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

In The Matter Of: )  
 )  
 [REDACTED], ) OHA Case No. 11-FH-160  
 )  
 Claimant. ) DPA Case No. [REDACTED]  
 )  
 \_\_\_\_\_ )

**FAIR HEARING DECISION**

**STATEMENT OF THE CASE**

[REDACTED] (Claimant) applied for Interim Assistance (IA) benefits on April 1, 2011 (Ex. 6). The Division of Public Assistance (DPA or Division) denied the Claimant's application on April 15, 2011 (Ex. 6). The Claimant requested a fair hearing contesting the Division's denial of his IA application on April 18, 2011 (Ex. 7.1).

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

The Claimant's hearing began as scheduled on May 31, 2011 before Hearing Examiner Jay Durych. The Claimant attended the hearing in person, represented himself, and testified on his own behalf. The Claimant's friend, [REDACTED], attended the hearing in person, assisted in representing the Claimant, and also testified on the Claimant's behalf. [REDACTED], a Public Assistance Analyst with the Division, appeared in person to represent and testify on behalf of the Division. [REDACTED], the Division's Interim Assistance Medical Reviewer, participated by telephone and testified on behalf of the Division. The parties' testimonies were received and all exhibits submitted by the parties prior to the end of the hearing were admitted into evidence. At the end of the hearing the record was closed and the case became ripe for decision.<sup>1</sup>

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<sup>1</sup> On May 31, 2011, within hours of the end of the Claimant's hearing, Ms. [REDACTED] sent an e-mail to this Office which contained argument and a summary of evidence (Exs. 32-33). The Division objected to the filing of this additional argument and evidence, on behalf of the Claimant, because the hearing had been concluded and the record had been closed (Ex. 33). The Division's objections were valid, and the evidentiary value of the Claimant's post-hearing filing was minimal at best. Accordingly, the argument and evidence contained in the Claimant's post-hearing filing was not considered in the preparation of this decision.

## ISSUE

Was the Division correct when, on April 15, 2011, it denied the Claimant's April 1, 2011 application for Interim Assistance benefits, based on the assertion that the Claimant did not satisfy the Interim Assistance Program's applicable disability criteria?

## SUMMARY OF DECISION

The Claimant is not currently working. His diabetes mellitus 2, diabetic neuropathy, and nephrotic syndrome each qualify individually as "severe impairments" based on the applicable regulations. The Claimant's impairments satisfy the 12-month durational requirement. The Claimant's diabetic neuropathy satisfies the criteria of the Social Security Administration's applicable Listing of Impairments, and the Claimant is deemed disabled on that basis. Accordingly, the Division was not correct when, on April 15, 2011, it denied the Claimant's April 1, 2011 application for Interim Assistance benefits.

## FINDINGS OF FACT <sup>2 3</sup>

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

### I. Case Procedural History.

1. The Claimant applied to the United States Social Security Administration (SSA) for federal disability benefits (Supplemental Security Income or SSI) at some time prior to November 2010 (██████ testimony; ██████ testimony).
2. In November 2010, while the Claimant's above-referenced SSI application was pending with SSA, the Claimant applied for Interim Assistance (Ex. 29). On November 5, 2010 the Division's Medical Reviewer approved the Claimant's Interim Assistance application in an e-mail stating "client meets IA disability criteria" (Ex. 4.146).<sup>4</sup>
3. On March 22, 2011 the Division received information indicating that the Claimant's application for SSI had been denied by the SSA Appeals Council (Ex. 4.002). The Claimant re-applied to SSA for SSI the same day (Exs. 4.011, 4.020).<sup>5</sup>

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<sup>2</sup> Some medical abbreviations used in the medical reports quoted herein have been spelled out to promote clarity.

<sup>3</sup> The Claimant's file with the Office of Hearings and Appeals contains approximately 230 pages of medical records and releases. All of these records were reviewed during the preparation of this decision. However, in the interest of brevity, only the most relevant documents are quoted or discussed in this decision.

<sup>4</sup> According to the Division's Medical Reviewer, this approval was based on "the potential that neuropathy in the upper extremities as described in a letter from ██████ M.D. dated 07/29/2010 and reiterated in a later letter dated 11/29/2010 would meet dexterous movement impairment criteria" (Ex. 4.001).

<sup>5</sup> The Alaska statutes and regulations regarding the effect of the denial of an application for Supplemental Security Income by the Social Security Administration at the Appeals Council level are clear. AS 47.25.455(a) provides in relevant part that "the department shall pay . . . [interim] assistance under this chapter while the eligibility of the

4. The Claimant re-applied for Interim Assistance on April 1, 2011 (Ex. 6). On April 6, 2011 the Division's Medical Reviewer denied the Claimant's April 1, 2011 application for Interim Assistance (Exs. 4.000, 4.001). His bases for denial, as stated in his April 6, 2011 memorandum, were essentially the same as stated in his hearing testimony of May 31, 2011, summarized in Paragraph 29, below.

