

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

In the Matter of:)
)
E G) OAH No. 13-0260-APA
_____) DPA No.

DECISION

I. Introduction

The Division of Public Assistance denied E G’s application for Interim Assistance benefits. Ms. G requested a hearing and the matter was referred to the Office of Administrative Hearings.

The administrative law judge conducted a telephonic hearing on April 2, 2013. Ms. G represented herself, and Jeff Miller represented the Division. Ms. G and Jamie Lang, a disability adjudicator employed by the Division, provided testimony.

The examining physician diagnosed seizure disorder, recurrent pancreatitis and severe lipid disorder.¹ The Division’s medical reviewer concluded that Ms. G did not meet Step 2 of the Social Security Administration’s test for disability because she was not following prescribed treatment and continued to drink, and that she did not meet Step 3 because she did not meet any of the disability listings.²

Considering the factors applicable to the determination whether she meets the disability listings for purposes of eligibility for Interim Assistance, the preponderance of the evidence is that Ms. G does not meet the listing for a seizure disorder. Therefore, the Division’s decision to deny her application is sustained.

II. Facts

From 2003 until early 2012, E G had occasional well controlled seizures.³ The frequency of the seizures varied; sometimes they occurred two or three times a month, but typically every two or three months.⁴ As treatment she was prescribed Dilantin.⁵ She was also prescribed

¹ Ex. 3.6 (Dr. Lynn Prysunka, M.D.)

² Ex. 3.2.

³ Testimony of D. G; see Ex. 3.38 (“Occasional well controlled seizures since 2003”).

⁴ Testimony of D. G.

⁵ See Ex. 3.20 (200 mg per day, 3/10/2010); 3.38; Testimony of J. Lang.

gemfibrozil, which is used to treat high cholesterol.⁶ Beginning in early 2012, she began to have problems with dizziness.⁷ In April, 2012 she had a seizure and in addition a “pre-syncopal event” while working as a waitress that cost her job as a waitress.⁸

Since her seizure in April, 2012, Ms. G has had two more seizures, one about a month prior to the April, 2013, hearing and the other three or four months prior to that.⁹ Her seizures are convulsive, and it can take up to three days for her to return to normal after a seizure. Ms. G sometimes injures herself in falls resulting from the seizures.¹⁰

Ms. G applied for Interim Assistance benefits, and on November 8, 2012, she was examined by Dr. Lynn Prysunka, who is Ms. G’s primary treating physician, and who submitted the physician’s report required by the Division.¹¹ On November 14, Dr. Prysunka noted that her seizure disorder was poorly controlled, and that she had “severe hyperlipidemia, mainly high triglyceridemia that leads to recurrent pancreatitis.”¹² Ms. G reported that she was regularly taking her prescribed dosage of Dilantin, but the doctor suspected she was not.¹³ At a follow-up visit on December 26, Dr. Prysunka noted, “She has been consistent with her dosing [of Dilantin] and seizure free and feels fine for over a month.”¹⁴ At her next visit, on January 24, 2013, Dr. Prysunka noted, “She has not had any acute pancreatitis now for some time.”¹⁵ Dr. Prysunka added, “she is not having seizures.”¹⁶ Dr. Prysunka diagnosed her recurrent pancreatitis and seizure disorder as stable.¹⁷

III. Discussion

Alaska Public Assistance benefits are payable to eligible needy aged, blind and disabled persons pursuant to AS 47.25.430-.615. Applicants who are under age 65 are required to apply and qualify for federal Supplemental Security Income (SSI) benefits.¹⁸

⁶ Testimony of D. G; Ex. 3.20.

⁷ See Ex. 3.20.

⁸ See Ex. 3.20-21. Dr. Prysunka’s report, dated April 24, 2012, states that her last seizure was April 6, but also states that she had a seizure “last weekend.”

⁹ Testimony of D. G.

¹⁰ Testimony of D. G.

¹¹ Testimony of D. G; Ex. 3.5-6. See 7 AAC 40.180(a).

¹² Ex. 3.26.

¹³ Ex. 3.26.

¹⁴ Ex. 3.28.

