

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

In the Matter of: )  
 )  
 K N. N ) OAH No. 13-0449-APA  
 ) DPA Case No.  
\_\_\_\_\_ )

**DECISION**

**I. Introduction**

The issue in this case is whether K N is disabled for purposes of Alaska's "state only" disability program. This decision finds, based on the testimony and medical records presented at the hearing, that Mr. N can no longer perform his prior work due to physical impairments, and cannot perform sedentary work (which he might otherwise be physically able to perform) due to pain and other non-exertional factors. Accordingly, Mr. N meets the disability criteria necessary to receive "state only" disability benefits under 7 AAC 40.170(c) for the period in which he was financially eligible. The Division's decision denying "state only" disability benefits to Mr. N is therefore reversed.

**II. Facts<sup>1</sup>**

*A. Mr. N's Physical Impairments*

Mr. N is 41 years old.<sup>2</sup> He has a number of physical impairments, many stemming from three incidents which occurred during the period 2001 - 2003 while he was serving in the U.S. Navy.<sup>3</sup> First, he fell about eight feet from a ladder onto machinery during heavy seas. Second, his right leg was slammed in a door. Third, a heavy sheet of steel fell on him. He was discharged from the Navy in 2004 with a disability rating of 80% and has not been employed regularly since that time.

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<sup>1</sup> The record in this case is largely in electronic format. It consists of paper exhibits marked 1 through 48, and four compact disks ("CDs"). The four CDs have been lettered A, B, C, and D, and contain the following files / pages:

Disk A - Contains 9 separate files of documents in portable document format (pdf). The nine files are named "Part 1" through "Part 9." Part 1 contains pages A1 - A40; Part 2 contains pages A41 - A57; Part 3 contains pages A58 - A193; Part 4 contains pages A194 - A442; Part 5 contains pages A443 - A594; Part 6 contains pages A595 - A1170; Part 7 contains pages A1171 - A1372; Part 8 contains pages A1373 - A1390; and Part 9 contains pages A1391 - A1638.

Disk B - Contains x-rays and other diagnostic imaging viewable using RADinfo SYSTEMS' RSVS "Web Content Viewer." These images are not paginated.

Disk C - Contains x-rays and other diagnostic imaging viewable using DatCard Systems' viewer. These images are not paginated.

Disk D - Contains 2 separate files of documents in portable document format (pdf). The file named "4-15-2013 9-45-23\_NIMAGES-K" contains pages D1 - D73; the file named "4-15-2013 9-45-29\_N-K-7111" contains pages D74 - D306.

<sup>2</sup> Exhibit D5.

<sup>3</sup> Exs. D60, D200, and N hearing testimony (sources for entire paragraph).

Mr. N was hospitalized due to a right medial meniscus tear in 1999, a right wrist and ulna nerve repair in 2002, and a right hip arthroscopy and debridement in 2003.<sup>4</sup> He has chondromalacia of the patella bilaterally, back and neck pain, chronic pain syndrome, degenerative spondylolisthesis, diabetes, eczema, foot pain, gastroesophageal reflux disease, hiatal hernia, hypertension, irritable colon, migraines, night sweats, obesity, radicular spinal pain, seizure disorder, sleep apnea, and tinnitus.<sup>5</sup>

X-rays of Mr. N's right wrist taken February 23, 2011 showed "mild to moderate degenerative changes of the radiocarpal joint," with a plate remaining in the distal ulna from an old healed fracture, all of which the radiologist characterized as a "major abnormality."<sup>6</sup>

On March 21, 2013 Mr. N underwent an MRI of his lumbar spine.<sup>7</sup> The MRI found "disc protrusion at L5-S1, with possible impingement of the traversing left S1 nerve root," which the MRI report stated was a "significant abnormality" requiring attention.

Mr. N's current medications include Absorbace, Amitriptyline, ammonium lactate lotion (for skin problems), aspirin, Bupropion (Wellbutrin), Cholecalciferol, Cyclobenzaprine (for muscle spasms), Desonide cream (for skin problems), Docusate, Ergocalciferol, Flexeril, Hydrocodone, Ketoconazole shampoo (for skin problems), Lisinopril, Meloxicam, Metoprolol, morphine, multivitamins, Naproxen, nitroglycerin (for chest pain), Ondansetron (for nausea), Pantoprazole, Prazosin, Promethazine, Psyllium, and Sumatriptan succinate.<sup>8</sup>

*B. Mr. N's Mental Impairments*

Mr. N has been diagnosed with Post-Traumatic Stress Disorder (PTSD) and Major Depressive Disorder, Recurrent.<sup>9</sup> Mr. N also had a history of alcohol abuse, but medical records indicate this had substantially improved or resolved by April 2013. Also, in April 2013 Mr. N received a score of 38 on the Beck Anxiety Index, indicating that he suffers from severe anxiety. These problems stem from his chronic pain and from traumatic incidents that occurred during his Navy service. One of these involved cutting down his best friend, who had hanged himself, and with transporting the body. Mr. N has reported depressed mood, lack of interest, energy, and motivation, weight gain and weight loss, chronic insomnia, nightmares about once or twice a week, and flashbacks of transporting his deceased friend's body once or

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<sup>4</sup> Exs. D235, N hearing testimony.

<sup>5</sup> Exs. D5 - D8, D139, D179, D180, N hearing testimony.