5. On April 15, 2011 the Division mailed to the Claimant a notice titled "APA Denied – Other Reasons" (Ex. 6). This notice stated in relevant part as follows (original formatting modified for brevity):

Your application for Adult Public Assistance (APA) and Medicaid received on April 1, 2011 is denied because of reason number five, below . . . . You do not meet the disability requirements for APA . . . . This action is based on APA Manual Section[s] 424 and 425 . . . . Medical Reviewer has made a decision to deny your [Interim Assistance] request because you do not meet the IA disability criteria.

6. On an unknown date <sup>6</sup> prior to May 31, 2011 the Division mailed to the Claimant a second denial notice <sup>7</sup> titled "APA Closed – Other Reasons" (Ex. 20.3). This notice stated in relevant part as follows (original formatting modified for brevity):

Your Adult Public Assistance (APA) and Medicaid case is closed as of May 31, 2011 . . . . Your APA and Medicaid case closed because of reason number five, below . . . . Your case is closed because of reasons explained below. The APA Manual Section that supports this action is 426 . . . . The Medical Reviewer has made a determination to deny your Interim Assistance request, as you do not meet the disability criteria.

## II. Medical Evidence of Physical Impairments.

7. The Claimant first noticed that his vision was becoming distorted in 2007 (Ex. 4.208).

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person for [SSI] benefits . . . is being determined." Regulation 7 AAC 40.375(a) narrows the more general language of the above statute by clearly stating that Interim Assistance is only provided "while the individual's eligibility for SSI is being determined by the Social Security Administration." 7 AAC 40.190(a) is more explicit still and states that an interim assistance recipient "will continue to receive interim assistance until the [recipient] . . . (4) receives . . . an adverse decision from the Social Security Appeals Council." Accordingly, once the Social Security Appeals Council denied the Claimant's SSI appeal, the Division was required to terminate the Claimant's Interim Assistance benefits. The Claimant then had the burden of re-applying for both SSI and Interim Assistance if he wished to obtain those benefits.

<sup>6</sup> The date of the notice, as stated on Ex. 20.3, is "999999."

<sup>7</sup> The Division's notices did not state the reasons why the Division found that the Claimant was not disabled. Accordingly, the Division's notices did not satisfy the minimum notice requirements of Alaska Fair Hearings regulation 7 AAC 49.070 and/or the Alaska Supreme Court's decisions in *Baker v. State of Alaska Department of Health & Social Services*, 191 P.3d 1005, 1009 (Alaska 2008) and *Allen v. State of Alaska Department of Health & Social Services*, 203 P.2d 1155, 1168 – 1170 (Alaska 2009)). However, given this Office's disposition of this case, neither party is harmed by adjudication of the case on the merits.

8. A medical report dated March 31, 2010 states that on that date the Claimant complained to his doctor of vertigo and insomnia (Ex. 4.046).

9. A medical report dated April 14, 2010 states that on that date the Claimant complained to his eye doctor of specks in his visual field and white-out in his peripheral vision (Exs. 4.118, 4.217). His eye doctor noted the presence of retinal edema, vitreal fibrosis, and hard exudates in the Claimant's eyes. *Id.*

10. A medical report dated April 28, 2010 states that on that date the Claimant complained to his eye doctor of lines and specks in his visual field, constant blurry vision, and feelings of ocular pressure (Exs. 4.134, 4.217).

11. A medical report dated May 20, 2010 states that on that date the Claimant complained to his eye doctor of feelings of ocular pressure (Exs. 4.136, 4.219).

12. A medical report dated June 3, 2010 states that on that date the Claimant complained to his eye doctor of eye pain, feelings of ocular pressure, and what he said looked like a kaleidoscope, with rainbows and spots, in his central vision (Exs. 4.138, 4.221).

13. A medical report dated June 24, 2010 states that on that date the Claimant complained to his eye doctor of a spot appearing in the center of one eye, blind spots, cloudiness in his right eye, light flashes, floaters, and an overall decrease in his vision (Exs. 4.125, 4.215).

14. A medical report dated July 12, 2010 states that on that date the Claimant complained to his eye doctor of glare problems and an overall decrease in his vision (Ex. 4.140).

15. As of July 14, 2010 the Claimant's diagnoses were listed as diabetes mellitus type 2 of less than two years' duration; asthma, hypertension, hypercholesterolemia, post right ankle open reduction with internal fixation, atopic dermatitis, and depression (Ex. 4.182). As of July 14, 2010 the Claimant's daily medications consisted of Lisinopril, Flovent, a Ventolin inhaler, Janumet, Coreg, Fluoxetine, Vicodin, and Zetia (Ex. 4.190).

