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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-507
)
 Claimant.) Division Case No. [REDACTED]

FAIR HEARING DECISION

STATEMENT OF THE CASE

Mr. [REDACTED] (Claimant) applied for Interim Assistance benefits on October 21, 2011. (Exs. 1, 2) On November 29, 2011, the Division of Public Assistance (Division) sent Claimant written notice his Interim Assistance application was denied because he had not appealed the denial of his application for Supplemental Security Income. (Exs. 4, 6) On December 10, 2011, Claimant provided documentation that he had appealed the Social Security Administrations' (SSA) denial of his federal Supplemental Security Income (SSI) application and that he requested a Fair Hearing. (Exs. 5, 5.1-5.2, 6.1) On February 7, 2012, the Division again denied his October 21, 2011 application.¹ (Ex. 12)

This Office has jurisdiction pursuant to 7 AAC 49.010 *et. seq.*

A Fair Hearing began on February 2, 2012. Claimant attended the hearing in person, represented himself and testified on his own behalf. Mr. [REDACTED], Public Assistance Analyst with the Division, attended in person, represented the Division and testified on its behalf. At the early stages of the hearing, before testimony was presented, Claimant stated he was being represented by an attorney in a related matter and requested a continuance to discuss this case with his attorney. The hearing was continued to March 12, 2012 for Claimant's benefit.

During the interim, the Division confirmed Claimant appealed the SSA's denial of his SSI application on November 9, 2011 and that the SSA initially denied his application because it determined Claimant had the capacity for substantial gainful activity. (Ex. 11) On February 7, 2012, the Division re-affirmed its denial of Claimant's October 21, 2011 application on grounds that his asthma and depression are controlled and that the severity of his back impairment does not prevent him from doing work. (Ex. 12)

¹ For purposes of this decision, the Division's initial denial on November 29, 2011 is considered the date of denial. The February 7, 2012 denial notice stated: "Again, this notice is providing you with more detail into the denial, it is not changing the original denial decision." (Ex. 12)

Also during the interim, on or about February 16, 2012², Claimant supplied additional medical evidence that the Division reviewed on March 15, 2012 and found it did not change its decision to deny Claimant's application. (Exs. 13-13.17)

The hearing continued on March 12, 2012. Claimant supplied additional information at the hearing, which was marked for identification as Exhibits A, B, and C. These exhibits were not admitted as evidence because the Division's Disability Adjudicator had not had an opportunity to review them.³

On March 12, 2012, Claimant attended the hearing in person and testified on his behalf. Claimant was represented by the Alaska Legal Services Corporation by and through its attorney, Mr. Greg Peters. The Division of Public Assistance was represented by Mr. [REDACTED], Public Assistance Analyst (Division's Hearing Representative) who participated in person and testified on behalf of the Division. Ms. [REDACTED], the Division's Medical Reviewer and Disability Adjudicator, participated telephonically and testified on behalf of the Division. All exhibits offered for admission were admitted on March 12, 2012. The parties agreed to a continuation of the hearing to April 12, 2012 but then stipulated to cancel the April 12, 2012 hearing.

ISSUE

Was the Division correct when it denied Claimant's October 21, 2011 application for Interim Assistance?

SUMMARY OF DECISION

On October 21, 2011 Claimant applied for Interim Assistance based on his asthma, depression, degenerative disc disease, spinal stenosis, and back pain (application). On November 29, 2011 the Division of Public Assistance determined Claimant was not likely to be found disabled by the Social Security Administration and denied his application. Claimant did not provide the preponderance of the evidence proving he was eligible for Interim Assistance or that the Division incorrectly denied his application. Claimant's evidence did not show he was permanently and totally disabled from doing all

² The documents (Ex. 13.1-13.17) are date stamped February 16, 2012 by the Division of Public Assistance. However, a facsimile cover sheet states that Exhibits 13.1-13.17 were in the "back-log info worked at Muldoon" and were not transmitted to the Division's Medical Reviewer/Disability Adjudicator until March 15, 2012. (Ex. 13.0) On March 19, 2012, the Division's Hearing Representative notified Claimant that the Hearing Representative received Exhibits 13.1-13.17 on March 15, 2012 and that the Division's decision to deny Claimant's application for Interim Assistance had not changed after review of these exhibits. (Ex. 13)

³ The parties agreed to proceed with the hearing and set a date for a continued hearing to allow the Division's Disability Adjudicator an opportunity to review this additional information, which had not been supplied to the Division before the March hearing. Exhibits A and B are Anchorage Neighborhood Health Center reports from visits on January 11, 2012 and February 16, 2012, respectively. Exhibit C is a copy of a letter dated February 21, 2012 stating a volunteer doctor for neurosurgery is not available to treat Claimant. The hearing was scheduled for April 12, 2012 and the parties agreed these exhibits could be addressed at the April hearing. However, the parties cancelled the April 12, 2012 hearing because they agreed it was unnecessary. Therefore, Exhibits A, B, and C were not admitted as evidence.

work. Therefore, the Division was correct when it denied the Claimant's October 21, 2011 Interim Assistance application on November 29, 2011.

FINDINGS OF FACT

The following facts were proven by a preponderance of the evidence and support this decision:

1. Claimant is a 45 year old man.⁴ (Ex. 1, 3, 3.1; Claimant's testimony)
2. Claimant has completed the 6th grade and expects to complete his General Equivalency Diploma (GED) in summer 2012. (Ex. 3.17; Claimant's testimony)
3. Claimant's past relevant work was farming, fishing, and working as a fish processor. (Ex. 3.15; Claimant's testimony) This work involved very heavy work over long hours. (Claimant's testimony) In June 2010, he was not able to continue working in an Alaska fish processing facility because the work was too strenuous for him and he felt too much pain in his back. (Claimant's testimony) He worked successfully for ██████████ Services as a maintenance person and helping to shop for items at Costco because it was part-time work that did not involve lifting or carrying heavy items. (Claimant's testimony)
4. On October 21, 2011, Claimant applied for Interim Assistance (Application). (Exs. 1; 2) Claimant supported his application with three forms: two AD 2 forms completed by Claimant's treating doctor, Dr. ██████████ on October 27, 2011 and January 11, 2012, and Claimant's Disability and Vocational Report. (Exs. 3.07-3.08; Exs. 3.13-3.17; Exs. 13.1-13.2) In addition, Claimant supplied reports from the Anchorage Neighborhood Health Center, (Exs. 3.26-3.99), and results of three Magnetic Resonance Imaging (MRI) tests. (Exs. 3.03-3.05; Exs. 3.9-3.11)
5. Claimant described his circumstances on his "Disability and Vocational Report."⁵ (Ex. 3.13-3.17) Claimant described his back condition as "chronic back pain, pain in the spinal cord" for which physical therapy in 2009 and 2010 did not help.⁶ (Ex. 3.13)
6. In support of his application, Claimant also submitted Dr. ██████████' October 27, 2011 Preliminary Examination for Interim Assistance form (also called an "AD 2"). (Ex. 3.07-3.08) Dr. ██████████ is associated with the Anchorage Neighborhood Health Center (Health Center), where Claimant has received medical care and is Claimant's treating physician. (Ex. 3.02; Exs. 3.26-3.99) On October 27, 2011, Dr. ██████████ diagnosed Claimant with degenerative disc disease of the spine, depression,

⁴ The Division records his birth date as January 1, 1967. (Ex. 3) Claimant was unsure of his birth day or year due to the circumstances of his birth but testified he was 45 years old, born in 1967. (Claimant's testimony)

⁵ This form was completed by Claimant and is also called form APA # 4. (Ex. 3.13-3.17)

⁶ On Exhibit 3.13, Claimant wrote the words "phisical syrafy," which are understood to mean physical therapy because his medical report at the Health Center noted he had not had surgery on his back. See Exhibit 3.42.

asthma, and spinal stenosis.⁷ (Ex. 3.08) Dr. [REDACTED] wrote Claimant was not expected to recover from the diagnosed conditions. (Ex. 3.08) Also on October 27, 2011, Dr. [REDACTED] also wrote on the AD 2 that he referred Claimant for a Magnetic Resonance Imaging (MRI) of his neck and thoracic areas, physical therapy for “limited time and capacity,” and that he recommended Division of Vocational Rehabilitation (DVR) job training. (Ex. 3.08)