<sup>6</sup> Ex. D106, N hearing testimony.

<sup>7</sup> Ex. D99, N hearing testimony.

<sup>8</sup> Exs. D75 - D93; Ex. D145; N hearing testimony.

<sup>9</sup> Exs. D138, D140, D141, D146, D149, D224, and N hearing testimony (sources for entire paragraph).

twice a month. He is hypervigilant and has an exaggerated startle response. He also has difficulties with concentration and sometimes feels "useless." Finally, he has come to avoid most interpersonal relationships and has become socially isolated.

C. Mr. N's Functional Limitations

Mr. N walks with a cane and wears wrist and knee braces.<sup>10</sup> He has received steroid injections, and has used a transcutaneous electrical nerve stimulation unit (TENS unit) to control his back pain. He sometimes has numbness and tingling in his neck and both arms. His left ankle sometimes feels like it "pops in and out." He has pain in both knees and in his right hip. The pain in his right hip sometimes radiates down his right leg. He has lower back pain in his tailbone area since his fall, and it hurts to sit. If he sits for too long he loses feeling in his legs. He sometimes has a loss of sensation, numbness, and/or tingling in his fingers after prolonged sitting, and sometimes has a loss of sensation in both feet after prolonged standing.

Mr. N is mostly independent with transfers.<sup>11</sup> He has difficulty opening jars, lifting heavy items, and bending to reach items in lower cupboards. He has difficulty with self-grooming due to poor grip strength, coordination, and endurance. He has difficulty bathing due to back pain. He has occasional difficulty dressing his upper body due to shoulder stiffness. He sometimes needs minor assistance putting on his knee braces, socks, and shoes due to back pain. He can use the toilet independently. He relies on public transportation. He requires some assistance with housekeeping.

An assessment by an occupational therapist dated April 9, 2013 states that Mr. N has significant strength limitations in his right and left hands, that his back pain limits his level of independence with his activities of daily living, and that chronic pain has limited his "success with vocational, recreational, and self-care skills."<sup>12</sup>

D. Mr. N's Relevant Educational and Vocational Background

Mr. N had dyslexia which was not diagnosed until he was in high school.<sup>13</sup> Because of this he received below average grades, but he was still able to graduate from high school, and he is literate and able to communicate in English. He worked in hotel security for about 18 months, and worked at K-Mart briefly. He worked for at least four years as the owner (and generally sole employee of) a video rental store. He joined the Navy at the age of 28 and

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<sup>10</sup> Exs. D2, D125, D126, D130, D134, D237, and N hearing testimony (sources for entire paragraph).

<sup>11</sup> Ex. D125, N hearing testimony (sources for entire paragraph).

<sup>12</sup> Ex. D126, N hearing testimony.

<sup>13</sup> Exs. D139, D142, D143, N hearing testimony (sources for entire paragraph).

worked as a welder, plumber, fire fighter, and in flood control. After his discharge from the Navy at age 32 he worked briefly as a volunteer emergency medical technician (EMT) and firefighter training officer. However, since his discharge from the Navy he has been living mostly off of military disability benefits, and he is not currently employed.

Mr. N's prior work as a welder, plumber, fire fighter, EMT, and firefighter training officer was physical work, and Mr. N does not believe he could still perform that work.<sup>14</sup> While Mr. N's work in security and video rentals was not as physically demanding, those jobs still required prolonged standing and sitting, which would now be painful for Mr. N due to his musculoskeletal problems.

*E. Relevant Procedural History and Evolution of Issues*

Mr. N applied for Adult Public Assistance (APA)<sup>15</sup> and APA-related Medicaid on February 15, 2013.<sup>16</sup> The Division denied Mr. N's application on February 21, 2013.<sup>17</sup> However, on April 2, 2013 the Division realized that it should have sent Mr. N's file to the Department of Labor and Workforce Development's Disability Determination Service (DDS) for a decision as to eligibility for "state only" disability, and it so advised Mr. N.<sup>18</sup> Mr. N requested a hearing on that date.<sup>19</sup>

A status conference was held in Mr. N's case on April 23, 2013. The Division moved to dismiss the case to allow DDS to make its own determination as to eligibility for the "state only" disability program. The Division's motion was denied without prejudice to later re-filing. The hearing was rescheduled to May 30, 2013, by which time it was expected that DDS would have made a disability determination.

On May 22, 2013 the Division determined that an increase in the amount of Mr. N's Veteran's Administration (VA) benefits, which had taken effect in April 2013, had made him over-income for APA, APA-related Medicaid, and state-only disability effective April 1, 2013.<sup>20</sup> The Division so notified Mr. N on May 23, 2013.<sup>21</sup>

A status conference was held on May 30, 2013. At that time it was discussed, and Mr. N agreed, that the recent increase in the amount of his VA benefits made him financially

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<sup>14</sup> N hearing testimony (source for entire paragraph).

<sup>15</sup> "State-only" disability benefits are a type of benefit available under the Adult Public Assistance Program.

<sup>16</sup> Exs. 3, 4. His application does not appear to be in the record, but there is no dispute that he did apply.

<sup>17</sup> Ex. 4.

<sup>18</sup> Exs. 6, 7.

<sup>19</sup> Ex. 8.

<sup>20</sup> Exs. 10 - 12.

