio (INR) of at least 1.5. OR

C. Spontaneous bacterial peritonitis with peritoneal fluid containing an absolute neutrophil count of at least 250 cells/mm³. OR

D. Hepatorenal syndrome as described in 5.00D8, with one of the following: (1) Serum creatinine elevation of at least 2 mg/dL; or (2) Oliguria with 24-hour urine output less than 500 mL; or (3) Sodium retention with urine sodium less than 10 mEq per liter. OR

E. Hepatopulmonary syndrome as described in 5.00D9, with: (1) Arterial oxygenation (P_aO₂) on room air of: (a) 60 mm Hg or less, at test sites less than 3000 feet above sea level, or (b) 55 mm Hg or less, at test sites from 3000 to 6000 feet, or (c) 50 mm Hg or less, at test sites above 6000 feet; or (2) Documentation of intrapulmonary arteriovenous shunting by contrast-enhanced echocardiography or macroaggregated albumin lung perfusion scan. OR

F. Hepatic encephalopathy as described in 5.00D10, with 1 and either 2 or 3:

1. Documentation of abnormal behavior, cognitive dysfunction, changes in mental status, or altered state of consciousness (for example, confusion, delirium, stupor, or coma), present on at least two evaluations at least 60 days apart within a consecutive 6-month period; and

2. History of transjugular intrahepatic portosystemic shunt (TIPS) or any surgical portosystemic shunt: or

3. One of the following occurring on at least two evaluations at least 60 days apart within the same consecutive 6-month period as in F1: (a) Asterixis or other fluctuating physical neurological abnormalities; or (b) Electroencephalogram (EEG) demonstrating triphasic slow wave activity; or (c.) Serum albumin of 3.0 g/dL or less; or (d) International Normalized Ratio (INR) of 1.5 or greater. OR

thorough independent review of the record also demonstrates that the requirements of Section 5.05 are not met here.

D. Summary – None of the Claimant’s Impairments Individually “Meet the Listings.”

In summary, the Claimant failed to prove, by a preponderance of the evidence, that any of her three (3) severe impairments (DJD and related back pain, COPD, and Hepatitis C and its related neuropathy), meet the specific requirements of “the Listings” (20 CFR Part 404, Subpart P, Appendix 1). The next issue is whether the Claimant is disabled by the *combined effect* of her impairments.

E. Is The Claimant Disabled Based on a *Combination* of Her Impairments?

As demonstrated above, none of the Claimant’s impairments, *individually*, satisfy the requirements of the Social Security Administration’s applicable “listings.” However, a finding of disability may also be based on the *combined effect* of multiple impairments which, considered individually, are not of the requisite severity. *See* 20 CFR § 404.1523; ¹¹ 20 CFR § 416.923.

The consideration of the combined effect of different impairments is mandatory. A hearing officer is required to assess the combined effect of a social security disability claimant's impairments throughout the disability analysis. *Fleming v. Barnhart*, 284 F.Supp.2d 256, 271 (D. Maryland 2003). If a claimant has a combination of impairments, no one of which meets a listed impairment under the regulations, the hearing officer must compare his or her findings with those for closely analogous listed impairments. *Washington v. Commissioner of Social Security*, 659 F.Supp.2d 738, 744 (D. S.C. 2009). If the findings related to the claimant’s impairments are at least of equal medical significance to those of a listed impairment, the hearing officer must find that the claimant's combination of impairments is medically equivalent to that listing. *Id.*

In this case, the record is clear that the Claimant suffers from serious DJD-related back pain, significant fatigue related to her COPD, and neuropathy in her extremities which her physicians believe is related to her Hepatitis C. *See* Findings of Fact at Paragraphs 8, 9, 10, 15, 20, and 21, above. These medically documented impairments – found to be medically severe in Section II, above - have resulted in significant functional limitations for the Claimant. *See* Findings of Fact at Paragraphs 37 – 41, above.

In addition, the Claimant has a lengthy history (over 42 years) of significant mental health problems. *See* Findings of Fact at Paragraph 23, above. These psychological problems include two documented suicide attempts, each of which required hospitalization (Ex. 3.45). As recently as

G. End stage liver disease with SSA CLD scores of 22 or greater calculated as described in 5.00D11. Consider under a disability from at least the date of the first score.