7. On January 11, 2012, Claimant submitted a second Preliminary Examination for Interim Assistance form completed by Dr. [REDACTED]. (Ex. 13.1-13.2) On this form Dr. [REDACTED] again diagnosed Claimant with degenerative disc disease of the spine, depression, asthma and spinal stenosis, from which Claimant was not expected to recover. (Ex. 13.2) In addition, Dr. [REDACTED] wrote “MRI’s were obtained documenting degenerative changes & disc bulge causing pain. Functional capacity assessment results pending. He was advised to [follow up with] DVR for training in field without manual labor. He is referred to neurosurgery for consideration of intervention.” (Ex. 13.2)

8. On November 4, 2011, Claimant received an MRI of the cervical spine without contrast and of the thoracic spine without contrast from Providence Health Systems Alaska (Providence). (Ex. 3.03-3.04) The radiologic diagnosis resulting from these two MRI tests is summarized as “cervicalgia”⁸, “degeneration of lumbar or lumbosacral intervertebral disc,”⁹ and “other affections of shoulder region, not elsewhere classified.” (Ex. 3.05)

9. Claimant’s back problems are not related to his thoracic spine. This finding is supported by the report of the November 4, 2011 MRI of Claimant’s thoracic spine, which includes a statement that the impression is of a “[n]ormal thoracic spine MRI” and, in more detail (Ex. 3.04):

[t]he vertebral body heights and marrow signal are normal. There are scattered benign-appearing hemangiomas throughout the thoracic and lumbar spine. The cord signal is normal. The neural foramen and spinal canal are patent with no significant degenerative changes or stenosis. The paraspinal soft tissues are normal.

10. Claimant’s neck pain is related to two bulging cervical discs and some mild to moderate stenosis of these two discs. This finding is supported by facts as follows. The report of the November

⁷ Spinal stenosis is defined as a “narrowing of the vertebral canal, nerve root canals, or intervertebral foramina of the lumbar spine caused by encroachment of bone upon the space; symptoms are caused by compression of the cauda equine and include pain, paresthesias, and neurogenic claudication. Dorland’s Illustrated Medical Dictionary 1795 (31st ed. 2007)

⁸ Cervicalgia is neck pain that occurs toward the rear or the side of the cervical vertebrae. It generally is felt as discomfort or a sharp pain in the upper back, neck or shoulders. The term cervicalgia covers a broad range of neck pain causes, including whiplash, muscle strain, ligament sprain, and inflammation of the neck joints. It also could be caused by a number of abnormalities in the region of the cervical vertebrae, including a bulging disc, a pinched nerve, narrowing of the spinal canal (stenosis), spinal arthritis or degenerative disc disease. Accessed May 16, 2012 at: http://www.laserspineinstitute.com/back_problems/neck_pain/overview/cervicalgia

⁹ The reference to Claimant’s lumbar area appears to be a carry-over from a report of an MRI of his lumbar spine on September 18, 2010. See Finding of Fact 11.

4, 2011 MRI of Claimant's cervical spine, the results of which are given substantial weight in this decision, that includes (Ex. 3.03):

- a. C5-C6: There is a broad-based disk bulge and uncovertebral joint hypertrophy. There is moderate left and mild right neural foraminal stenosis.¹⁰
- b. C6-C7: There is a broad-based disk bulge. There is effacement of the ventral thecal sac and mild neural foraminal narrowing.
- c. There was no significant disk degeneration or stenosis or significant abnormality of any other cervical vertebrae. The spinal cord signal and marrow signals are noted as normal and the vertebral body heights are maintained.

11. Claimant's lower back pain is related to two bulging lumbar discs and facet joint hypertrophic changes causing inferior foraminal narrowing at these two disc areas. This finding is supported by facts as follows. On September 18, 2010, Claimant had an MRI of the lumbar spine without contrast, the results of which are given substantial weight in this decision. (Ex. 3.9) The report of this MRI stated:

Vertebral body heights are maintained. No evidence for abnormal marrow signal. Focal central disk protrusions superimposed on broad-based disk bulge is noted at L5-S1 level with significant bilateral and lateral recess narrowing and inferior foraminal narrowing. Broad-based disk bulge is also noted at L4-5 level, but facet joint hypertrophic changes at this location are prominent, which results in lateral recess narrowing and inferior neuroforaminal narrowing. Remainder of the vertebral bodies and disk heights are within normal limits.

Impression: Dominant abnormality appears to be significant facet joint hypertrophic¹¹ changes of L4-5 and L5-S1 level with central disk protrusion and broad-based disk bulge at L5-S1 level. (Ex. 13.15)

¹⁰ Foraminal stenosis is a narrowing of the spinal foramen, the hole through which passes a spinal nerve as it exits the spine (foramen basically just means "hole"). It is usually a form of degenerative spine disease which occurs slowly over time with wear and tear of the spinal column. Arthritic changes of the spine, including herniated discs and bulging discs, soft tissue swelling and bony growth can all impinge on the foraminal foramen and compress the nerve within. A foramen exists at each level of the spine with one on each side. At each level, a spinal nerve, a nerve coming to or from the spinal cord, passes through the foramen. Because the foramen is a relatively small area, anything impinging on that area can cause foraminal stenosis, which is a pinch of the nerves inside the foramen. Accessed May 8, 2012: <http://www.nervous-system-diseases.com/foraminal-stenosis.html>

¹¹ Facet joint hypertrophy is a condition in which the facet joints of the spine become enlarged. The facet joints are cartilage-encased hinges that hold adjacent vertebrae together. With age, these joints can begin to degenerate and may become painfully inflamed, causing symptoms like stiffness, numbness, reduced mobility, spinal deformities, and inability to arch the spine backwards. Accessed May 24, 2012 at: http://www.laserspineinstitute.com/back_problems/facet_disease/articles/facet_joint_hypertrophy

12. In addition to the three MRI tests, Claimant received medical attention from the Anchorage Neighborhood Health Center (Health Center) and supported his application with copies of medical documentation of the care and laboratory results¹² he obtained there from May 27, 2009 to, and including, November 11, 2011. (Ex. 3.02, 3.26-3.99)

13. Claimant's back pain is related to his cervical and lumbar spine disc bulges, facet joint hypertrophy, and spinal stenosis. Claimant's cervical and lumbar back pain is controlled by pain medication. These findings are supported by medical evidence concerning his spinal impairment and back pain as noted in the Health Center reports as follows:

a. November 22, 2011: "Primary diagnosis of lumbago"; "cervicalgia – pain is stable on Tramadol 50 mg TID and naproxen 500 mg BID." (Ex. 3.34)

b. November 10, 2011: "Patient has chronic back pain stemming from manual labor as a fisherman.... He is taking naproxen as well as tramadol on a frequent basis to control his pain and he says it controls it to some extent, but he still feels disabled and not able to work." (Ex. 3.36) "He does have an MRI of his lumbar and cervical spine, showing central disk protrusions and broad-based disk bulge in the lumbar spine as well as some nerve compression in the cervical spine. Dr. [REDACTED] did refer him for a physical therapy functional capacity assessment, and this is pending." (Ex. 3.36) "Assessment: ... Lumbago – stable." (Ex. 3.38) Claimant "reports he tried PT for 6 months but then gave up because it wasn't making a difference." (Ex. 3.40)

c. October 27, 2011: Claimant "says he is disabled because he has chronic back pain. He said he fell from a tree years ago...and started having significant back pain in about 2005," when he worked as a fisherman. "He has pain in his lower back that is quite severe. He takes naproxen and tramadol on a frequent basis to control his pain." ... He says he has pain in his arms. It strains his back and he says he can not lift really more than 10 pounds on a frequent basis. He has gone to physical therapy for a few months and did not really seem to help him much. The last time he worked was as a fisherman...in June 2, 2010, and he was let go from his job because he could not keep up with the work because of his pain."