<sup>21</sup> Ex. 13.

ineligible for state-only disability benefits after April 1, 2013. The parties agreed that Mr. N had been financially eligible for state-only disability benefits in February and March 2013, and that a decision was still needed as to whether Mr. N was disabled for purposes of APA / state-only disability benefits during that two month period. However, because DDS had still not made its disability determination, the matter was continued once more.

In Adult Public Assistance "state only" disability cases such as this, 7 AAC 40.070 generally requires that DPA issue an eligibility determination within 30 days from the date an identifiable application is received. In this case, DPA received Mr. N's application on February 15, 2013. Thus, the 30 day period within which the Division was to make its eligibility determination in this case technically expired in March of 2013. Mr. N did request the opportunity to submit additional medical records, and those medical records were provided to DPA on April 26, 2013. However, even assuming that this event "re-set the 30 day meter" for DPA's eligibility determination, DPA's determination should have been made by May 26, 2013. Accordingly, on May 30 the undersigned found it appropriate to proceed to determine Mr. N's eligibility for the two months of benefits at issue without waiting further for a decision by DPA. As of the date of issuance of this decision (approximately five months after referral of the matter to DDS), DPA has apparently still not issued a decision.

The case was heard on the merits on August 12, 2013. Mr. N participated in the hearing by phone, represented himself, and testified on his own behalf. Public Assistance Analyst Jeff Miller participated in the hearing by phone, represented the Division, and testified on its behalf. The record closed at the end of the hearing.

### **III. Discussion**

#### **A. "State Only" Disability Determinations**

Adult Public Assistance and "state-only" disability are based on AS 47.25.430(a), which states in relevant part that "financial assistance shall be given . . . to every aged, blind, or disabled needy resident . . ." <sup>22</sup> AS 47.25.615(5) defines "disabled" for purposes of Adult Public Assistance and "state-only" disability as "being unable to engage in substantial gainful activity by reason of a medically determinable physical or mental impairment that can be

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<sup>22</sup> See also AS 47.25.590(b) ("[t]he purpose of AS 47.25.430 - 47.25.615 is to furnish financial assistance as far as practicable to needy aged, blind, and disabled persons, and to help them attain self-support or self-care.")

expected to result in death or that has lasted or can be expected to last for a continuous period of not less than 12 months."<sup>23</sup>

The regulation pertaining to "state-only" disability benefits is 7 AAC 40.170(c), which provides benefits to applicants whose income exceeds SSI income standards but who are within APA income standards, are otherwise eligible for APA, and who are found by DDS to meet the definition of disability contained in 42 USC 1382c(a)(3). The federal statutory definition (essentially the same as that contained in AS 47.25.615(5), quoted above), is the definition applied by the Social Security Administration (SSA) in determining eligibility for Supplemental Security Income (SSI). The SSA's regulations on disability determinations for SSI are found in Part 416 of Title 20 of the Code of Federal Regulations (CFR).

*B. The Five Step Disability Analysis Used for SSI and "State Only" Disability Determinations*

The SSA uses a five-step evaluation process in making its disability determinations.<sup>24</sup> Each step is considered in order, and if the evaluation shows the applicant to be disabled at any step, it does not go on to consider subsequent steps.<sup>25</sup> As noted above, 7 AAC 40.170(c) expressly incorporates the federal procedure into "state only" disability determinations.

The first step in the SSI disability determination process looks at the applicant's current work activity. If the applicant is performing "substantial gainful activity," the SSA will find that the applicant is not disabled.<sup>26</sup> This finding is made regardless of the applicants' medical condition, age, education, or work experience.<sup>27</sup>

The second step in the analysis is to determine whether the applicant's impairment is "severe" as defined by the applicable Social Security regulations. A severe impairment is one that significantly limits a person's physical or mental ability to perform "basic work activities."<sup>28</sup> Medical evidence, which consists of "signs, symptoms, and laboratory findings, not only [the applicant's] statement of symptoms," is required to establish an applicant's impairment.<sup>29</sup>

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<sup>23</sup> Alaska's statutory definition of "disabled" (above) is virtually identical to the SSA's definition of "disability" for purposes of its SSI program. Pursuant to 20 CFR § 416.905(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 same basic definition of disability is found in the Division's *Alaska Adult Public Assistance Manual* at Sections 425-1 and 425-2 D.

<sup>24</sup> 20 CFR §416.920.

<sup>25</sup> 20 CFR §416.920(a)(4).

<sup>26</sup> 20 CFR §416.920(a)(4)(i).

<sup>27</sup> 20 CFR §416.920(b).

<sup>28</sup> 20 CFR § 416.920(c); 20 CFR § 416.921(a).

<sup>29</sup> 20 CFR § 416.908.

In order to be considered severe, the impairment or combination of impairments must also be expected to result in death, or must have lasted or be expected to last at least 12 months.<sup>30</sup> If the impairment is not severe under this definition, then the applicant is not disabled.

At step three, the SSA determines whether the applicant's severe impairment meets or medically equals the criteria contained in the SSA's "Listing of Impairments."<sup>31</sup> If it does, the applicant is considered disabled.<sup>32</sup>

If an applicant is not determined to be disabled at step three, the SSA proceeds to step four and looks at the applicant's ability to perform past relevant work.<sup>33</sup> If the applicant is able to perform his or her past relevant work, the applicant is not disabled.