¹⁵ Ex. 3.30.

¹⁶ Ex. 3.30.

¹⁷ Ex. 3.30.

¹⁸ 7 AAC 40.170(a). Adult Public Assistance applicants whose income exceeds the SSI standards are not required to apply for SSI benefits. *Id.*

Interim Assistance benefits are paid monthly to eligible Adult Public Assistance applicants while they are waiting for the Social Security Administration to approve their SSI application.¹⁹

An applicant qualifies for Interim Assistance benefits if the Division determines the applicant to be disabled under 7 AAC 40.180.²⁰ The applicant must submit to an examination by a physician²¹ (in this case, Dr. Prysunka) and the Division's determination as to whether the applicant is disabled is based on:

- (1) a medical review by the department as to whether the applicant is likely to be found disabled by the Social Security Administration, including whether the applicant's impairment meets... (B) Social Security Administration disability criteria for the listings of impairments....;
- (2) medical evidence provided by the applicant or obtained by the department;
- (3) other evidence provided by the applicant...; and
- (4) a review of the written results of the... physician's examination...^[22]

For purposes of its review as to whether the applicant's impairment meets the Social Security Administration's disability criteria, the Division has adopted by reference the Social Security Administration's listing of impairments, set forth at 20 C.F.R. §404, Subpart P, appendix 1.²³ In determining whether the applicant's disability meets the criteria set out in 7 AAC 40.180(b)(1)(B), the Division considers whether the:

- (1) ...applicant's condition is listed as an impairment category...;
- (2) medical information...documents the applicant's impairment;
- (3) impairment affects the applicant's activities of daily living;
- (4) ...applicant can perform any other work, including sedentary work; and
- (5) ...applicant's impairment has lasted or is expected to last for a continuous period of not less than 12 months.^[24]

A. The April 1, 2005 Listings Apply

Initially, it must be determined which version of the disability listings applies. In making its determination, the Division applied the most recent version of the listings. However, in several recent decisions the commissioner has applied the April 1, 2005,

¹⁹ 7 AAC 40.170(a), (b); AS 47.25.455.

²⁰ 7 AAC 40.170(b).

²¹ 7 AAC 40.180(a).

²² 7 AAC 40.180(b)(1)(B), (2), (3), (4).

²³ 7 AAC 40.180(b)(1)(B).

²⁴ 7 AAC 40.180(c)(1)-(4).

version.²⁵ In doing so, the commissioner relied on the plain language of 7 AAC 40.180(b)(1)(B), which states:

- (b) The department will make a determination of whether the applicant is disabled based on
 - (1) a medical review by the department as to whether the applicant is likely to be found disabled by the Social Security Administration, including whether the applicant's impairment meets

...

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

AS 44.62.245(a)(1) provides that an agency may incorporate future amendments to a state regulation by adding the phrase “as may be amended” or “as amended from time to time” to the adoption clause, but 7 AAC 40.180(b)(1)(B) adopts a federal regulation. In any event, 7 AAC 40.180(b)(1)(B) does not include the language specified in AS 44.62.245 as necessary in order to adopt future amendments. Accordingly, 7 AAC 40.180(b)(1)(B) does not adopt future amendments to the April 1, 2005 version of the disability listings.

At the hearing in this case, the Division argued that notwithstanding the adoption of the April 1, 2005, version of the listings in 7 AAC 40.180(b)(1)(B), the most recent version of the listings must be applied, pursuant to 7 AAC 40.030(a), which states:

- (a) An applicant must meet the eligibility requirements of the SSI program contained in title XVI of the Social Security Act, as amended (42 U.S.C. 1381-1383) and in 20 C.F.R. Part 416, and the eligibility requirements set forth in this chapter. If the requirements of this chapter conflict with requirements of the SSI program, the requirements of this chapter apply unless the requirements of the SSI program specifically supersede inconsistent state program provisions.