16. The Claimant underwent a right kidney biopsy on July 14, 2010 (Exs. 4.095, 4.097, 4.188, 4.189). As of this date, the Claimant's doctor characterized his renal function as "normal" and his type 2 diabetes mellitus as "well controlled" (Ex. 4.183). The pathology report of the Claimant's renal biopsy, dated July 20, 2010 (Exs. 4.099, 4.100, 4.192, 4.193) diagnoses the Claimant with diabetic nephropathy and focal segmental glomerulosclerosis.

17. A medical report dated July 27, 2010 states that on that date the Claimant complained to his doctor of numbness in his fingers, wrists, toes, and ankles; that he was having problems handling objects because of numbness in his hands; that he was unable to stand for more than 10 minutes; that he needed a cane to walk; and that he occasionally had balance problems (Exs. 4.052, 4.159).

18. In a letter dated July 29, 2010 the Claimant's primary treating physician, Dr. [REDACTED], M.D. opined that, because of the Claimant's diabetes, proteinuria, hypertension, neuropathy, and nephropathy, the Claimant was "permanently disabled" and "not able to maintain gainful employment" (Exs. 4.030, 4.158).

19. A medical report dated August 18, 2010 states that on that date the Claimant complained to his eye doctor of black lines and flashes in his visual field, and that his vision was now more blurry than before (Exs. 4.126, 4.216).

20. On September 1, 2010 and November 4, 2010 the Claimant's ophthalmologist wrote letters to the Social Security Administration (Exs. 4.116, 4.117, 4.207). The content of the two letters was essentially the same. The letter dated September 1, 2010 (Exs. 4.116, 4.207) stated in relevant part:

[Claimant] suffers from retinopathy secondary to diabetes and kidney complications. [Claimant's] current vision is 20/70 in the right eye and 20/80 in the left eye with correction. Vision is worse at near: 20/200 in both the right and left eye. Considering the nature of [Claimant's] retinopathy, it is not likely that vision will improve and it may continue to decline in years to come. Low vision devices, like magnifiers and telescopes, may allow some improvement in visual function but he will not be able to function with the speed and accuracy of a normal sighted person.

. . . . The retinopathy has decreased his vision to a point that prevents him from fully functioning in many work settings . . . .

21. A medical report dated September 27, 2010 states that on that date the Claimant complained to his eye doctor of light flashes in his visual field, seeing double, floaters, and brown spots (Ex. 4.127).

22. On September 29, 2010 the Claimant's primary treating physician, Dr. [REDACTED], M.D. completed a Preliminary Examination for Interim Assistance (Form AD-2) on behalf of the Claimant (Exs. 4.147 – 4.147A). The Claimant was diagnosed as suffering from diabetes mellitus 2, diabetic neuropathy,<sup>8</sup> and nephrotic syndrome. *Id.* The doctor further indicated that the Claimant was not expected to recover from these conditions. *Id.*

23. On October 7, 2010 [REDACTED], M.D. prepared and signed a seven page-report stating his professional opinion as to the Claimant's functional limitations (Exs. 4.031 – 4.037). The report can be summarized as follows:

- a. The Claimant's symptoms are fatigue, joint stiffness and pain, muscle loss and weakness, edema, numbness, tingling, and bowel problems (Ex. 4.031).
- b. The Claimant has joint pain in his back, neck, and hands, rated as 8 on a scale of 1-10, and worst in the morning (Ex. 4.031).
- c. The Claimant has a reduced range of motion in his hands, arms, feet, and legs (Ex. 4.031). He has joint instability, reduced grip strength, and sensory and reflex changes. *Id.*

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<sup>8</sup> Diabetic neuropathy is caused by nerve damage. See Mayo Clinic website at <http://www.mayoclinic.com/health/peripheral-neuropathy/DS00131> (date accessed July 26, 2010). Diabetes is one of the most common causes of neuropathy. *Id.* The symptoms of neuropathy can include (1) the gradual onset of numbness and tingling in the feet or hands, which may spread upward into the legs and arms; (2) burning pain in the affected area; (3) sharp, jabbing or electric-like pains in the affected area; (4) extreme sensitivity to touch; (5) lack of coordination; and (6) muscle weakness or paralysis if motor nerves are affected. *Id.*