Finally, if the applicant is unable to perform his or her past relevant work, the SSA proceeds to step five and examines the applicant's age, education, and work experience to determine whether the applicant can perform any other work in the national economy.<sup>34</sup>

C. Step 1 - Is the Applicant Engaged in Substantial Gainful Activity?

The first step of the disability analysis asks whether the applicant is performing "any substantial gainful activity."<sup>35</sup> Mr. N testified that he is not currently working, and the Division did not dispute this. Accordingly, Mr. N has proven that he is not currently engaged in substantial gainful activity and has satisfied Step 1 of the disability analysis.

D. Step 2 - Are Any of Mr. N's Impairments Medically Severe?

In order to avoid being found to be *not disabled* at this stage, Mr. N must prove that at least one of his impairments is medically severe. Pursuant to 20 CFR § 416.920(c), a "severe impairment" is one that "significantly limits [a person's] physical or mental ability to do basic work activities." Regulation 20 CFR § 416.921(b) defines "basic work activities:"

[B]asic work activities [mean] the abilities and aptitudes necessary to do most jobs. Examples . . . 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.

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<sup>30</sup> 20 CFR § 416.920(a)(4)(ii); 20 CFR §416.909.

<sup>31</sup> See 20 CFR § 404, Subpart P, Appendix 1 (hereafter "Appendix 1").

<sup>32</sup> 20 CFR § 416.920(a)(4)(iii).

<sup>33</sup> 20 CFR § 416.920(a)(4)(iv).

<sup>34</sup> 20 CFR § 416.920(a)(4)(v).

<sup>35</sup> 20 CFR § 416.972 defines "substantial gainful activity" as work that (a) involves doing significant and productive physical or mental duties, and (b) is done (or intended) for pay or profit.

The criteria used to analyze physical impairments are different from the criteria used to analyze mental impairments, as explained below. Accordingly, Mr. N's physical and mental impairments must be analyzed separately.

1. Mr. N's Physical Impairments

From a functional standpoint, Mr. N's primary physical impairments are the musculoskeletal problems with his neck, lower back, right wrist, right hip, knees, and feet. These impairments clearly limit Mr. N's physical ability to perform functions such as walking, standing, sitting, lifting, pushing, pulling, reaching, carrying, and handling (*see* Section II (A) and (C), above). Accordingly, these physical impairments are medically severe.

2. Mr. N's Mental Impairments.

Mental impairments are evaluated under 20 C.F.R. § 404.1520a and 20 C.F.R. § 416.920a, which are essentially identical. 20 C.F.R. § 404.1520a provides in relevant part:

(c) Rating the degree of functional limitation.

....

(3) We have identified four broad functional areas in which we will rate the degree of your functional limitation: Activities of daily living; social functioning; concentration, persistence, or pace; and episodes of decompensation. *See* 12.00C of the Listing of Impairments.

(4) When we rate the degree of limitation in . . . (activities of daily living; social functioning; and concentration, persistence, or pace), we will use the following five-point scale: None, mild, moderate, marked, and extreme. When we rate the degree of limitation in . . . (episodes of decompensation), we will use the following four-point scale: None, one or two, three, four or more . . . .

(d) Use of the technique to evaluate mental impairments. After we rate the degree of functional limitation resulting from your impairment(s), we will determine the severity of your mental impairment(s).

(1) If we rate the degree of your limitation in the first three functional areas as “none” or “mild” and “none” in the fourth area, we will generally conclude that your impairment(s) is not severe, unless the evidence otherwise indicates that there is more than a minimal limitation in your ability to do basic work activities (*see* § 404.1521).

Thus, the first step is to rate the degree to which Mr. N's mental impairments affect his activities of daily living, social functioning, and concentration, persistence, and pace, and to determine whether Mr. N has episodes of decompensation.

a. Restriction of Activities of Daily Living<sup>36</sup>

The evidence in the record indicates that Mr. N's activities of daily living are restricted, but that these restrictions are primarily the result of his physical impairments rather than his mental impairments. Accordingly, the degree of limitation on Mr. N's ability to perform his activities of daily living should be characterized as “none” (1 on a scale of 1-5).

b. Restriction of Social Functioning<sup>37</sup>

Mr. N has reported that he has avoided most interpersonal relationships, and has become socially isolated, since the incidents which occurred while he was serving in the Navy (see Section II (A) and (B), above). Accordingly, the degree of limitation on Mr. N's social functioning should be rated as “moderate” (3 on a scale of 1-5).

c. Restrictions on Concentration, Persistence, and/or Pace<sup>38</sup>

Mr. N has reported depressed mood, lack of interest, energy, and motivation, chronic insomnia, hypervigilance, exaggerated startle response, and difficulties with concentration (see Section II (A) and (B), above). The degree of limitation on Mr. N's concentration, persistence, or pace should thus be rated as “marked” (4 on a scale of 1-5).

d. Has Mr. N Had Episodes of Decompensation?<sup>39</sup>

There is no evidence that Mr. N has had episodes of decompensation. Accordingly, his degree of decompensation must be graded as “none” (1 on a scale of 1-4).

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<sup>36</sup> The Social Security Regulations define “activities of daily living” in relevant part as follows (20 CFR, Part 404, Subpart P, Appendix 1, Section 12.00(C)(1):

Activities of daily living include adaptive activities such as cleaning, shopping, cooking, taking public transportation, paying bills, maintaining a residence, caring appropriately for your grooming and hygiene, using telephones and directories, and using a post office.