¹¹ 20 CFR 404.1523, titled “ Multiple Impairments,” provides in relevant part as follows:

In determining whether your physical or mental impairment or impairments are of a sufficient medical severity that such impairment or impairments could be the basis of eligibility under the law, we will consider the combined effect of all of your impairments without regard to whether any such impairment, if considered separately, would be of sufficient severity. If we do find a medically severe combination of impairments, the combined impact of the impairments will be considered throughout the disability determination process

January 26, 2010 a medical report categorized the Claimant as “severely emotionally disturbed” (Ex. 3.49). A Global Assessment of Functioning (GAF) conducted on January 26, 2010 assigned the Claimant a GAF score of “less than 50.” *Id.* A psychiatric report dated January 27, 2010 (Ex. 3.47) assigned the Claimant a GAF score of 40. According to the Diagnostic and Statistical Manual Of Mental Disorders: DSM-IV-TR (American Psychiatric Association, 2000) at pp. 32 - 37, a person with a GAF score of 40 or less is considered unable to work. Similarly, federal district courts reviewing Social Security disability decisions have concluded on several occasions that a GAF score of 50 or below is generally inconsistent with the ability to work. *See, for example, Colon v. Barnhart*, 424 F.Supp.2d 805, 812-813 (E.D. Pa. 2006).

In summary, although (as discussed in the preceding three subsections) the Claimant does not meet the precise requirements of any one listing, the combination of her impairments, taken as a whole, are easily more severe than the requirements of any one of the three relevant individual listings. Accordingly, the Claimant is disabled pursuant to 20 CFR § 404.1523 because the combined effect of the Claimant’s impairments is at least equal in medical significance to the Listings criteria for any one of the Claimant’s individual impairments. The Claimant is therefore considered disabled for purposes of the Interim Assistance Program. However, in order to consider all aspects of the Claimant’s disability, this decision will proceed to the last two steps of the disability analysis and determine (1) whether the Claimant can still perform her prior work; and (if not) (2) whether the Claimant can perform any other work.

V. Do The Claimant’s Impairments Prevent Her From Performing Her Previous Work?

The next step is to determine whether the Claimant’s severe impairments prevent her from performing her previous relevant work. If the Claimant is not prevented from performing her previous relevant work, she is not disabled. 20 CFR § 416.920(a)(4)(iv). If, however, the Claimant can no longer perform her 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.

A Residual Functional Capacity Assessment (RFC),¹² and the testimony of a vocational specialist, are 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 § 404.1545(a)(5), 20 CFR § 404.1560(b)(2). Unfortunately, no such testimony exists in this case.¹³ The only evidence on this issue is the Claimant’s hearing testimony and her statements to her doctors contained in her medical records.

The Claimant asserts that, due to her lack of stamina, her peripheral neuropathy, the attendant numbness and weakness in her hands, and her memory problems, the Claimant does not believe that she can competently perform the job duties she previously performed as a registered nurse (Claimant testimony). Based on the medical evidence, the Claimant’s testimony regarding her work limitations is credible. Further, the Division never asserted that the Claimant *could* still perform her

¹² “Residual functional capacity,” which may prevent a finding of disability for Social Security purposes, is defined as that which an individual is still able to do despite the limitations caused by his or her impairments. *See* 20 CFR § 404.1520(d); *Fargnoli v. Massanari*, 247 F.3d 34 (3rd Cir. 2001).

¹³ In the Social Security system it is the responsibility of the agency to provide for a Residual Functional Capacity Assessment. *See* 20 CFR § 404.1545(a)(3). The State of Alaska’s Interim Assistance regulations do not address this issue.

prior nursing work. Rather, the Division asserted only that the Claimant's impairments did not meet or equal the requirements of the Social Security Administration's "Listing of Impairments," and that the Claimant was presumed not to be disabled by Rule 201.07 of "the Grids."¹⁴

Accordingly, the Claimant has carried her burden and proven, by a preponderance of the evidence, that she can no longer perform her past nursing work. It is therefore necessary to proceed to the final step in the Social Security disability analysis: determining whether the Claimant can perform any work.

VI. Do The Claimant's Impairments Prevent Her 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 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 impairments were purely *exertional* (i.e. if the issue was simply whether he has the physical strength to walk, sit, stand, and perform the requirements of the job – see 20 CFR § 416.969a(a)), then Rule 201.07 of "the Grids" would apply as asserted by the Division. According to that rule, the Claimant would be deemed *not* to be disabled.