Clearly, there is a conflict between the eligibility requirements of 7 AAC 40.180(b)(1)(B) and the eligibility requirements of the SSI program: to be considered disabled for purposes of 7 AAC 40.180(b)(1)(B) one applies the 2005 version of the Social Security Administration's disability listings, whereas to be considered disabled for purposes of the SSI program one applies the current version. However, notwithstanding the conflict,

²⁵ See In Re D.M., at 5, OAH No. 12-0285-APA (Commissioner of Health and Social Services 2013); In Re S.T., at 4, OAH No. 12-0750-APA (Commissioner of Health and Social Services 2012); In Re O.M., at 4, OAH No. 12-0748-APA (Commissioner of Health and Social Services 2013).

the requirements of the 2005 version apply, “unless the requirements of the SSI program specifically supersede inconsistent state program provisions.”

In making disability determinations for purposes of eligibility for the SSI program, a state must apply federal disability rules.²⁶ But the Division has not identified a requirement of the SSI program (or any other federal program) that a state must apply the Social Security Administration’s disability listings for purposes of eligibility for the Interim Assistance program.²⁷ Absent a showing that the Social Security Administration’s disability listings supersede state standards for eligibility for the Interim Assistance program, 7 AAC 40.030(a) mandates the application of the disability listings adopted in 7 AAC 40.180(b)(1)(B), even though the version of the disability listings adopted in 7 AAC 40.180(b)(1)(B) is inconsistent with the current version of those listings.

B. Likelihood of SSA Disability Determination Based on Steps 1-3

As previously observed, the Division’s disability determination for purposes of Interim Assistance is based, in part, on a medical review of whether the applicant is likely to be found disabled by the Social Security Administration, including whether the impairment meets the criteria stated in the disability listings.²⁸ The Social Security Administration follows a five evaluation process to determine whether a person is disabled.²⁹ Initially, the Division follows the first three steps of that process in determining whether a person is likely to be found disabled by the Social Security Administration.³⁰ At Step 1, the Social

²⁶ 20 C.F.R. §416.1015(a).

²⁷ The federal regulations governing interim assistance are set forth at 20 C.F.R. §416.1901-.1922. None of those regulations requires the use of Social Security Administration’s disability listings for purposes of participation in a state’s interim assistance program. 20 C.F.R. §416.1910 states that “An interim assistance agreement must be in effect between us and the State if we are to repay the State for interim assistance.” If there is a provision in the agreement between the Social Security Administration and the Division that mandates the application of the Social Security Administration’s disability listings rules as a condition of repayment for Interim Assistance payments, the Division has not identified it.

²⁸ 7 AAC 40.180(b)(1)(B). In addition, the Division considers medical and other evidence, and reviews the examining physician’s report. 7 AAC 40.180(b)(2)-(4).

²⁹ 20 C.F.R. §416.920 (SSI [Title XVI]); 20 C.F.R. §404.1520 (Federal Old Age, Survivors, and Disability Insurance [Title II]). These regulations are substantially the same.

³⁰ The Division follows the process set out in 20 C.F.R. §416.920, applicable to SSI, rather than 20 C.F.R. §404.1520. *See generally In Re M.H.*, OAH No. 12-0688-APA (Commissioner of Health and Social Services 2012). The use of the Social Security Administration’s process is not required by statute or regulation; use of the five step process was considered an analytical aid, not a requirement of law. *See* OHA No. 11-188, at 18 (*overruled in part, In Re M.H.*). 7 AAC 40.180(b)(1)(B) adopts by reference the listings; does not adopt by reference the Social Security Administration’s process for making a disability determination, which is established in different regulations. The department’s task is to predict what the Social Security Administration is likely to do, not to replicate the Social Security Administration’s process for making a disability determination. *See In Re M.H.*, at 2

Security Administration considers whether the person is performing substantial gainful activity.³¹ At Step 2, the Social Security Administration considers whether the impairment has lasted, or is expected to last, for at least 12 months.³² At Step 3, the Social Security Administration considers whether the person meets or equals the disability listings.³³ If a person meets these first three steps of the Social Security Administration’s process the Division will consider that person “likely” to be found disabled by the Social Security Administration, for purposes of eligibility for Interim Assistance benefits.³⁴

C. SSA Is Not Likely To Find That Ms. G Meets The Disability Criteria

Ms. G’s application specified a seizure disorder as her disabling condition.³⁵ She confirmed at the hearing that this is the only impairment she has that she considers disabling. Seizure disorders are listed as an impairment category, under Sections 11.02 (convulsive epilepsy) and 11.03 (nonconvulsive epilepsy).³⁶ The Division reviewed Ms. G’s medical records to determine if her conditions met the criteria for the 2012 listings in those categories.³⁷ In this decision, for the reasons previously stated, the 2005 version is applied.