<sup>37</sup> The Social Security Regulations define “social functioning” in relevant part as follows (20 CFR, Part 404, Subpart P, Appendix 1, Section 12.00(C)(2):

Social functioning refers to your capacity to interact independently, appropriately, effectively, and on a sustained basis with other individuals. Social functioning includes the ability to get along with others . . . . You may demonstrate impaired social functioning by, for example, a history of altercations, evictions, firings, fear of strangers, avoidance of interpersonal relationships, or social isolation . . . .

<sup>38</sup> The Social Security Regulations define “concentration, persistence, or pace” in relevant part as follows (20 CFR, Part 404, Subpart P, Appendix 1, Section 12.00(C)(3):

Concentration, persistence, or pace refers to the ability to sustain focused attention and concentration sufficiently long to permit the timely and appropriate completion of tasks commonly found in work settings...

<sup>39</sup> The Social Security Regulations define “episodes of decompensation” in relevant part as follows (20 CFR, Part 404, Subpart P, Appendix 1, Section 12.00(C)(4):

Episodes of decompensation may be demonstrated by an exacerbation in symptoms or signs that would ordinarily require increased treatment or a less stressful situation (or a combination of the two). Episodes of decompensation may be inferred from medical records showing significant alteration in medication; or documentation of the need for a more structured psychological support system (e.g. hospitalizations, placement in a halfway house, or a highly structured and directing household); or other relevant information in the record about the existence, severity, and duration of the episode.

e. Summary – Mr. N's Mental Impairments Qualify as Severe

Mr. N scored “none” (1 out of 5) with regard to “activities of daily living,” “moderately impaired” (3 out of 5) with regard to “social functioning,” “markedly impaired” (4 out of 5) with regard to “concentration, persistence, and pace,” and “none” (1 out of 4) with regard to “episodes of decompensation.” Mr. N's depression and PTSD thus qualify as “medically severe” pursuant to 20 C.F.R. § 404.1520a(d)(1) and 20 C.F.R. § 416.920(c).<sup>40</sup>

*E. Step 2 - Do Mr. N's Impairments Satisfy the Duration Requirement?*

The SSA’s durational regulation states:

Unless your impairment is expected to result in death, it must have lasted or must be expected to last for a continuous period of at least 12 months. We call this the duration requirement.<sup>[41]</sup>

The record indicates that Mr. N's musculoskeletal problems, depression, and PTSD date back to his period of naval service, which ended in 2004. This is a continuous period of approximately nine years. Accordingly, Mr. N's musculoskeletal problems, depression, and PTSD satisfy the 12 month durational requirement.

*F. Step 3 - Do any of Mr. N's Impairments Meet or Equal a "Listing?"*

The next step in the analysis is to determine whether any of the applicant’s severe impairments meets the criteria of any of the listings of impairments contained in the SSA’s regulations at 20 CFR Part 404, Subpart P, Appendix 1 (“the listings”). The applicant bears the burden of establishing that his or her impairment satisfies the requirements of a “listings” impairment.<sup>42</sup> To meet a listing, an impairment must meet *all* of the listing's specified criteria; an impairment that manifests only some criteria, no matter how severely, does not qualify.<sup>43</sup>

1. Mr. N's Musculoskeletal Impairments

Mr. N's musculoskeletal problems with his neck, lower back, right wrist, right hip, knees, and feet must be analyzed under the SSA's listing for the musculoskeletal system (Listing § 1.00 et. seq.). Listing § 1.02 provides in relevant part:

1.02 Major dysfunction of a joint(s) (due to any cause): Characterized by gross anatomical deformity (e.g., subluxation, contracture, bony or fibrous ankylosis,

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<sup>40</sup> In *Webb v. Barnhart*, 433 F.3d 683, 686 (9th Cir. 2006), the court stated that a medically determinable impairment or combination of impairments may be found to be “not severe only if the evidence establishes a slight abnormality that has no more than a minimal effect on an individual's ability to work.” See also *Smolen v. Chater*, 80 F.3d 1273, 1290 (9th Cir. 1996) and *Yuckert v. Bowen*, 841 F.2d 303, 306 (9th Cir. 1988). Here, Mr. N's mental impairments can fairly be rated as more than a “slight abnormality.”

<sup>41</sup> 20 CFR § 416.909.

<sup>42</sup> *Tackett v. Apfel*, 180 F.3d 1094, 1098-1099 (9th Cir.1999); *Sullivan v. Zebley*, 493 U.S. 521, 530-531 (1990).

<sup>43</sup> *Sullivan, supra*, 493 U.S. at 530.

instability) and chronic joint pain and stiffness with signs of limitation of motion or other abnormal motion of the affected joint(s), and findings on appropriate medically acceptable imaging of joint space narrowing, bony destruction, or ankylosis of the affected joint(s). With:

A. Involvement of one major peripheral weight-bearing joint (i.e., hip, knee, or ankle), resulting in inability to ambulate effectively, as defined in 1.00B2b . . . .