Claimant's pain "is mostly centered in his lower back. He does have some midback and some upper back pain that radiates around his shoulders on occasion. ... He denies any surgeries on his back." (Ex. 3.42)

"Objective GENERAL: He gets from sitting to standing unassisted. He gets up on the exam table unassisted. He reports tenderness down his cervical, thoracic, and lumbar spine. He denies any pain that radiates down his legs." (Ex. 3.43-3.44)

¹² Claimant submitted results of laboratory tests dated June 25, 2009; October 9, 2009; November 29, 2010; May 25, 2011; October 27, 2011; and November 10, 2011, the results of which were all normal. (Exs. 3.26-3.31)

- d. October 3, 2011: Claimant obtained a flu shot; the medical report notation is “Routine F/U back pain well controlled with tramadol.” (Ex. 3.46)
- e. July 11, 2011: Assessment: “Primary diagnosis of lumbar hernia with obstruction.” Prescribed naproxen with tramadol to alternate daily. (Ex. 3.51) Claimant reported “he was recently discharged from physical therapy because there was nothing else that they could do for him. His back pain remains stable.” (Ex. 3.49)
- f. May 25, 2011: “Primary diagnosis of lumbago – stable. Continue antiinflammatory and tramadol as prescribed.” (Ex. 3.54) Claimant’s musculoskeletal system was normal.... (Ex. 3.54)
- g. January 26, 2011: “He has a history of back pain. He reports that he is currently in physical therapy and this initially was helpful, but now he is having increase in his back pain. ... He has not had any new injury or trauma to his back.” (Ex. 3.58) Assessment: “Lumbago – stable. Continue PT and naproxen.” (Ex. 3.60)
- h. December 8, 2010: “records indicate he has a long history of upper and lower back pain which he attributes to hard work as a fisherman.... His MRI shows lumaar [sic] herniation. He had extensive PT at PH last year which he says was very helpful.” (Ex. 3.61) “Counseling/Education Back care – sleep in back with 2 pillows under knees; warm shower and Tramadol and/or Tylenol in the morning; walking 20-30 minutes per day or other exercise regimen such as swimming encouraged; avoiding sitting down as much as possible; Lifting keeping spine straight and using knees and hips to pick up; avoid lifting more than 20 pounds until better. Back care exercises discussed.” (Ex. 3.63) Claimant’s bilateral straight-leg raise tests were negative. (Ex. 3.66)
- i. November 29, 2010: “The Chief Complaint is: Pt here today for back pain...” and consultation on alternatives to physical therapy. In addition, the report notes Claimant has “a long history of chronic low back pain. He was in physical therapy in September 2009 and reported this was somewhat helpful. He injured his back years ago while doing physical labor ... but has since reinjured it.” Claimant “reports that he was doing fishing work January through June 2010 and his back pain was exacerbated. ... Back pain stays isolated to his low back and also his thoracic spine. Sometimes it radiates around into his intercostal muscles bilaterally. Patient was advised he needed physical therapy, ice, and antiinflammatories.” (Ex. 3.64) Claimant’s bilateral straight-leg raising tests were negative. (Ex. 3.66)
- k. October 21, 2010: Claimant received results of the September 18, 2010 MRI of his lumbar spine [L4-L5 disc herniation with foraminal stenosis] and reported “continuous pain with flares on bad days.” (Ex. 3.70) Claimant’s treatment plan was pain management with physical therapy, medication, and limitation of activities to “those that do not hurt his back....” (Ex. 3.72)

l. July 13, 2010: Claimant's chief complaint was to get pain medication because he hurt himself fishing. (Ex. 3.83)

m. July 22, 2009: Claimant reported "low back pain has been lasting 2-3 months now." Also, "reports this as being his entire back, upper back, midback and his lower back." (Ex. 3.91) Claimant was referred to physical therapy. (Ex. 3.92)

n. June 24, 2009: Claimant reported having "back pain for 6-7 years," that he "thinks it is from hard work on his farm and on the roads," and that "[n]othing makes it better." (Ex. 3.94) Claimant's back condition was assessed as "Lumbago. I think that this likely is overuse injury and chronic back pain. I will give him a trial of ibuprofen. I do not think this is spinal stenosis...." (Ex. 3.96)

14. Claimant's back pain and condition does not affect his ability to ambulate. This finding is based on reports from the Anchorage Neighborhood Health Center reports from September 14, 2010 to and including November 22, 2011 which consistently describe Claimant's gait and stance as normal.¹³ (Exs. 3.34-3.77) The October 27, 2011 Health Center report is that Claimant is "not using a mobility aid to walk." (Ex. 3.42) He is able to walk without any assistive device. (Claimant's testimony)

15. Claimant's depression does not impair his ability work and is directly related to his back pain and lack of income due to employment. Claimant's depression is controlled by therapeutic counseling and medication providing relief from his back pain. These findings of fact are supported by medical evidence noted in the Health Center reports that consistently relate Claimant's depression to, and resulting from, his chronic back pain and stress in trying to be meaningfully employed. These findings are further supported as follows:

a. Evaluation of Claimant's psychiatric mood was "euthymic"¹⁴ and his affect was "normal" as reported on each visit between May 29, 2009 and November 11, 2011, except on October 21, 2010 when reported as "dysthymic"¹⁵ and "abnormal dysthymic." (Exs. 3.026-3.99; Ex. 3.72)

¹³ The sole exception was on May 25, 2011 when Claimant sought medical treatment for a swollen right ankle and his gait was described as abnormal. (Ex. 3.54)

¹⁴ Euthymic means, pertaining to a normal mood in which the range of emotions is neither depressed nor highly elevated. Mosby's Medical Dictionary, 8th ed. 2009. Accessed May 8, 2012 at: <http://medical-dictionary.thefreedictionary.com/euthymic>

¹⁵ Dysthymic Disorder (also known more generally as "dysthymia") is characterized by an overwhelming yet chronic state of depression, exhibited by a depressed mood for most of the days, for more days than not, for at least 2 years.....This generally means that the person needs to have had an uncomplicated, long-term, low-grade depression for two or more years in order to meet this diagnosis. In order to meet the diagnostic criteria for Dysthymic Disorder, the symptoms may not be due to the direct physiological effects of the use or abuse of a substance (for instance, alcohol, drugs, or medications) or a general medical condition (e.g., cancer or a stroke). The symptoms must also cause significant distress or impairment in social, occupational, educational or other important areas of functioning. Accessed on May 8, 2012 at: <http://psychcentral.com/disorders/sx14.htm>

- b. The November 22, 2011 Health Center report noted Claimant obtained cognitive-behavioral therapy which he found to be helpful and was encouraged to continue. (Ex. 3.34-3.35) Claimant was assessed with “chronic major depression – currently controlled without medications. He is attending the IMPACT¹⁶ classes and getting a lot out of them. He is encouraged to continue to do this.” (Ex. 3.34)
- c. November 15, 2011: Claimant attended “class designed to teach cognitive-behavioral tools for managing stress and depression.” (Ex. 3.35) Claimant reports his depression ‘is stable, he is not on medications and does not desire any.’ (Ex. 3.37)
- d. November 10, 2011: Claimant reports experiencing “episodes of depression on and off throughout the past year. He attributes this to medication for his back pain being ‘too weak’ and being unable to afford more effective medications....” “Is interested in coming to the Project IMPACT class to learn some stress mgmt. techniques,” (Ex. 3.40)
- e. October 31, 2011: Claimant referred to “psycho-educational” classes to learn “cognitive-behavioral tools for managing stress and depression.” (Ex. 3.41)
- f. October 27, 2011: Claimant reports some depression because of “poverty” and “pain.” (Ex. 3.42) Claimant is noted as engaged “in GED classes through the Division of Vocational Rehabilitation.” (Ex. 3.42) Claimant expects to complete his GED in summer 2012. (Claimant’s testimony)
- g. November 29, 2010: “his depression is directly linked to his pain and his inability to find work.” (Ex. 3.64) Assessment – “Depression – stable” (Ex. 3.66)
- h. November 3, 2010: Claimant is noted as “denies any symptoms of depression” and “[o]ptimistic that physical therapy and obtaining a job will help him maintain a positive mood.” (Ex. 69)
- i. November 2, 2010: Claimant “[c]urrently denies any symptoms of depression.” (Ex. 3.69)
- j. October 21, 2010: Claimant is reported as “anxious to go to work” but “discouraged” that his back pain prevents him from doing “most jobs that are available to him [because they] are physical and exacerbate his back pain.” (Ex. 3.70)
- k. August 17, 2010 and July 20, 2010: Claimant is assessed as having “[s]ymptoms of stress and depression related to unemployment and back pain. (Ex. 3.81; Ex. 3.82)
- l. July 13, 2010: Claimant reported “no hx [history] of depression in family or self. ... Expressed interest in receiving support through IMPACT program as he deals with