- d. The Claimant has impaired sleep, impaired appetite, weight changes, and muscle spasms (Ex. 4.032).
- e. The Claimant frequently experiences pain severe enough to interfere with his attention and concentration (Ex. 4.032). The Claimant has depression and anxiety which also affect his pain level (Ex. 4.032).
- f. The Claimant has a marked limitation as to his ability to handle work-related stress (Ex. 4.032).
- g. The side effects of the Claimant's prescribed medications include fatigue, dizziness, nausea, diarrhea, and constipation (Ex. 4.032).
- h. The Claimant can sit for no longer than 15 minutes before needing to get up and walk about (Ex. 4.033). The Claimant should sit for no longer than one hour, total, during an eight-hour work day (Ex. 4.033). It is medically necessary for the Claimant to elevate both legs while sitting in order to minimize pain (Ex. 4.033).
- i. The Claimant should not stand or walk longer than 15 minutes at a time without sitting or lying down (Ex. 4.033). The Claimant should then lie down or recline for two hours before standing or walking again (Ex. 4.034). The Claimant should stand and/or walk for no longer than one hour, total, during an eight-hour work day (Ex. 4.034). The Claimant requires a cane to aid in both walking and standing (Ex. 4.036).
- j. The Claimant should never lift more than five pounds, and should never stoop (Ex. 4.035). He can use his fingers and handle items with his right hand, but never with his left hand (Ex. 4.035).
- k. The Claimant should rest (lie down or recline) for four hours out of an eight-hour work day to relieve pain and fatigue from his documented medical impairments (Ex. 4.034).
- l. The Claimant's functional limitations, as outlines above, have existed since August 2009 or before (Ex. 4.036).

24. A medical report dated October 13, 2010 states that on that date the Claimant complained to his eye doctor of cloudiness and light flashes in his visual field (Ex. 4.142).

25. On November 29, 2010 [REDACTED], M.D. prepared and signed a letter which stated in relevant part as follows (Ex. 4.029):

[Claimant] is my patient . . . since 09/27/09. [He] was diagnosed with a number of medical conditions that lead to a significant impairment of the patient's functional level . . . . [T]he patient has the following medical diagnoses confirmed: asthma, diabetes mellitus type 2, retinopathy (diabetic in nature), neuropathy affecting both hands and both feet, nephropathy manifested with proteinuria and nephritic syndrome confirmed with kidney biopsy, hypertension, atopic dermatitis, depression, microscopic hematuria, and hyperlipidemia . . . . [T]he patient is allergic to statins,

hydrochlorothiazide, and Bystolic, and also doesn't tolerate Niacin. Therefore, the treatment of his hyperlipidemia becomes problematic. Currently, the patient complains of difficulty handling objects with his hands because of numbness . . . . He also is walking using a cane and occasionally has a problem with maintaining balance. He is unable to stand for more than 10 minutes. From a medical standpoint, I believe the patient is unable to work and is medically disabled . . . .

26. On March 17, 2011 Dr. [REDACTED] completed a second Preliminary Examination for Interim Assistance (Form AD-2) on behalf of the Claimant (Exs. 4.003, 4.003A). The Claimant was diagnosed as suffering from diabetes mellitus 2, diabetic neuropathy, and nephrotic syndrome.<sup>9</sup> *Id.* The doctor indicated that the Claimant was not expected to recover from these conditions. *Id.*

### III. Credible Hearing Testimony.

27. At the hearing of May 31, 2011 the Claimant credibly testified in relevant part as follows:

a. He had surgery on his left eye in May 2010 to try to stabilize his diabetic retinopathy. This left him with some blind spots. He also sees flashes of light in the center of his eyes, and white spots and floaters over his entire field of vision.

b. His vision is bad enough that, even with his glasses on, he has not been able to get a driver's license. He has difficulty reading a newspaper and viewing a computer monitor. His vision can be corrected to 20/70 in the right eye and 20/80 in the left eye, but his vision fluctuates due to his diabetic retinopathy.

c. He has stiffness and numbness in his arms and fingers. He cannot hold papers very well.

d. He has stiffness and pain in his back. He cannot comfortably sit for very long.

e. He is very depressed, but he cannot take his two prescription antidepressants because of their side-effects. He is always tired. Sometimes he cannot get up in the morning.

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<sup>9</sup> Nephrotic Syndrome is a group of symptoms including protein in the urine (more than 3.5 grams per day), low blood protein levels, high cholesterol levels, high triglyceride levels, and swelling. *See* Medline Plus online medical dictionary, a service of the U.S. National Library of Medicine and the National Institutes of Health (accessed on July 11, 2011 at <http://www.nlm.nih.gov/medlineplus/ency/article/000490.htm>). Nephrotic syndrome is caused by various disorders that damage the kidneys, particularly the basement membrane of the glomerulus. *Id.* This immediately causes abnormal excretion of protein in the urine. *Id.* In adults, the most common causes are diabetic nephropathy and membranous nephropathy. *See* National Kidney & Urologic Diseases Information Clearinghouse (NKUDIC), a service of the National Institutes of Health, (accessed on July 11, 2011 at <http://kidney.niddk.nih.gov/kudiseases/pubs/nephrotic/>). Treatment of nephrotic syndrome focuses on reducing high cholesterol, blood pressure, and protein in urine through diet, medications, or both. *Id.* As many as half of those with Nephrotic Syndrome develop chronic kidney disease that progresses to end-stage renal disease. *Id.* In these cases, the kidneys gradually lose their ability to filter wastes and excess water from the blood. *Id.* If kidney failure occurs, the person will need dialysis or a kidney transplant. *Id.*

f. He has memory loss. Ms. [REDACTED] has to tell him when to take his medications.