To meet the listing for convulsive seizures, which is the type of seizures Ms. G suffers from, the seizures must occur “more frequently than once a month in spite of at least 3 months of prescribed treatment.”³⁸ For nonconvulsive seizures, even more frequent

(“The intent of [7 AAC 40.180] is to allow the Department to make a fast and relatively inexpensive prediction of whether an applicant will ultimately be found to be disabled by the SSA.”).

³¹ 20 C.F.R. §416.920(a)(4)(i).

³² 20 C.F.R. §416.920(a)(4)(ii). *See* 20 C.F.R. §416.909.

³³ 20 C.F.R. §416.920(a)(4)(iii).

³⁴ *See generally* In Re M.H., OAH No. 12-0688-APA (Commissioner of Health and Social Services 2012). 7 AAC 40.180(b)(1)(B) states that the Division’s determination of disability for purposes of Interim Assistance will be based, in part, on whether the person meets the criteria. This is substantially different from the standard applied by the Social Security Administration in making a disability determination in Step 3 of its disability analysis. In Step 3, the Social Security Administration considers whether the person meets or equals the criteria stated in a listing. 20 C.F.R. §416.920(a)(4)(iii); -925(c)(5); -926(a), (b).

In Re M.H. adopts the first three steps of the Social Security Administration’s evaluation process as part of the process for determining whether an applicant is disabled for purposes of eligibility for Interim Assistance. The commissioner’s decision states that the proposed decision “correctly concluded that Mr. H’[s] impairments do not meet or equal any of the listings[.]” *Id.*, at 2. However, whether the applicant’s condition was equal to a listing was not at issue in that case, and the quoted language is *dictum* . *Cf. id.*, at 2 (“[T]he regulation requires the determination of whether...the applicant’s impairment satisfies the criteria.” [emphasis added]).

³⁵ Ex. 3.8.

³⁶ 20 C.F.R. §404, Subpart P, Appendix 1 (2005). *See* note 8, *supra*.

³⁷ Testimony of J. Lang.

³⁸ Sec. 11.02.

occurrences are required.³⁹ Because Ms. G’s seizures have not occurred with the requisite frequency, she does not meet the listing for a seizure disorder, for purposes of Step 3 of a disability determination by the Social Security Administration.

D. Other Considerations

Mr. G has not shown that she meets the disability listing for a seizure disorder, for purposes of a disability determination by the Social Security Administration. However, as the commissioner noted In Re M.H.,⁴⁰ in determining whether a person meets criteria set out in 7 AAC 40.180(b)(1)(B) the Division is required by law to consider whether: (1) the condition is listed;⁴¹ (2) the impairment is medically documented;⁴² (3) the impairment affects the person’s activities of daily living;⁴³ (4) the person can perform any work (including sedentary work) other than their former work;⁴⁴ and (5) whether the impairment will last twelve months.⁴⁵

1. *Listing*

Seizure disorders are a listed impairment. Accordingly, the listings are an appropriate indicator of the severity of the impairment for purposes of determining whether Ms. G is likely to be found disabled by the Social Security Administration.⁴⁶ Thus, consideration of this factor yields no additional support for Ms. G’s application.

2. *Medical Documentation*

The listings for seizure disorder call for documentation of a detailed description of a typical seizure, but the documentation need not be provided by a medical professional.⁴⁷ Medical documentation of the blood levels of medication is required only if the seizures meet the frequency requirements.⁴⁸ There is medical documentation, dated January 24, 2013, to the effect

³⁹ Sec. 11.03 (“occurring more frequently than once weekly”).