¹⁶ IMPACT classes are stress/depression education classes designed to teach cognitive-behavioral tools for managing stress and depression. (Ex. 3.35)

current transition and stress.” (Ex. 3.85) Claimant reported he had been to the Division of Vocational Rehabilitation as part of his effort to actively seek employment. (Ex. 3.85)

16. Claimant’s asthma is controlled and does not impair his ability to work. This finding is based on the medical evidence as noted in the Health Center reports as follows:

Claimant’s asthma is controlled by use of occasional short-acting bronchodilator which he inhales as needed, approximately once to twice monthly. (Ex. 3.36; 3.49 [“rarely uses his Pro-Air inhaler, maybe a few times every few months”]; Ex. 52; Ex. 57 [asthma exacerbation, prescribed prednisone and continued use of inhalers]; Ex. 3.76 [“he reports that his asthma is generally well controlled”])

17. Claimant is capable of performing work demanding a medium level of physical exertion, including lifting 20 to 50 pounds occasionally. This finding is based on the results of a January 9, 2012 “Physical Work Performance Evaluation” conducted at Providence Sports Med. & Rehab. Therapies. (Ex. 13.3-13.12) The evaluation took place over 3 hours 15 minutes. (Ex. 13.7) Claimant performed 17 tasks. (Ex. 13.3) The results of this evaluation are stated in part as:

[t]olerance for the 8-Hour Day: Based on this evaluation, the client is capable of sustaining the Medium level of work for an 8-hour day/40-hour week. (Ex. 13.3)

In addition, the results state:

Minimal Overall Level of Work; Falls within the Medium range. Exerting 20 to 50 pounds of force occasionally, and/or 10 to 25 pounds of force frequently, and/or greater than negligible up to 10 pounds of force constantly to move objects. Physical Demand requirements are in excess of those for Light Work. *Please note that the overall level of work was significantly influenced by the client’s self-limiting behavior. Therefore the Medium level of work indicates a minimum ability rather than a maximum ability. A maximum overall level of work cannot be determined at this time due to the self-limiting behavior.* (Ex. 13.3) (Emphasis in original.)

Also, the evaluation reports that Claimant recently was assigned a Division of Vocational Rehabilitation (DVR) counselor but had not yet been tested by DVR. (Ex. 13.4)

18. The following facts were established by Claimant’s testimony during the Fair Hearing:

a. He believes his unemployment circumstances are temporary and that he is not permanently disabled from working.

b. He does his own grocery shopping, laundry, and food preparation but has reduced the weight of the items he carries at the grocery store and to and from the laundry due to the

pain in his back. He lives on the second floor. He believes he can lift 10-20 pounds but it hurts and he believes he could not lift that weight for more than 10 minutes.

c. He walks to the bus stop and rides the bus nearly daily to attend GED classes. On some days, he takes the bus home for lunch and rides it again to attend classes in the afternoon.

d. He engages in a social life with his friends. (*See also* Ex. 3.85¹⁷)

e. He cannot stand without pain. He feels the least pain when he sits and he can sit for 3-4 hours, at most, without moving. He has felt pain for more than one year.

f. He suffers asthma attacks about 2-3 times per year and controls his asthma with medication. Dust makes his asthma worse.

19. The Division denied Claimant's application on November 29, 2011 and on February 7, 2012¹⁸ because it determined Claimant did not meet the disability requirements for Adult Public Assistance and Medicaid. (Exs. 4; 12) The February 7, 2012 denial notice explained: "[a]fter a review of the medical records, the agency has determined that your asthma and depression is (sic) well controlled. Your back impairments, does cause you to have pain, but medical findings do not show that your condition is at a level of severity that prevents you from doing all work in the national economy." (Ex. 12)

20. The Division concedes the following:

a. Claimant currently is not doing substantial gainful activity and therefore has satisfied step 1 of the SSI 20 C.F.R. § 416.920(a)(4)(i) sequential evaluation.

b. Claimant has a severe medically determinable impairment of his spine.

c. The duration requirement of 20 C.F.R. § 416.920(a)(4)(ii) and (iii) is satisfied for his severe medically determinable impairment because Claimant has had back problems since 2005 and his doctor found these back problems would not improve.

d. Claimant can no longer do his former work of fishing and farm work or hard labor.

e. Claimant has degenerative disc disease, spinal stenosis and some faceted arthritis. Claimant has degenerative changes and some moderate neural foraminal stenosis at the C5-6-7 level (neck) of his spine.

¹⁷ July 13, 2010 Health Center report notes: "Currently lives with friends and feels very satisfied with this living arrangement – they all take care of each other, which he really believes in." (Ex. 3.85)

¹⁸ *See* footnote 1.

f. Claimant has faceted arthritis that would cause him pain bending and standing.

21. During the Fair Hearing, the parties agreed that the appropriate impairment listing for Claimant's back condition and pain was the Social Security Administration's "Category of Impairments, Musculoskeletal 1.04 Disorders of the Spine" listed in Appendix 1 of 20 C.F.R. Part 404, Subpart P.

22. It is undisputed that Claimant does not have a severe impairment related to his thoracic spine.

23. The following facts were established by the Division's Interim Assistance Disability Adjudicator during the Fair Hearing:

a. Claimant's back impairment does not result in compromise of a nerve root (including the cauda equina) or the spinal cord. Claimant's medical evidence does not mention nerve root compromise. Claimant's straight leg raises during examination that were negative, his musculoskeletal exams were normal, and his neurological exams were normal.

b. Claimant's pain is not due to neurological problems. Claimant has no neurological problems or bowel problems and can walk, or stand at least 6 hours per day while occasionally changing positions, and may need to rest for some periods of time.

c. Claimant's pain does not impair his ability to perform all work. Claimant is able to do work available in the national economy.

d. Claimant could work as a photocopy machine operator, or operate a collator, each an unskilled job that a worker can learn in two weeks and that requires light lifting, frequent handling and reaching. Another job Claimant could do is the work of a basket filler, also an unskilled job requiring light work.

PRINCIPLES OF LAW

I. Burden of Proof and Standard of Proof

Alaska Adult Public Assistance Regulation 7 AAC 40.050(a) expressly provides "[a]ll applicants must 'furnish adequate evidence to demonstrate ... eligibility for assistance.'"¹⁹ More generally, as an applicant for Interim Assistance benefits, the Claimant has the burden of proving that he is eligible for the benefits he seeks. *See, State of Alaska Alcohol Beverage Control Board v. Decker*, 700 P.2d 483, 485 (Alaska 1985). And, a party who is seeking a change in the status quo has the burden of proof by a preponderance of the evidence. *State, Alcoholic Beverage Control Board v. Decker*, 700 P.2d 483, 485

¹⁹ In contrast, the Social Security Administration's five-step sequential evaluation process shifts the burden of proof to the government at step five. At step five, the government must prove that the applicant can perform work available in the national economy. *Washington v. Barnhart*, 424 F. Supp. 2d 939, 948 (S.D.Tex. 2006)

(Alaska 1985); *Amerada Hess Pipeline v. Alaska Public Utilities Comm'n*, 711 P.2d 1170, n. 14 at 1179 (Alaska 1986).

“Where one has the burden of proving asserted facts by a preponderance of the evidence, he must induce a belief in the minds of the [triers of fact] that the asserted facts are probably true.” *Robinson v. Municipality of Anchorage*, 69 P.3d 489, 495 (Alaska 2003).