28. At the hearing of May 31, 2011 [REDACTED] credibly testified in relevant part as follows:

a. She has lived with the Claimant for 11 years. She helps take care of him.

b. Before the Claimant had diabetes he could do most anything. Now he can hardly do anything.

c. The Claimant's condition is definitely worse than it was one year ago. The Claimant has neuropathy in both arms now. His arms and legs are numb. He has back and neck pain. He cannot walk very far. He cannot carry very much weight. If he stands or walks for very long his feet swell. He cannot stand for more than 5-10 minutes, and he cannot sit for more than 20 minutes. His memory is poor. His vision is not good enough to perform sedentary work.

29. At the hearing of May 31, 2011 the DPA's Medical Reviewer credibly testified in relevant part as follows:

a. The Division has access to an SSA database. The database indicates whether an SSI application has been denied, and provides a three-digit code which indicates in very broad terms why SSA denied an application. However, the database does not provide, and DPA does not otherwise receive, an actual copy of the SSA's decision. Accordingly, the Division never knows the *specific* reason(s) why SSA has denied an SSI application.

b. The Claimant was originally approved for Interim Assistance in November 2010. However, the SSA Appeals Council subsequently denied the Claimant's pending application for SSI. SSA denied the Claimant's SSI application based on Code N31, indicating that SSA determined that the Claimant could still perform his past work. This caused the Claimant's Interim Assistance to terminate.

c. The Claimant then re-applied for SSI with SSA, and subsequently re-applied for Interim Assistance with DPA. The DPA Medical Reviewer denied the Claimant's new / current Interim Assistance application primarily on the basis that, since SSA had denied the Claimant's prior SSI application, it appeared most likely that SSA would also deny the Claimant's new SSI application.

d. Nephrotic Syndrome is categorized by SSA under Section 6.06 of the SSA's Listing of Impairments. The Claimant has Nephrotic Syndrome, but his symptoms are not severe enough to satisfy the requirements of Section 6.06 of the SSA's Listings.

e. Neuropathy is categorized by SSA under Sections 9.08(a) and/or 11.14 of the SSA's Listing of Impairments. He approved the Claimant's original Interim Assistance application on the basis that the Claimant's neuropathy satisfied the



requirements of Sections 9.08(a) and/or 11.14. However, following the SSA Appeals Council's denial of the Claimant's original SSI application, it appeared to him that SSA did not agree with his prior decision finding that the Claimant was disabled. Accordingly, he denied the Claimant's second (current) application for Interim Assistance benefits.

f. He did not consider Claimant's depression as being a factor in the disability analysis because depression was not listed as a diagnosis on Claimant's Form AD-2. He only considers the diagnoses listed on the form AD-2.

#### IV. The Claimant's Educational and Vocational History.

30. The Claimant was born in [REDACTED] 1979 (Ex. 4.221) and was 32 years old at the time of the hearing held in this case.

31. The Claimant completed the 12<sup>th</sup> grade (Ex. 4.155). He can read, write, speak, and understand English adequately (Ex. 4.155).

32. In 1996 the Claimant worked as a laborer (Ex. 4.153). In 1998 the Claimant worked as a cashier in a grocery store (Ex. 4.153).

33. In 1998-1999 the Claimant worked for a cleaning business (Ex. 4.153). In 1999 the Claimant also worked in a restaurant as a pizza-maker, and later also worked as a cashier in a grocery / department store (Ex. 4.153). In the later job the Claimant was responsible for cash handling, cashiering, stocking, cleaning, customer assistance, preparing reports, and using photo developing equipment (Ex. 4.154). This job required frequent standing, walking, reaching, and bending (Ex. 4.154).

34. In 2000 the Claimant worked as a cashier in a gas station (Ex. 4.153). In this capacity he performed cash handling, customer assistance, cleaning, stocking, and food preparation (Ex. 4.154). This work required him to carry up to 30 pounds frequently (Ex. 4.154).

35. From 2001 – 2005 the Claimant worked again as a laborer (Ex. 4.153). As a laborer he performed cleaning, digging, and roofing (Ex. 4.153). This work required him to walk and bend frequently and to carry up to 50 pounds frequently (Ex. 4.153).

36. The Claimant has not worked since March 27, 2005 (Ex. 4.026). He can no longer perform his prior work due to his impairments (Claimant hearing 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 proof<sup>10</sup> by a preponderance of the evidence.<sup>11</sup>

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<sup>10</sup> "Ordinarily the party seeking a change in the status quo has the burden of proof." *State of Alaska Alcoholic Beverage Control Board v. Decker*, 700 P.2d 483, 485 (Alaska 1985).