The Grids cannot, however, be applied where a person suffers from *nonexertional impairments* that significantly impact that person's ability to perform the full range of work. See *Foreman v. Callahan*, 122 F.3d 24, 25 (8th Cir. 1997). *Nonexertional impairments* are limitations on a person's ability to maintain attention, concentrate, remember, etc. (20 CFR § 416.969a(c)).¹⁵ Pain has long

¹⁴ "The Grids" are presumptive rules promulgated by SSA to assist in the disability determination. The Grids are discussed in Section VI, below.

¹⁵ "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.*

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).

There is ample medical evidence indicating that the Claimant is often in a significant amount of pain as a result of her DJD and other impairments. *See* Findings of Fact at Paragraphs 5, 10, 15, and 37-41, above. There is no evidence in the record indicating that the Claimant's physicians felt that the Claimant is malingering. Accordingly, the Claimant's pain qualifies as a *nonexertional impairment*. For this reason, the Claimant's case cannot be decided using "the Grids," and the Division is required to present vocational evidence proving that the Claimant can perform sedentary or other work.

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

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 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 this step. *See Thompson v. Sullivan*, 987 F.2d 1482, 1491 (10th Cir. 1993). It is also held that a hearing officer is not qualified to provide affirmative vocational evidence. *Wilson v. Califano*, 617 F.2d 1050, 1053-54 (4th Cir. 1980).

C. The Division Did Not Prove That The Claimant Can Perform Any Other Work.

The Division asserts that the Claimant can still perform some form of work. However, the Division presented no evidence that the Claimant's impairment still permits certain 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).¹⁶

¹⁶ 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.

D. Summary.

In summary, the Claimant proved that she can no longer perform her prior work; the burden of proof shifted to the Division, and the Division then failed to prove that the Claimant is capable of performing any other work. The Claimant is therefore deemed disabled on this basis according to the Social Security regulations and relevant case law. 20 CFR § 416.920(a)(4)(v).

VII. Would the Claimant Still Be Disabled Absent Her Prior Alcohol Addiction?

The Claimant has long suffered from alcohol abuse and/or addiction. *See Findings of Fact at Paragraphs 32 - 35.* In cases involving drug or alcohol addiction, the hearing officer must *first* determine whether the claimant is disabled using the standard five-step approach (which was concluded in Analysis Section VI, immediately above). *Viers v. Astrue*, 582 F.Supp.2d 1109 (N.D. Iowa 2008).

If the hearing officer determines that the addicted claimant is disabled, the hearing officer must next consider whether the claimant would still be disabled if the effects of the substance abuse *were absent*. *Viers v. Astrue*, 582 F.Supp.2d 1109 (N.D. Iowa 2008). The issue at this point is the level of impairment that would remain *if the substance abuse ceased*, and whether those remaining impairments are disabling. *Id.*

The hearing officer may then only deny benefits if the claimant's drug addiction or alcoholism is a contributing factor material to the determination of the claimant's disability. 20 C.F.R. § 416.935. A drug or alcohol addiction is a contributing factor if the claimant's remaining limitations would *not* be disabling in the absence of drugs or alcohol. *Id.* If, however, the claimant's other (i.e. non-drug or alcohol-related) limitations would still be disabling by themselves, the claimant must be found to be disabled regardless of his or her drug addiction or alcoholism. *Id.*, *see also Grogan v. Barnhart*, 399 F.3d 1257 (10th Cir. 2005).

In this case, the Claimant's alcohol abuse and/or addiction may have been a contributing factor with regard to the Claimant's *mental impairments*. However, there is absolutely no evidence in the record indicating that the Claimant's alcohol abuse and/or addiction is a contributing factor with regard to the Claimant's *physical impairments* (DJD, COPD, and/or Hepatitis C).

Further, the Claimant's primary physician indicated on her DPA Form AD-2 ("Preliminary Examination for Interim Assistance") that the Claimant was not expected to recover from her impairments, including her depression (Exs. 3.26 – 3.27). This is inconsistent with the premise that the Claimant would not be depressed absent her alcohol abuse, given that there is always a chance that an alcoholic will stop drinking. Accordingly, the medical evidence does not indicate that the Claimant's depression is completely dependent on her alcohol abuse.