II. Interim Assistance Program Requirements

Interim Assistance is a benefit provided by the State to a recipient of Adult Public Assistance while he or she is waiting for the federal Social Security Administration to approve his/her application for Supplemental Security Income (SSI). 7 AAC 40.170(a) and (b); AS 47.25.255. Interim Assistance is aid to “permanently and totally disabled” Alaskans. 7 AAC 40.020; *see* 7 AAC 40.050(c)(d). Adult Public Assistance regulation 7 AAC 40.170 pertaining to disability states, in relevant part:

(a) An applicant for aid to the permanently and totally disabled whose income is within SSI income standards must be found by the Social Security Administration to meet the definition of disability contained in Title XVI of the Social Security Act, as amended (42 U.S.C. 1382c(a)(3)).

(b) An applicant described in (a) of this section may receive interim assistance under 7 AAC 40.375²⁰ if the department determines that the applicant is disabled under 7 AAC 40.180.

To be eligible for Interim Assistance, an applicant must meet a number of eligibility criteria. *See* 7 AAC 40.030-130; 7 AAC 40.170-180. Among those criteria, the Division of Public Assistance (Division) must consider medical evidence and whether the applicant can perform any work and if the applicant’s impairment “has lasted or is expected to last for a continuous period of not less than 12 months.” 7 AAC 40.180(b) and (c). The criteria of 7 AAC 40.180, requiring the Division to determine whether an applicant would “be found disabled by the Social Security Administration,” incorporate the requirements of the Social Security Administration’s (SSA) determination of Supplemental Security Income (SSI) eligibility. The Interim Assistance applicant must be “likely to be found disabled by the Social Security Administration” either as a person meeting specific presumptive disability criteria or by meeting the disability criteria for impairments listed in the Social Security regulations at Appendix 1 of 20 C.F.R. Part 404, Subpart P. 7 AAC 40.180(b)(1). Thus, the receipt of State Interim Assistance depends, in part, on an applicant’s eligibility for federal SSI.

Disability is defined by federal law, in part, as an “inability to engage in any substantial gainful activity” due to a “medically determinable physical or mental impairment.” 42 U.S.C. §§ 423(d)(1)(a) & 1382e(a)(3)(A); *Bowen v. Yukert*, 482 U.S. 137, 140-42, 107 S. Ct. 2287, 96 L.2d 119 (1987); 20 C.F.R. § 416.905a.

²⁰ Regulation 7 AAC 40.375 establishes that an applicant eligible for Interim Assistance may receive Interim Assistance while waiting for the SSA to determine the applicant’s eligibility for SSI. This regulation also provides such recipients must agree to reimburse the State for the Interim Assistance benefits received and sets the amount of Interim Assistance at \$280 per month.

The Division is required to review the medical information provided by the applicant to determine if the applicant's alleged impairment(s) meet the disability criteria for at least one impairment listed in the Social Security regulations. 7 AAC 40.180(b). When making its determination, the Division applies the same five-step evaluation process as is applied by the federal Social Security Administration. *See* 7 AAC 40.180.

Five-Step Sequential Evaluation Process

The federal Social Security Administration (SSA) Supplemental Security Income (SSI) disability determination process involves a five-step "sequential evaluation process." 20 C.F.R. § 416.920.²¹ The five-step disability determination process includes:

Step 1. Is the applicant doing "substantial gainful activity"? 20 C.F.R. § 416.920(a)(4)(i). Substantial gainful activity is defined at 20 C.F.R. § 416.910. *See also*, 20 C.F.R. §§ 416.971-976. "Substantial gainful activity" is work activity that involves doing significant physical or mental activities and is the kind of work usually done for pay or profit. 20 C.F.R. §§ 416.972. If the applicant is performing substantial gainful activity, the applicant is not disabled and the eligibility evaluation stops. 20 C.F.R. §§ 416.920(a)(4)(i) and (b).

Step 2. Does the applicant have a "severe medically determinable physical or mental impairment" that has lasted or is expected to last for at least 12 months? 20 C.F.R. § 416.920(a)(4)(ii). A severe impairment is any impairment or combination of impairments which "significantly limits [a person's] physical or mental ability to do basic work activities." 20 C.F.R. § 416.920(c). To be "medically determinable" medical evidence is required to establish an applicant's impairment and an applicant's statements, alone, are insufficient. 20 C.F.R. § 416.908. Medical evidence consists of "signs, symptoms, and laboratory findings." 20 C.F.R. § 416.908; *see* 20 C.F.R. § 416.928. If the impairment is not severe, the applicant is not disabled. 20 C.F.R. § 416.920(a)(4)(ii).

The "severe medical impairment" also must have 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; this period is called the "duration requirement." 20 C.F.R. § 416.909. If the severe impairment does not satisfy the duration requirement, the applicant is not disabled. 20 C.F.R. § 416.920(a)(4)(ii).

Step 3. Has the applicant's severe impairment met or medically equaled one or more of the impairments listed in the Social Security regulations located at 20 C.F.R. Part 404, Subpart P, Appendix 1 (hereinafter, Appendix 1) for the duration requirement? 20 C.F.R. § 416.920(a)(4)(iii). An applicant's alleged impairment must meet all of the specified medical criteria of an Appendix 1 listing. *Fleming v. Barnhart*, 284 F. Supp.2d 256, 269 (D. Md 2003); *Washington v. Barnhart*, 424 F. Supp.2d 939, 950 (S.D.Tex. 2006). If the applicant's impairment has met the criteria of a listing in Appendix 1

²¹ An applicant claiming mental disability or a disability by which the applicant may be presumed disabled, such as blindness, is evaluated by a similar process. *See, e.g.* Evaluation of mental impairments at 20 C.F.R. § 416.920a; blindness at 20 C.F.R. § 416.981-416.985. Alaska Adult Public Assistance regulations concerning blindness are at 7 AAC 40.140-40.160.

for a period of 12 months or will meet the criteria for 12 months, the applicant is disabled and the evaluation stops. 20 C.F.R. § 416.920(a)(4)(iii).

If an applicant has multiple impairments, the combined effect of all the impairments must be considered to determine whether an applicant is severely medically impaired. 20 C.F.R. § 416.923. To show an unlisted impairment or a combination of impairments are the equivalence of a listed impairment, the applicant must present medical findings equal in severity to *all* the criteria for the one most similar listed impairment. *Washington v. Barnhart*, 424 F.Supp.2d 939, 950 (S.D.Tex. 2006) 20 C.F.R. § 416.926(a). A claimant's disability is equivalent to a listed impairment if the medical findings are at least equal in severity and duration to a listed impairment. *Washington v. Barnhart*, 424 F.Supp.2d 939, 951 (S.D.Tex. 2006); 20 C.F.R. § 416.926. There must be a correlation between the signs, symptoms and laboratory findings pertaining to the alleged impairment with the criteria corresponding to an impairment in the SSA's listings at Appendix 1. *Fleming v. Barnhart*, 284 F. Supp. 2d 256 (2003). An applicant cannot prove medical equivalence by showing that the "overall functional impact of [an] unlisted impairment or combination of impairments is as severe as that of a listed impairment." *Washington v. Barnhart*, 424 F.Supp.2d 939, 951 (S.D.Tex. 2006) (citing *Sullivan v. Zebley*, 493 U.S. 521,531, 110 S. Ct. 885, 107 L.Ed.2d 967 (1990)).

The impairments listed at Appendix 1 are described in twelve functional body system categories.²² 20 C.F.R. Part 404, Subpart P, Appendix 1. Evaluation of each impairment is described in general terms and by specific criteria which describe the disabling impairment. *See e.g.* 1.00 Musculoskeletal System and 1.01 Category of Impairments, Musculoskeletal, ... 1.04 Disorders of the spine.

If an applicant's alleged impairment(s) do not meet or equal an Appendix 1 listing, the applicant's severe impairment is further evaluated in relation to ability to work.

Step 4. Does the applicant's severe impairment prevent the person from doing his or her past relevant work? 20 C.F.R. § 416.920(a)(4)(iv). An assessment of the applicant's "residual functional capacity" is made to determine the most the applicant can do, despite existing limitations. 20 C.F.R. § 416.920(f); 20 C.F.R. § 416.945. The assessment includes considering if the applicant can do the applicant's past relevant work. 20 C.F.R. § 416.945(a)(5)(i); 20 C.F.R. § 416.960(a),(b). If the applicant's impairment does not prevent the applicant from performing past relevant work, the applicant is not disabled. 20 C.F.R. § 416.920(a)(4)(iv).