## The Interim Assistance Program; Use of SSA Disability Criteria.

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

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

The Social Security Administration’s SSI disability analysis involves a sequential multistep evaluation. *Briscoe ex rel. Taylor v. Barnhart*, 425 F.3d 345, 351-52 (7th Cir. 2005). This evaluation considers (1) whether the claimant is presently engaged in substantial gainful activity; (2) whether the claimant has a severe impairment or combination of impairments (the duration of the impairment is an aspect of this severity requirement); (3) whether the claimant's impairment meets or equals any impairment listed in the regulations as being so severe as to preclude substantial gainful activity; (4) whether the claimant's residual functional capacity leaves him unable to perform his past relevant work; and (5) whether the claimant is unable to perform any other work existing in significant numbers in the national economy. 20 C.F.R. §§ 404.1520, 416.920. A finding of disability requires an affirmative answer at either step three or step five.

### Substantial Gainful Activity

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

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

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<sup>11</sup> Preponderance of the evidence is defined as “[e]vidence which is of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not.” *Black’s Law Dictionary* at 1064 (West Publishing, 5<sup>th</sup> Edition, 1979).

### 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. The claimant's own statement of symptoms alone will not suffice. 20 C.F.R. § 416.908. Acceptable medical sources include licensed physicians and psychologists. 20 C.F.R. § 404.1513(a). Substantial weight must be given to the opinion, diagnosis and medical evidence of these medical providers unless there is good cause to do otherwise. 20 C.F.R. § 416.1527(d).

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

### Duration.

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

### Severe Impairment That Meets or Equals a Listing.

The next step in the analysis is to determine whether the applicant's impairment meets or medically equals the listing of impairments contained in the Social Security regulations located at 20 CFR Part 404, Subpart P, Appendix 1. The claimant bears the burden of establishing that his impairments

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<sup>12</sup> 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.

satisfy the requirements of a listings impairment. *Tackett v. Apfel*, 180 F.3d 1094, 1098-1099 (9th Cir. 1999); *Sullivan v. Zebley*, 493 U.S. 521, 530-531, 110 S.Ct. 885, 107 L.Ed.2d 967 (1990).

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

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

#### Capability of Performing Previous Relevant Work

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

#### Capability of Performing Other Work

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

Whether an applicant is capable of performing other work requires the application of the Social Security medical vocational guidelines that include the evaluation of the applicant's residual functional capacity, age, education, English literacy, and previous work experience. If the applicant is not capable of performing other work, he is disabled. 20 CFR 416.920(a)(4)(v).

## **ANALYSIS**

### Introduction; Basic Definition of Disability.

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

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

### I. Is the Claimant Performing Substantial Gainful Activity?

The first element of the disability analysis is whether the claimant is performing “any substantial gainful activity.” Pursuant to 20 CFR 404.1510, “substantial gainful activity” means “work that (a) involves doing significant and productive physical or mental duties, and (b) is done (or intended) for pay or profit.”

The written record indicates that the Claimant has not worked since March 27, 2005 (Ex. 4.026). The Division did not contest this. Accordingly, the Claimant has met the first step of the Social Security disability analysis – he has proven, by a preponderance of the evidence, that he is not engaged in “substantial gainful activity.” It is therefore necessary to proceed to the next step and to determine whether the Claimant is severely impaired.

### II. Does the Claimant Have a Severe Impairment?

A severe impairment is one that “significantly limits [a person’s] physical or mental ability to do basic work activities.” 20 CFR 416.920(c). “Basic work activities” include “physical functions such as walking, standing, sitting, lifting.” 20 CFR 416.921(b).

The Division did not assert, either in its written determination (Exs. 4.000, 4.001), or at hearing, that the Claimant’s impairments were *not* severe. Rather, the Division asserted that none of the Claimant’s impairments met or medically equaled the requirements of the SSA’s applicable Listings of Impairments (discussed in Analysis Section IV, below). *See* Findings of Fact at Paragraph 29 (e-g), above. In addition, there is ample medical evidence indicating that the Claimant’s impairments adversely affect his physical and mental ability to perform basic work activities. *See* Findings of Fact at Paragraphs 21, 24, and 26, above. Accordingly, the Claimant has carried his burden and proven, by a preponderance of the evidence, that his diabetes mellitus 2, diabetic neuropathy, and nephrotic syndrome, constitute “severe impairments” as defined by 20 CFR § 404.1520(c) and 20 CFR § 416.920(c).

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

The next step, pursuant to 20 CFR § 416.909, is to decide whether or not the Claimant’s severe impairments (diabetes mellitus 2, diabetic neuropathy, and nephrotic syndrome), have lasted, or can be expected to last, for a continuous period of at least 12 months. In this regard, it is important to note that the 12-month durational requirement of 20 CFR § 416.909 is *retrospective* as well as *prospective*; it looks *back in time* as well as *forward in time* (i.e. the impairment “must have lasted or must be expected to last”).