The medical evidence pertaining to Mr. N's musculoskeletal problems may or may not satisfy the criteria contained in the first six lines of Section 1.02; this is difficult to determine without medical expertise. However, Mr. N's functional limitations, while significant, are not severe enough to satisfy the requirements of Section 1.02(A) (quoted above). Section 1.02(A) requires that the musculoskeletal problem result in an “inability to ambulate effectively, as defined in [Section] 1.00B2b.” That regulation (20 CFR Part 404, Subpart P, Appendix 1, §§ 1.00(B)(2)(b)) defines the ability to ambulate effectively as follows:

(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. They must have the ability to travel without companion assistance to and from a place of employment or school. Therefore, examples 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. The ability to walk independently about one's home without the use of assistive devices does not, in and of itself, constitute effective ambulation.

Mr. N's ability to walk is clearly impaired; Mr. N walks with a single cane and wears knee braces. However, the record indicates that Mr. N can walk without using a walker, two crutches, or two canes; that he can use standard public transportation; and that he can perform his own shopping and banking. Accordingly, Mr. N does not have “an extreme limitation of the ability to walk” as defined by 20 CFR Part 404, Subpart P, Appendix 1, §§ 1.00(B)(2)(b). Because Mr. N has not established “an extreme limitation of the ability to walk,” he does not meet or medically equal the applicable criteria for the musculoskeletal category of the SSA's Listing of Impairments.

## 2. Mr. N's Mental Impairments

The next step is to decide whether or not the Mr. N's mental impairments (depression and PTSD) meet the criteria of the applicable impairment listings contained in the Social Security regulations at 20 C.F.R. Part 404, Subpart P, Appendix 1. The Listing applicable to depression is Listing 12.04. This listing looks for medical documentation of different combinations of symptoms:

The required level of severity for these disorders is met when the requirements in both A and B are satisfied, or when the requirements in C are satisfied.

A. Medically documented persistence, either continuous or intermittent, of one of the following:

1. Depressive syndrome characterized by at least four of the following:
  - a. Anhedonia or pervasive loss of interest in almost all activities; or
  - b. Appetite disturbance with change in weight; or
  - c. Sleep disturbance; or
  - d. Psychomotor agitation or retardation; or
  - e. Decreased energy; or
  - f. Feelings of guilt or worthlessness; or
  - g. Difficulty concentrating or thinking; or
  - h. Thoughts of suicide; or
  - i. Hallucinations, delusions, or paranoid thinking; or . . . .

AND

B. Resulting in at least two of the following:

1. Marked restriction of activities of daily living; or
2. Marked difficulties in maintaining social functioning; or
3. Marked difficulties in maintaining concentration, persistence, or pace;  
or
4. Repeated episodes of decompensation, each of extended duration;

OR

C. Medically documented history of a chronic affective disorder of at least 2 years' duration that has caused more than a minimal limitation of ability to do basic work activities, with symptoms or signs currently attenuated by medication or psychosocial support, and one of the following:

1. Repeated episodes of decompensation, each of extended duration; or

2. A residual disease process that has resulted in such marginal adjustment that even a minimal increase in mental demands or change in the environment would be predicted to cause the individual to decompensate; or
3. Current history of 1 or more years' inability to function outside a highly supportive living arrangement, with an indication of continued need for such an arrangement.

The record indicates that Mr. N has suffered a loss of interest in almost all activities, has had significant changes in weight, has sleep disturbances, and has decreased energy, feelings of worthlessness, and difficulty concentrating. Accordingly, Mr. N satisfies a sufficient number of the "A" criteria. However, with regard to the "B" criteria, Mr. N is "markedly impaired" only as to concentration, persistence, and pace, and he has had no episodes of decompensation. Accordingly, he does not satisfy the necessary number of "B" criteria. Finally, there is no evidence in the record that Mr. N satisfies the "C" criteria. Accordingly, Mr. N does not meet the listing for depression.

Mr. N's PTSD and anxiety are both categorized under SSA Impairment Listing No. 12.06, which states in relevant part:

The required level of severity for these disorders is met when the requirements in both A and B are satisfied, or when the requirements in both A and C are satisfied.

- A. Medically documented findings of at least one of the following:
  1. Generalized persistent anxiety accompanied by three out of four of the following signs or symptoms: (a) Motor tension; or (b) Autonomic hyperactivity; or (c) Apprehensive expectation; or (d) Vigilance and scanning; or
  2. A persistent irrational fear of a specific object, activity, or situation which results in a compelling desire to avoid the dreaded object, activity, or situation; or
  3. Recurrent severe panic attacks manifested by a sudden unpredictable onset of intense apprehension, fear, terror and sense of impending doom occurring on the average of at least once a week; or
  4. Recurrent obsessions or compulsions which are a source of marked distress; or
  5. Recurrent and intrusive recollections of a traumatic experience, which are a source of marked distress; and
- B. Resulting in at least two of the following:

1. Marked restriction of activities of daily living; or
  2. Marked difficulties in maintaining social functioning; or
  3. Marked difficulties in maintaining concentration, persistence, or pace;  
or
  4. Repeated episodes of decompensation, each of extended duration, or
- C. Resulting in complete inability to function independently outside the area of one's home.

Initially, Mr. N has nightmares about the traumatic experiences he had in the Navy once or twice a week. Accordingly, he satisfies the "A" criteria for PTSD. However, with regard to the "B" factors, Mr. N is "markedly impaired" only as to concentration, persistence, and pace, and he has had no episodes of decompensation. Accordingly, he does not satisfy the necessary number of "B" criteria. Finally, with regard to the "C" criteria, there is no evidence in the record indicating that the Mr. N's PTSD and/or anxiety makes him completely unable to function independently outside of his home. Accordingly, Mr. N does not satisfy the Listings criteria for PTSD and/or anxiety.