Step 5. Is the applicant's assessed residual functional capacity such that the applicant is capable of making an adjustment to any other work? 20 C.F.R. § 416.920(a)(4)(v); 20 C.F.R. § 416.920(g). The assessment of the applicant's residual functional capacity together with "vocational factors" such as "age, education and work experience" are considered. 20 C.F.R. § 416.920(g); *see* 20 C.F.R. § 416.960-969a. The type of work considered is work that exists in the national economy if it exists in "significant numbers in the region where" the applicant lives or in "several other regions of the country." 20 C.F.R. § 416.960(c); 20 C.F.R. § 416.966. If the applicant is not capable of performing other work, he is disabled. 20 C.F.R. § 416.920(a)(4)(v).

²² The impairments listed that are applicable to children under 18 are found in Appendix 1, Part B, and are applied where the criteria of Part A do not give appropriate consideration to the particular disease process in childhood.

An applicant's individual characteristics are applied to the appropriate medical-vocational guideline. To determine if an applicant can adjust to perform other work, age (20 C.F.R. § 416.963), education (20 C.F.R. § 416.964), work skills and abilities (20 C.F.R. § 416.965) are contemplated. 20 C.F.R. § 416.960-969a. Also, to evaluate an applicant's ability to adjust to other work, the physical exertion requirements of work are classified as "sedentary, light, medium, heavy and very heavy." 20 C.F.R. § 416.967. Skill requirements of the work in the national economy are classified as "unskilled," "semi-skilled," and "skilled." 20 C.F.R. § 416.968. The "transferability" of past skills also is considered in determining if the applicant can adjust to other work requirements. 20 C.F.R. § 416.968(d)

In addition, 20 C.F.R. Part 404, Subpart P, Appendix 2, Medical-Vocational Guidelines²³, as well as publications of the United States government, such as the Dictionary of Occupational Titles, are applied determine if an applicant can make an adjustment to any other work. 20 C.F.R. § 416.966; 20 C.F.R. Part 404, Subpart P, Appendix 2 (hereinafter, Appendix 2).

Appendix 2 provides tables which combine age, education, and past work experience to determine if an applicant is disabled or not disabled, based on the applicant's residual functional capacity (that is, ability) to adjust to work demands. Appendix 2 provides Table 1 for sedentary work, Table 2 for light work, and Table 3 for medium work. Each Table is accompanied by textual description(s) of the functional capacity needed to perform sedentary, light or medium work. For example, the descriptive text for Table 3 (medium work) states, in relevant part:

203.00 Maximum sustained work capability limited to medium work as a result of severe medically determinable impairment(s). (a) The functional capacity to perform medium work includes the functional capacity to perform sedentary, light, and medium work. Approximately 2,500 separate sedentary, light, and medium occupations can be identified, each occupation representing numerous jobs in the national economy which do not require skills or previous experience and which can be performed after a short demonstration or within 30 days. (b) The functional capacity to perform medium work represents such substantial work capability at even the unskilled level that a finding of disabled is ordinarily not warranted in cases where a severely impaired individual retains the functional capacity to perform medium work. Even the adversity of advanced age (55 or over) and a work history of unskilled work may be offset by the substantial work capability represented by the functional capacity to perform medium work.

See Appendix 2 to Subpart P of Part 404 – Medical-Vocational Guidelines, 201.00; Appendix 2: Table 3 Residual Functional Capacity: Maximum Sustained Work Capability Limited to Medium Work as a Result of Severe Medically Determinable Impairment(s) Rules 203.25-.27.

The tables consider an applicant's ability to do work in the national economy based on the physical exertion requirements of work. Appendix 2; 20 C.F.R. § 416.967. Physical exertion requirements are classified in groups describing work as "sedentary, light, medium, heavy, and very heavy." (*Id.*)

²³ Appendix 2 is sometimes called "the grids" or the "grid rules" because it contains tables. See *Draegert v. Barnhart*, 311 F.3d 468, 473 (2nd Cir. 2002).

Education, previous work experience and age also are accommodated in the tables. The tables sort the age characteristic according to the following groupings (Appendix 2, §§ 201-204):

1. Persons between 18-49 years of age are included in the group “younger individual 18-44.”
2. Persons 45-49 are included in the group “younger individual 45-49.”
3. Persons 50-54 are included in the group “closely approaching advanced age.”
4. Persons 55 years and over are included in the group “advanced age.”
5. Persons 60-64 are included in the group “closely approaching retirement age.”

An applicant’s residual functional capacity assessment incorporates an applicant’s exertional and non-exertional limitations. 20 C.F.R. § 416.969(a). The classification of sedentary, light, and medium work according to tables takes into consideration an applicant’s ability to meet demands of a job in light of the applicant’s exertional and/or non-exertional limitation(s). Thus, an applicant’s ability to meet the strength demands of jobs is incorporated in the tables. 20 C.F.R. § 416.969-416.969a.

Exertional limitations are “limitations and restrictions imposed by [an applicant’s] impairment(s) and related symptoms, such as pain, [that] affect only ... the ability to meet the strength demands of jobs (sitting, standing, walking, lifting, carrying, pushing, and pulling....)” 20 C.F.R. § 416.969a(b). When an applicant’s impairment(s) impose only exertional limitations and the applicant is found to have the ability to adjust to work as established through Appendix 2, the rule of the appropriate table in Appendix 2 finalizes the disability determination. 20 C.F.R. § 416.969a(b).

Non-exertional limitations are those that affect only an applicant’s ability to meet the demands of jobs other than demands requiring strength. 20 C.F.R. § 416.969a(c). Examples include difficulty functioning due to anxiety and depression; difficulty concentrating, understanding, or remembering detailed instructions; difficulty seeing or hearing; difficulty tolerating certain environmental/physical job conditions; or difficulty with physical postures such as “reaching, handling, stooping, climbing, crawling, or crouching.” 20 C.F.R. § 416.969a(c)(i)-(vi).

Pain can be either an exertional or non-exertional limitation or a combination of both. 20 C.F.R. § 416.969a(b), (c), (d).

The medical vocation guidelines, located at 20 C.F.R. Part 404, Subpart P, Appendix 2, are not strictly applied when an applicant has both exertional and non-exertional limitations that limit his ability to perform certain demands of a job. 20 C.F.R. § 416.969a; Appendix 2, 200.00(e). Where non-exertional impairments do not “diminish or significantly limit” an applicant’s residual functional capacity to work, it is appropriate to use the medical vocation guidelines. *Baker v. Barnhart*, 457 F.3d 882, 894 (8th Cir.2006)

If the applicant cannot make an adjustment to other work, the applicant is deemed disabled. 20 C.F.R. § 416.920(a)(5); 20 C.F.R. § 416.960(c). If the applicant’s characteristics, when applied to the appropriate table, result in a determination that he can adjust to any work, the applicant is found not disabled. Thus, the appropriate Appendix 2 table may finally determine if an applicant is permanently and totally disabled or if an applicant can do any work. However, Appendix 2 does not consider all possible variations of factors and further evaluation may be needed. 20 C.F.R. § 416.969.

ISSUE

Was the Division correct when it denied Claimant's October 21, 2011 Interim Assistance application?

BURDEN OF PROOF AND STANDARD OF PROOF

Alaska Regulation 7 AAC 40.050(a) expressly provides “[a]ll applicants must “furnish adequate evidence to demonstrate ... eligibility for assistance.” More generally, as an applicant for Interim Assistance benefits, Claimant has the burden of proving that he is eligible for the benefits he seeks. *See, State of Alaska Alcohol Beverage Control Board v. Decker*, 700 P.2d 483, 485 (Alaska 1985). Therefore, Claimant has the burden of proving that he is eligible for Interim Assistance benefits or that the Division erred in denying his Interim Assistance application.