In summary, a preponderance of the evidence indicates that the Claimant's physical and mental impairments would still be disabling in the absence of the Claimant's alcohol abuse. The Claimant must therefore be found to be disabled regardless of her alcohol abuse and/or addiction.

CONCLUSIONS OF LAW

1. The Claimant carried her burden and proved, by a preponderance of the evidence, that:
 - a. She is not currently engaged in substantial gainful activity as defined by 20 CFR § 404.1510.
 - b. Her degenerative disk disease (DJD) and related back pain (SSA Impairment Listing Nos. 1.02 and 1.04), her Chronic Obstructive Pulmonary Disease (COPD) (SSA Impairment Listing No. 3.00 *et. seq.*), and her Hepatitis C and related neuropathy (SSA Impairment Listing No. 5.05), constitute medically severe impairments as defined by 20 CFR § 416.920(c) and 20 CFR § 416.921(b).
 - c. Her degenerative disk disease (DJD) and related back pain (SSA Impairment Listing Nos. 1.02 and 1.04), her Chronic Obstructive Pulmonary Disease (COPD) (SSA Impairment Listing No. 3.00 *et. seq.*), her Hepatitis C and related neuropathy (SSA Impairment Listing No. 5.05), have lasted or can be expected to last for 12 months or longer, and the Claimant therefore satisfies the twelve (12) month durational requirement of 20 CFR § 416.909 and 20 CFR § 416.920(a)(4)(ii).
2. The Claimant did not carry her burden and failed to prove, by a preponderance of the evidence, that her degenerative disk disease (DJD) and related back pain (SSA Impairment Listing Nos. 1.02 and 1.04), her Chronic Obstructive Pulmonary Disease (COPD) (SSA Impairment Listing No. 3.00 *et. seq.*), and/or her Hepatitis C and related neuropathy (SSA Impairment Listing No. 5.05), meet the specific requirements of the Social Security Administration's applicable Listing of Impairments.
3. The Claimant carried her burden and proved, by a preponderance of the evidence, that:
 - a. The combined effect of the Claimant's severe impairments, (i.e. the three physical impairments listed in Paragraphs 1 and 2, above), in conjunction with the Claimant's psychological impairments (depression, anxiety, and low GAF scores), is at least equal in medical significance to the Listings criteria for any one of the Claimant's individual impairments (20 CFR § 404.1523).
 - b. The Claimant can no longer perform her prior work as a result of the combined effect of her severe physical and mental impairments (20 CFR § 416.920(a)(4)(iv)).
 - c. The Claimant would still be disabled absent her alcohol abuse / addition (20 C.F.R. § 416.935).
4. The Division did not carry its burden and failed to prove, by a preponderance of the evidence, that the Claimant can still perform work of any kind (20 CFR § 404.1545(a)(5)(ii)).
5. The Division was therefore not correct when, on November 17, 2010, it denied the Claimant's September 29, 2010 application for Interim Assistance benefits, based on the assertion that the Claimant did not meet the Interim Assistance Program's disability requirements.

DECISION

The Claimant satisfies the disability criteria for Interim Assistance benefits pursuant to 7 AAC 40.180. Accordingly, the Division was not correct when, on November 17, 2010, it denied the Claimant's September 29, 2010 application for Interim Assistance benefits.

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 13th day of June, 2011.

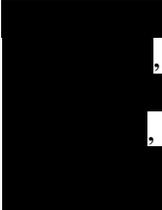
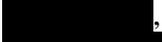
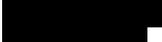
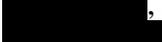
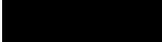
(signed)

Jay Durych
Hearing Authority

CERTIFICATE OF SERVICE

I certify that on June 13, 2011 true and correct copies of this document were sent to the Claimant via USPS Mail, and to the remainder of the service list by secure / encrypted e-mail, as follows:

Claimant – Certified Mail, Return Receipt Requested

, DPA Hearing Representative
, DPA Hearing Representative
, Policy & Program Development
, Staff Development & Training
, Administrative Assistant II
, Eligibility Technician I

(signed)

By: _____

J. Albert Levitre, Jr.
Law Office Assistant I