### 3. Summary - None of Mr. N's Impairments Satisfy the Listings

While Mr. N's musculoskeletal and mental impairments are significant, they do not satisfy the criteria of the applicable listings. It is therefore necessary to proceed to the next step of the disability analysis.

#### G. Step 4 - Can Mr. N Perform his Past Relevant Work?

The next step is to determine whether Mr. N's impairments prevent him from performing his past relevant work. "Past relevant work" is defined as "work that [the applicant has] done within the past 15 years, that was substantial gainful activity, and that lasted long enough for [the applicant] to learn to do it."<sup>44</sup> If the applicant is not prevented from performing his previous relevant work, he is not disabled.<sup>45</sup>

Mr. N's prior work was fairly physical work. Mr. N testified that he can no longer perform his prior work because of his back, hip, knee, and foot problems. This assertion is credible based on the functional limitations described by Mr. N and his physical and occupational therapists (see Section II (C), above). In turn, Mr. N's testimony and medical records regarding his functional limitations are credible based on the medical evidence

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<sup>44</sup> 7 CFR § 416.960(b)(1).

<sup>45</sup> 20 CFR § 416.920(a)(4)(iv); 20 CFR § 416.960(b)(2-3).

concerning his musculoskeletal impairments (see Section II (A), above). Accordingly, Mr. N has carried his burden and proven, by a preponderance of the evidence, that he can no longer perform his prior physical work. It is therefore necessary to proceed to the final step in the disability analysis and determine whether Mr. N can perform any work.

*H. Step 5 - Do Mr. N's Impairments Prevent Him From Performing Any Work?*

Under 20 CFR § 416.920(a)(4)(v) and 20 CFR § 416.960(c), if it is determined that an applicant cannot perform his or her past relevant work, it is then necessary to decide whether the applicant is capable of performing any other work. In order to do this, it is typically necessary to determine whether the applicant retains a particular exertional capacity and whether the applicant has acquired transferable skills; to identify specific jobs that the applicant can perform with the restrictions he or she has been found to have; and to verify that the jobs the applicant can do exist in significant numbers in the regional or national economies.<sup>46</sup> At this stage, however, the burden of proof shifts from the applicant to the agency.<sup>47</sup> Further, the ALJ cannot provide vocational evidence; it must be in the record.<sup>48</sup>

To meet its burden at “step 5,” the Division must show (1) that Mr. N's impairments still permit certain types of activity necessary for other occupations; (2) that Mr. N's experience is transferable to other work; and (3) that specific types of jobs exist in the national economy which are suitable for someone with Mr. N's capabilities and skills.<sup>49</sup> It is not Mr. N's burden to develop vocational evidence at step five.<sup>50</sup>

The preferred method for an agency to carry its burden at step five is through the testimony of a vocational expert.<sup>51</sup> In this case, the Division presented no vocational evidence. However, in many cases, a decision on whether an applicant is disabled can be made, even in the absence of expert vocational testimony, by 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 fact-based generalizations about the availability of jobs for people of varying ages, educational backgrounds, and previous work experience, with

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<sup>46</sup> *Haddock v. Apfel*, 196 F.3d 1084 (10th Cir. 1999).

<sup>47</sup> See 20 CFR § 416.960(c)(2); see also *Bowen v. Yuckert*, 482 U.S. 137, 144 (1987); *Smolen v. Chater*, 80 F.3d 1273, 1289 (9th Cir.1996); *Tacket v. Apfel*, 180 F.3d 1094, 1099 (9th Cir. 1999); *Bustamante v. Massanari*, 262 F.3d 949, 953–954 (9th Cir.2001); *Valentine v. Commissioner of SSA*, 574 F.3d 685, 689 (9th Cir. 2009).

<sup>48</sup> *Wilson v. Califano*, 617 F.2d 1050, 1053-1054 (4th Cir. 1980).

<sup>49</sup> *Decker v. Harris*, 647 F.2d 291, 294 (2nd Cir. 1981).

<sup>50</sup> *Thompson v. Sullivan*, 987 F.2d 1482, 1491 (10th Cir. 1993).

<sup>51</sup> *Lopez v. Califano*, 481 F.Supp. 392 (D.C. Cal. 1979).

differing degrees of exertional impairment.<sup>52</sup> The Grids “are used to evaluate the applicant's age, education, past work experience, and RFC [residual functional capacity] in order to determine whether that applicant is disabled.”<sup>53</sup>

In this case, Mr. N is 41 years old, is literate and able to communicate in English, has a high school education, and has performed some skilled work (see Section II (D), above). Accordingly, *if the Grids were applied*, and if the Mr. N were found to be able to perform any work, it would be under Rule 201 of “the Grids” (“Maximum sustained work capability limited to sedentary work as a result of severe medically determinable impairment(s)”). The specific sub-rule that would apply is Rule 201.28. According to that rule, where (as here) a person’s age is between 18 – 44 years, the person has graduated from high school, and was previously engaged in skilled or semi-skilled employment, the person is deemed *not* to be disabled, even if the skills from the person's prior employment are not transferable.