The standard of proof in an administrative proceeding is a “preponderance of the evidence,” unless otherwise stated. *Amerada Hess Pipeline Corp. v. Alaska Public Utilities Comm’n*, 711 P.2d 1170, 1183 (Alaska 1986). Therefore, Claimant must prove by a preponderance of the evidence that he is eligible for Interim Assistance or that the Division erred.

ANALYSIS

I. Interim Assistance Eligibility Determinations and Background

Eligibility for Interim Assistance benefits is evaluated, in part, by 7 AAC 40.180. This regulation requires that the Division of Public Assistance determine that an applicant appears “likely to be found disabled by the Social Security Administration” (SSA). 7 AAC 40.180(b)(1). Both the Division and the SSA apply the same five-step sequential evaluation process to make the disability determination. 20 C.F.R. § 416.920; 7 AAC 40.180(b)(1)(B). *See* Principles of Law section hereinabove.

Claimant agreed he initially was found not eligible for Supplemental Security Income (SSI) by the Social Security Administration (SSA) and appealed the initial denial of his application. The Division did not dispute this.

Claimant sought Interim Assistance based on three conditions: impairment of his back, including spinal stenosis, degenerative disk disease and pain (cervicalgia), depression and asthma. Claimant supplied results of three MRI tests, medical records, and reports in support of his application.

Claimant's complaint concerning his spinal impairment is manifested throughout his medical history at the Anchorage Neighborhood Health Center. Claimant's asthma has been of long duration, is controlled by medication, is not a severe impairment and does not contribute to his inability to work. *See* Finding of Fact 16. Claimant's depression is not severe, does not require medication, and arises from his back impairment and unemployment rather than causing him inability to work. *See* Finding of Fact 15. Claimant has a severe impairment of his back, including degenerative disc disease, spinal stenosis and pain.

I. Five-Step Evaluation 20 C.F.R. § 416.920

A comprehensive description of the five-step evaluation process for determining disability applied by the federal SSA and by the Division is found in the Principles of Law section of this decision. The evaluation steps applied to Claimant's circumstances are as follows.

Step 1: Is the applicant doing "substantial gainful activity"? 20 C.F.R. § 416.920(a)(4)(i). The Division conceded that Claimant is not engaged in substantial gainful activity because it believes Claimant is not employed. Finding of Fact 20.

Step 2: Does the applicant have a "severe medically determinable physical or mental impairment" that has lasted or is expected to last for at least 12 months? 20 C.F.R. § 416.920(a)(4)(ii). The Division conceded Claimant has a severe medically determinable physical impairment of the spine because it significantly impairs Claimant's ability to do basic work activities. Finding of Fact 20. The Division also conceded Claimant's spinal impairment met the duration requirement of having existed for at least 12 months in the past. Finding of Fact 20.

Step 3: Has the applicant's severe impairment met or medically equaled one or more of the impairments listed in the Social Security regulations located at 20 C.F.R. Part 404, Subpart P, Appendix 1, for the duration requirement? 20 C.F.R. § 416.920(a)(4)(iii).

The Division disputed that Claimant's severe impairment of the spine, or that his combination of spinal impairment, depression and asthma, met or equaled one or more of the impairments listed in Appendix 1 of 20 C.F.R. Part 404, Subpart P.

a. Spinal Impairment.

The parties agreed that the category of impairments applicable to Claimant's spinal impairment was category 1.04 "Disorders of the spine," listed in Appendix 1 of 20 C.F.R. Part 404, Subpart P. This category of impairment describes disorders of the spine as, "for example,

(herniated nucleus pulposus, spinal arachnoiditis, spinal stenosis, osteoarthritis, degenerative disc disease, facet arthritis, vertebral fracture), resulting in compromise of a nerve root (including the cauda equine) or the spinal cord.

With:

A. Evidence of nerve root compression characterized by neuro-anatomic distribution of pain, limitation of motion of the spine, motor loss (atrophy with associated muscle weakness or muscle weakness) accompanied by sensory or reflex loss and, if there is involvement of the lower back, positive straight-leg raising test (sitting and supine);
or

B. Spinal arachnoiditis,²⁴ confirmed by an operative note or pathology report of tissue biopsy, or by appropriate medically acceptable imaging, manifested by severe burning or painful dysesthesia, resulting in the need for changes in position or posture more than once every 2 hours;

or

C. Lumbar spinal stenosis resulting in pseudoclaudication, established by findings on appropriate medically acceptable imaging, manifested by chronic nonradicular pain and weakness and resulting in inability to ambulate effectively, as defined in 1.00B2b.”²⁵

For Claimant to meet or equal this listed impairment he must have a disorder of the spine “resulting in compromise of a nerve root (including the cauda equine) or the spinal cord, and at least one of three sets²⁶ of circumstances described by the criteria in A., B., or C. Claimant’s MRI evidence showed his cervical spine was diagnosed with mild foraminal narrowing at C6-C7 and mild foraminal stenosis at C5-C6, accompanied by broad-based disk bulge. Claimant’s lumbar spine was diagnosed from MRI results as normal, with significant broad-based disk bulge at L4-L5 and L5-S1, described by the radiologist as follows:

Vertebral body heights are maintained. No evidence for abnormal marrow signal. Focal central disk protrusions superimposed on broad-based disk bulge is noted at L5-S1 level with significant bilateral and lateral recess narrowing and inferior foraminal narrowing. Broad-based disk bulge is also noted at L4-5 level, but facet joint hypertrophic changes at this location are prominent, which results in lateral recess narrowing and inferior neuroforaminal narrowing. Remainder of the vertebral bodies and disk heights are within normal limits. ... Impression: Dominant abnormality appears to be significant facet joint hypertrophic changes of L4-5 and L5-S1 level with central disk protrusion and broad-based disk bulge at L5-S1 level. (Ex. 13.15) See Finding of Fact 11.

Claimant’s treating doctor, Dr. [REDACTED], diagnosed Claimant with degenerative disc disease and spinal stenosis and connected these conditions with Claimant’s reported back pain. This diagnosis was confirmed when Claimant’s cervical neck pain was diagnosed as “cervicalgia,” as a result of an MRI scan which found he had arthritic changes (moderate left and mild right neural foraminal stenosis, and

²⁴ Arachnoiditis describes a pain disorder caused by the inflammation of the arachnoid, one of the membranes that surround and protect the nerves of the spinal cord. Accessed on May 16, 2012 at: <http://www.ninds.nih.gov/disorders/arachnoiditis/arachnoiditis.htm>

²⁵ Regulation Appendix 1, 1.00B2b defines “inability to ambulate effectively.” The definition includes “extreme limitation of the ability to walk” and “having insufficient lower extremity functioning...to permit independent ambulation without the use of a hand-held assistive device(s) that limits the functioning of both upper extremities.”

²⁶ A. Evidence of nerve root compression characterized by neuro-anatomic distribution of pain, limitation of motion of the spine, motor loss (atrophy with associated muscle weakness or muscle weakness) accompanied by Sensory or reflex loss and, if there is involvement of the lower back, positive straight-leg raising test (sitting and supine) or B. spinal arachnoiditis, confirmed by an operative note.... Or C. Lumbar spinal stenosis resulting in pseudoclaudication, established by findings on an appropriate medically acceptable imagine, manifested by chronic nonradicular pain and weakness, and resulting in inability to ambulate effectively as defined in 100B2b.)

bulging discs at C5-C6). Findings of Fact 8, 10. Claimant's lumbar pain, as diagnosed by Dr. [REDACTED] was confirmed by an MRI scan which showed Claimant's L4-L5 and L5-S1 discs had disc bulge and that L4-L5 had facet joint hypertrophic changes. Thus, the medical evidence confirmed Claimant's report of back pain. The back pain is due to increase in size (hypertrophy) of parts of his spine resulting from arthritic processes.

However, Claimant's medical evidence shows no compromise of a nerve root or of his spinal cord. Therefore, Claimant's condition does not meet the foundational criteria for the listing of category 1.04. Even if Claimant met the foundational requirements of the listed condition of category 1.04, his medical evidence shows he does not meet any of the criteria required by subsections A, B, or C.