⁴⁰ See In Re M.H., at 2, note 5, OAH No. 12-0688-APA (Commissioner of Health and Social Services 2012).

⁴¹ 7 AAC 40.180(c)(1).

⁴² 7 AAC 40.180(c)(2).

⁴³ 7 AAC 40.180(c)(3).

⁴⁴ 7 AAC 40.180(c)(4).

⁴⁵ 7 AAC 40.180(c)(5).

⁴⁶ For a person whose disabling condition is not listed, the Social Security Administration will consider closely analogous listings. See 20 C.F.R. §416.926(b)(2).

⁴⁷ See Sec. 11.00A.

⁴⁸ See Sec. 11.00A.

that the level of prescribed medication in Ms. G's system had dropped.⁴⁹ Consideration of this factor provides no additional support for Ms. G's application.

⁴⁹ Ex. 3.30.

3. *Activities of Daily Living*

The phrase “activities of daily living” is not defined for purposes of 7 AAC 40.180(c). Ms. G’s seizures render her unconscious for brief periods and it can take her several days to fully recover. However, there is no indication that her condition adversely affects her everyday activities beyond short periods of unconsciousness. Consideration of this factor provides no additional support for Ms. G’s application.

4. *Ability to Perform Work*

Facts and evidence relevant to this consideration are also relevant to Step 4 and Step 5 of the process used by the Social Security Administration to determine disability. However, there are important procedural and substantive differences between what the Division is called upon to do under 7 AAC 40.180(c)(4), and what the Social Security Administration does under Steps 4 and 5. Procedurally, under 7 AAC 40.180(c)(4) the burden of proof is on the applicant rather than, as it would be if Step 5 were applied, on the Division. Substantively, nothing in 7 AAC 40.180(c)(4) requires consideration of the applicant’s age, education and work experience in considering an applicant’s ability to work, as is required in Step 5.

The preponderance of the evidence is that because of her seizure disorder, Ms. G is unable to work in her former job for the No Name System, and that she lost her job as a waitress. However, Ms. G continued to work for nearly ten years after her seizure disorder came into existence, and in the past year her treatment regimen has lessened the frequency of her seizures. While her condition undoubtedly limits Ms. G’s ability to work in some fields, Ms. G did not establish that she is unable to work in any capacity. Thus, consideration of this factor provides no additional support for Ms. G’s application.

5. *Duration*

The Division suggested that Ms. G’s seizure disorder is related to alcohol abuse or withdrawal, suggesting that absent alcohol abuse or withdrawal it would not persist. However, the condition has persisted for approximately ten years. Ms. G denies alcohol abuse in the past year, and while Dr. Prysunka’s notes indicate that Ms. G’s condition may be exacerbated by alcohol abuse, they do not suggest that absent alcohol use she would not have the condition. The preponderance of the evidence is that Ms. G’s condition will persist for at least twelve months, even absent alcohol abuse or withdrawal and with the prescribed treatment.

IV. Conclusion

The Division conducted a medical review as to whether Ms. G met the disability criteria. Medical evidence provided by the applicant or obtained by the Division was submitted into evidence at the hearing, along with the results of the physician’s examination required under 7 AAC 40.180(a). Following Steps 1-3 of the process employed by the Social Security Administration to make a disability determination, and taking into consideration the additional factors identified in 7 AAC 40.180(c), Ms. G has not shown by a preponderance of the evidence that she meets the disability listings for purposes of eligibility for Interim Assistance. For these reasons, Ms. G has not shown that she is disabled under 7 AAC 40.180. Accordingly, the Division’s decision to deny her application is sustained.

DATED May 13, 2013

Signed

Andrew M. Hemenway
Administrative Law Judge

Adoption

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

Judicial review of this decision may be obtained by filing an appeal in the Alaska Superior Court in accordance with AS 44.62.560 and Alaska R. App. P. 602(a)(2) within 30 days after the date of this decision.

DATED this 29th day of May, 2013.

By: Signed

Signature
Andrew M. Hemenway

Name
Administrative Law Judge

Title

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