It is well established, however, that “the Grids” do not apply if the applicant has a significant non-exertional impairment.<sup>54</sup> Non-exertional impairments include mental impairments, sensory impairments, and impairments involving environmental limitations.<sup>55</sup>

In this case, Mr. N has several non-exertional impairments: depression,<sup>56</sup> anxiety,<sup>57</sup> PTSD,<sup>58</sup> migraine headaches,<sup>59</sup> seizures,<sup>60</sup> diabetes,<sup>61</sup> hypertension,<sup>62</sup> obesity,<sup>63</sup> and chronic pain.<sup>64</sup> As discussed above, the Grids cannot properly be applied where (as here) a significant portion of an applicant’s disability is based on non-exertional impairments.

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<sup>52</sup> *Holley v. Massanari*, 253 F.3d 1088, 1093 (8th Cir. 2001).

<sup>53</sup> *Poole v. Astrue*, 2010 WL 2231873 (W. D. Ark. 2010).

<sup>54</sup> *Cole v. Secretary of Health and Human Services*, 820 F.2d 768, 771 (6th Cir. 1987); *Payan v. Chater*, 959 F.Supp. 1197 (C.D. Cal. 1996).

<sup>55</sup> *See Cole, supra*, 820 F.2d at 772; *see also Johnson v. Secretary*, 872 F.2d 810, 814 (8th Cir. 1989).

<sup>56</sup> *Van Winkle v. Barnhart*, 55 Fed. Appendix 784 (8th Cir. 2003); *Case v. Barnhart*, 165 Fed. Appendix 492 (8th Cir. 2006) (depression is a non-exertional impairment).

<sup>57</sup> *Van Winkle v. Barnhart*, 55 Fed. App'x 784 (8th Cir. 2003) (anxiety is a non-exertional impairment).

<sup>58</sup> *Brewitt v. Astrue*, 2009 WL 3711975 (W.D. Wash. 2009) (PTSD is a non-exertional impairment).

<sup>59</sup> *McKinzey v. Astrue*, 641 F.3d 884, 889 (7th Cir. 2011); *May v. Commissioner of Social Security Admin.*, 226 Fed. Appx. 955, 960 (11th Cir. 2007) (migraines are a non-exertional impairment).

<sup>60</sup> *Tegeler v. Astrue*, 390 Fed. App'x 610 (8th Cir. 2010); *Hollins v. Astrue*, 2009 WL 2596481 (E.D. Mo. 2009) (seizures are a non-exertional impairment).

<sup>61</sup> *See, e.g., Xiong v. Astrue*, 2009 WL 737030 (E.D. Cal.2009); *Mitchell v. Astrue*, 2009 WL 542216 (C.D.Cal.2009) (diabetes is a non-exertional limitation).

<sup>62</sup> *Evans v. Chater*, 84 F.3d 1054, 1056 (8th Cir.1996) (hypertension is a non-exertional impairment).

<sup>63</sup> *Evans v. Chater*, 84 F.3d 1054, 1056 (8th Cir.1996) (obesity is a non-exertional impairment).

<sup>64</sup> Pain has long been considered a non-exertional 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); *Gray v. Apfel*, 192 F.3d 799, 802 (8th Cir. 1999); *Cline v. Sullivan*, 939 F.2d 560, 565 (8th Cir.1991); *Prince v. Bowen*, 894 F.2d 283, 287 (8th Cir.1990).

Mr. N *may* be able to perform *some types* of light and/or sedentary work in spite of his mental and physical impairments. However, due to DDS' delay, the Division did not present evidence on this point. On the other hand, Mr. N presented credible testimony indicating that his impairments greatly impinge on his ability to work. Where an applicant cannot perform the full range of work in a particular category due to non-exertional impairments, an agency cannot carry the step-five burden by relying on the Guidelines, but must introduce testimony from a vocational expert as to the availability of jobs that a person with the applicant's profile could perform.<sup>65</sup> The Division did not do so.

In summary, Mr. N proved that he can no longer perform his prior work; the burden of proof shifted to the Division, and the Division then failed to prove that Mr. N is capable of performing other work. Mr. N is therefore deemed disabled based on the SSA's regulations and case law which are incorporated into Alaska's APA "state only" disability program.

#### **IV. Conclusion**

Mr. N is not currently engaged in substantial gainful activity, and he has medically severe impairments which have lasted for a continuous period of at least 12 months. His impairments do not satisfy the specific criteria of any of SSA's applicable listings. However, Mr. N is not capable of performing his prior work, and the Division failed to prove that Mr. N can still perform any other type of work. The Division's decision denying Mr. N's application for APA "state only" disability benefits is therefore reversed.

Dated this 12th day of September, 2013.

*Signed*  
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Jay Durych  
Administrative Law Judge

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<sup>65</sup> See, for example, *Trent v. Secretary of Health and Human Services*, 788 F.Supp. 939 (E.D. Ky. 1992); *Gathright v. Shalala*, 872 F.Supp. 893 (1993); *Banks v. Apfel*, 144 F.Supp. 2d 752 (2001); *Johnson v. Barnhart*, 378 F.Supp.2d. 274 (2005); *Baker v. Barnhart*, 457 F.3d 882, 888, 894-895 (8th Cir. 2006).

## Adoption

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

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

DATED this 9<sup>th</sup> day of October, 2013.

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

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