The Claimant’s treating physician stated in a written report that the Claimant has been functionally impaired by his three diagnosed medical problems since August 2009 or before (Ex. 4.036). Thus, as of the date of the hearing in this case, the Claimant’s impairments had been present for at least 21 months. Further, the Claimant’s treating physician stated on the DPA’s Form AD-2 that the

Claimant was not expected to recover from his diabetes mellitus 2, diabetic neuropathy, or nephrotic syndrome (Exs. 4.003, 4.003A). Accordingly, the Claimant's diabetes mellitus 2, diabetic neuropathy, and nephrotic syndrome satisfy the 12-month durational requirement.

#### IV. Do the Claimant's Severe Impairments Meet or Medically Equal "the Listings?"

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

##### A. The Claimant's Diabetes Mellitus 2 and Related Neuropathy.

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

- A. Neuropathy demonstrated by significant and persistent disorganization of motor function in two extremities resulting in sustained disturbance of gross and dexterous movements, or gait and station (see 11.00C); or
- B. Acidosis<sup>13</sup> occurring at least on the average of once every 2 months documented by appropriate blood chemical tests (pH or pCO<sub>2</sub> or bicarbonate levels); or
- C. Retinitis proliferans;<sup>14</sup> evaluate the visual impairment under the criteria in 2.02, 2.03, or 2.04.

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<sup>13</sup> Diabetic ketoacidosis (also referred to as DKA, ketoacidosis or simply acidosis) is a potentially life-threatening complication of diabetes mellitus. See Mayo Clinic website at <http://www.mayoclinic.com/print/diabetic-ketoacidosis/DS00674/DSECTION=all&METHOD=print> (date accessed July 19, 2010). It occurs when the body cannot use sugar (glucose) as a fuel source because the body has no insulin or not enough insulin, and fat is used instead (see Mayo Clinic article, above). Blood glucose levels rise (usually higher than 300 mg/dL) because the liver produces glucose to try to combat the problem. *Id.* However, the cells cannot pull in that glucose without insulin. *Id.* Due to the shortage of insulin, the body switches to burning fatty acids. *Id.* The byproducts of fat metabolism are ketones and acids. *Id.* These ketones and acids build up in the blood. *Id.* Thus, diabetic ketoacidosis is indicated by high ketone levels in the urine. *Id.* "The end stage of untreated diabetes . . . begins with diabetic ketoacidosis." See expert medical testimony in *Hennessey v. Secretary of Dept. of Health and Human Services*, 2009 WL 1709053 (Fed. Cl. 2009).

<sup>14</sup> Retinitis proliferans is a condition sometimes due to intraocular hemorrhage, with neovascularization and the formation of fibrous tissue extending into the vitreous from the retinal surface; retinal detachment may occur. See Dorland's Medical Dictionary for Health Consumers (Saunders 2007), accessed online at <http://medical-dictionary.thefreedictionary.com/retinitis+proliferans> (date accessed July 11, 2011). Retinitis proliferans is particularly associated with diabetic retinopathy. See Merriam-Webster's online dictionary at <http://www.merriam-webster.com/medical/retinitis%20proliferans> (date accessed July 11, 2011).

### 1. Does the Claimant's Acidosis or Retinitis Proliferans Satisfy the Listing?

The Division asserts that the record does not demonstrate the existence of acidosis or retinitis proliferans sufficient to meet the requirements of the listings (*see* Exs. 4.000, 4.001). This Office's independent review of the record indicates that the Division is correct. There are no medical reports in the record indicating that the Claimant has acidosis. Further, although there are numerous medical reports in the record indicating that the Claimant has a serious diabetes-related visual impairment, the degree of the Claimant's visual impairment is not sufficient to support a finding of disability under § 9.08(C).

### 2. Does the Claimant's Diabetic Neuropathy Satisfy the Listing?

The next issue is whether the Claimant's diabetic neuropathy is sufficient in degree to satisfy the requirements of Section 9.08A (set forth above). Section 9.08A requires "significant and persistent disorganization of motor function in *two extremities* resulting in sustained disturbance of gross and dexterous movements, or gait and station" [emphasis added].

The Division's Medical Reviewer approved the Claimant's original application for Interim Assistance based on his finding that the Claimant's diabetic neuropathy satisfied the requirements of Section 9.08A (*see* Exs. 4.000, 4.001, 4.146, and Medical Reviewer's hearing testimony). However, he denied the Claimant's new / current Interim Assistance application. He did so primarily on the basis that, since SSA had subsequently denied the Claimant's SSI application, it appeared most likely to him that SSA would also deny the Claimant's new SSI application (*see* Exs. 4.000, 4.001, and Medical Reviewer's hearing testimony).

The DPA Medical Reviewer's rationale appears facially logical. However, it is not legally correct. It is true that, pursuant to 7 AAC 40.190(a)(4), the Division is required to terminate the Interim Assistance benefits of a recipient who (as here) receives a notice of dismissal or an adverse decision from the Social Security Appeals Council. However, the Interim Assistance regulations do not give final preclusive effect to an adverse SSA disability decision with regard to *future eligibility*. Rather, the regulations allow the former recipient to *re-apply*. See generally 7 AAC 40.040, DHSS Administrative Procedures Manual at Section 101, and DPA Adult Public Assistance Manual at Section 410. This acknowledges the fact that the medical condition of an unsuccessful applicant or former recipient *may subsequently deteriorate* such that he or she may become eligible for Interim Assistance in the future.

In addition, the DPA Medical Reviewer acknowledged at hearing that, although the Division has access to an SSA database, and although the database indicates *in very broad terms* why SSA denied an application, *the database does not provide, and DPA does not otherwise receive, an actual copy of the SSA's decision*. Accordingly, the Division never knows the *specific* reason(s) why SSA has denied an SSI application.

Finally, because of this limited exchange of information between SSA and DPA, the Division has no way of knowing what medical evidence was considered by SSA at the time SSA made its decision. Due to the fact that SSI cases are often pending before the SSA for several years, the evidence in SSA cases will almost certainly be less current than the evidence presented in Interim Assistance cases, which proceed from initial application to hearing and decision in a few months. In this case, *virtually all of the medical evidence on which this decision is based did not exist as*

recently as one year ago; it is more likely than not that none of that evidence was considered by SSA in its denial of the Claimant's application. In summary, an SSA decision cannot be considered controlling, or even persuasive, for purposes of the Interim Assistance program, *without knowing exactly what evidence was considered by SSA in making its decision.*

At hearing, the Claimant credibly testified that he has stiffness and numbness in *both his arms and all his fingers*, and that he cannot hold papers very well (*see Findings of Fact at Paragraph 27*). Ms. [REDACTED] testified that the Claimant has neuropathy in *both arms*, and that his arms and legs are numb (*see Findings of Fact at Paragraph 28*). This testimony is confirmed by Dr. [REDACTED]'s letter dated November 29, 2010, which states in relevant part as follows (Ex. 4.029):

[The Claimant] . . . was diagnosed with a number of medical conditions that lead to a significant impairment of the patient's functional level . . . [T]he patient has . . . neuropathy *affecting both hands and both feet* . . . [The Claimant] complains of *difficulty handling objects with his hands because of numbness* . . . He also is *walking using a cane and occasionally has a problem with maintaining balance*. He is unable to stand for more than 10 minutes. From a medical standpoint, I believe the patient is unable to work and is medically disabled . . . [Emphasis added].

In summary, the evidence in this case satisfies Section 9.08A's requirement of significant and persistent disorganization of motor function in two extremities with sustained disturbance of gross and dexterous movement.<sup>15</sup> Accordingly, the Claimant is deemed disabled by his diabetic neuropathy pursuant to 20 CFR 416.920(a)(4)(iii).<sup>16</sup>

## CONCLUSIONS OF LAW

The Claimant carried his burden and proved, by a preponderance of the evidence, that:

1. He is not currently engaged in substantial gainful activity as defined by 20 CFR 404.1510.
2. His diabetes mellitus 2, diabetic neuropathy, and nephrotic syndrome constitute medically severe impairments as defined by 20 CFR 416.920(c) and 20 CFR 416.921(b).
3. His diabetes mellitus 2, diabetic neuropathy, and nephrotic syndrome have lasted or can be expected to last for 12 (twelve) 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).

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<sup>15</sup> This is the same basis on which the Division's Interim Assistance Medical Reviewer originally approved the Claimant's first Interim Assistance application on November 5, 2010 (*see Exs. 4.000, 4.001, 4.146*).

<sup>16</sup> Because the Claimant's diabetic neuropathy satisfies the relevant Listing of Impairments, it is not necessary to determine whether the Claimant's Nephrotic Syndrome is severe enough to satisfy the requirements of Section 6.06 of the SSA's Listing of Impairments.



4. His diabetic neuropathy meets or equals the requirements for Endocrine System Impairments located at 20 CFR Part 404, Subpart P, Appendix 1, § 9.08, and the Claimant is therefore deemed disabled on this basis pursuant to 20 CFR 416.920(a)(4)(iii).

### DECISION

The Division was therefore not correct when, on April 15, 2011, it denied the Claimant's application for Interim Assistance benefits dated April 1, 2011, based on the assertion that the Claimant did not satisfy the Interim Assistance Program's disability requirements.

### 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. If the Claimant appeals, the 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. To appeal, send a written request directly to:

Director of the Division of Public Assistance  
Department of Health and Social Services  
PO Box 110640  
Juneau, AK 99811-0640

DATED this 13th day of July, 2011.

(signed)

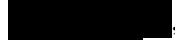
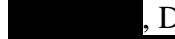
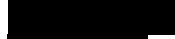
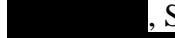
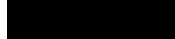

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Jay Durych  
Hearing Authority

### CERTIFICATE OF SERVICE

I certify that on July 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