Under category 1.04 subsection A, Claimant must also show that evidence of nerve root compression characterized by "neuro-anatomic distribution of pain, limitation of motion of the spine, motor loss accompanied by sensory or reflex loss, and if there is involvement of the lower back, positive straight-leg raising test...." Claimant did not have a positive straight-leg raising test: Claimant's straight-leg raising test results were negative. Finding of Fact 13 h. Claimant is able to walk, stand, and carry on his activities of daily life and there is no evidence of motor loss, limitation of spinal motion and neuro-anatomic distribution of pain. Claimant's has back pain due to degenerative changes but it is not of the severity that he meets the criteria of subsection A.

Under category 1.04, subsection B, Claimant must have a condition of spinal arachnoiditis. Claimant provided no evidence asserting he has spinal arachnoiditis.

Under category 1.04, subsection C, Claimant must show his lumbar spinal stenosis results in "pseudoclaudication" which is established by finding on "appropriate medically acceptable imaging." There is no reference to pseudoclaudication in Claimant's MRI results or anywhere in his medical records. In addition, even if Claimant had been found to have pseudoclaudication, to qualify as a disabling condition, Claimant also would have to provide medical evidence that pseudoclaudication results in inability to ambulate effectively.

An inability to ambulate effectively is described as an "extreme limitation in the ability to walk" such that the use of hand-held assistive device(s) are needed thereby limiting the function of both "upper extremities." Appendix 1, at 1.00 B2b. Claimant's gait and stance consistently were described as normal from September 2010 through November 2011. *See* Finding of Fact 14. Claimant does not use any assistive device to walk. *See* Finding of Fact 14. Claimant's testimony is that he walks to the bus, walks when doing grocery shopping and laundry, and generally can walk notwithstanding his back pain. Claimant does not meet the criteria of subsection C either.

Therefore, Claimant's back impairment and back pain do not meet or medically equal the impairment of the spine listed as category 1.04 in Appendix 1.

b. Combination of Impairments: Depression, Asthma, Spinal Impairment

Claimant also asserted that he was disabled because of his asthma and depression, in combination with his back condition. Whether the combined effect of Claimant's alleged impairments meets or

medically equals a listed impairment and/or constitutes a medically severe combination of impairments must be considered. 20 C.F.R. § 416.923. This regulation provides, in relevant part: “we will consider the combined effect of all your impairments without regard to whether any such impairment, if considered separately, would be of sufficient severity.” (*Id.*) Thus, even if an alleged impairment is not of sufficient severity to constitute a disabling impairment, the combination of impairments may result in disability. (*Id.*)

1. Depression

Claimant’s depression is not a severe impairment. Claimant’s evidence concerning his depression is his subjective reports to the Health Center and the observations of its staff. Claimant has not been hospitalized nor had any periods of decompensation. Claimant has no reported memory problems or reported problems of concentration, persistence or pace and has not reported difficulties in social functioning. Claimant’s depression is controlled and he refused medication suggested by his doctor. Claimant benefited from counseling in late 2011. Claimant self-reports that his depression is linked to his lack of income, lack of employment, and back pain. Claimant’s depression does not restrict or interfere with his activities of daily living and results from his present life circumstances. *See* Finding of Fact 15.

The listing for depression in Appendix 1 is found under Mental category “12.04 Affective Disorders Characterized by a disturbance of mood, accompanied by a full or partial manic or depressive syndrome.” Category 12.04 establishes that

“[m]ood refers to a prolonged emotion that colors the whole psychic life. The required level of severity for these disorders is met when there is medically documented persistence, either continuous or intermittent of depressive syndrome and either marked restriction of activities of daily living or marked difficulties in maintaining social functioning or marked difficulties in maintaining concentration, persistence or pace or repeated episodes of decompensation, each of extended duration; or a medical history of chronic affective disorder of at least two years duration.

Claimant’s depression, by itself, does not constitute a disabling condition because he does not meet the criteria of the depression category listed as 12.04 in Appendix 1, 20 C.F.R. Part 404, Subpart P, as noted above.

2. Asthma

Claimant’s asthma is not a severe impairment. Asthma is categorized as an impairment of the respiratory system at 3.03. To be disabled by asthma, Claimant would need to prove he suffers either

A. Chronic asthmatic bronchitis. Or B. Attacks ... in spite of prescribed treatment and requiring physician intervention, occurring at least once every 2 months or at least six times a year.

All of Claimant's evidence supported the finding that he has had asthma for a long time and there is no evidence that it has or does impair his ability to work. Claimant's asthma is well controlled through intermittent self-administration of medicine. See Findings of Fact 16. Claimant does not have chronic asthmatic bronchitis and he does not require periodic physician intervention. Claimant's asthma, by itself, does not constitute a disabling condition because it does not meet the criteria for the asthma category listed as 3.03 in Appendix 1, 20 C.F.R. Part 404, Subpart P.

3. Combined effect of spinal impairment, depression and asthma

Claimant provided no medical evidence that his asthma relates to or contributes to his back pain, spinal impairment, ability to work or depression. Claimant's depression arises from his current life circumstances and does not cause either his asthma or spinal impairment. The combination of Claimant's asthma, depression and spinal impairment does not result in a disabling condition nor medically equal a disabling condition. Therefore, the combination of Claimant's spinal impairment, depression and asthma does not result in a medically severe combination of impairments that meets or medically equals one or more of the impairments listed in Appendix 1.

Claimant's severe impairment, in combination with his asthma and depression, does not meet or medically equal a listed impairment in Appendix 1 of 20 C.F.R. Part 404, Subpart P.

Step 4: Does the applicant's severe impairment prevent the applicant from doing past relevant work? 20 C.F.R. § 416.920(a)(4)(iv).

This requires determining Claimant's residual functional capacity to do past relevant work. The Division conceded Claimant was unlikely to be able to work as a farmer, fisherman or fish processor, which constitutes Claimant's relevant past work. Claimant testified he also worked as a maintenance person and shopper for a local aid agency. This work was temporary, part-time and does not realistically represent Claimant's past work. Therefore, the Division was correct to concede Claimant can no longer do his past work.

Step 5: Is the applicant's assessed residual functional capacity such that the applicant is capable of making an adjustment to any other work? 20 C.F.R. § 416.920(a)(4)(v).

At the fifth step of the five-step sequential evaluation of SSI eligibility, the federal government has the burden of proving a job exists which the applicant can perform.²⁷ The Division argued that Claimant could perform "light" work and provided three examples of work Claimant might do. Light work requires less exertional strength than does "medium" work. 20 C.F.R. Part 404, Subpart P, Appendix 2 § 202. The Division identified three jobs available in the national economy by referring to Appendix 2

²⁷ This burden is clearly established by regulation and by case law. See 20 C.F.R. § 416.960(c)(2); *Draeger v. Barnhart*, 311 F.3d 468, 472 (2d Cir. 2002); *Carroll v. Secretary of Health and Human Services*, 705 F.2d 638, 642 (2d Cir.1983). However, the Alaska Division of Public Assistance does not bear this burden because, by regulation, eligibility for Interim Assistance is the applicant's burden. 7 AAC 40.030 ("An applicant must meet the eligibility requirements of the SSI program ... and the eligibility requirements set forth in this chapter.") The fact that, in practice, the Division applies the same five-step sequential analysis as does the SSA does not alter the regulatory requirement that an applicant meet all the eligibility requirements to receive Interim Assistance, including those of 7 AAC.40.030, 7 AAC 40.170, and 7 AAC 40.180 or 7 AAC 40.140.

of 20 C.F.R. Part 404, Subpart P. Although the Division argued Claimant could do work as a photocopy machine operator, a collator, or a basket filler, these light duty jobs are within rules 202.17 and 202.18 of Table 2.

However, Claimant has the physical capacity to perform work requiring a medium level of exertional strength. *See* Finding of Fact 17. Therefore, the appropriate table is Table 3: “Residual Functional Capacity: Maximum Sustained Work Capability Limited to Medium Work as a Result of Severe Medically Determinable Impairments” because it addresses work requiring “medium” strength. The functional capacity to perform “medium” work “includes the functional capacity to perform sedentary, light, and medium work.” 20 C.F.R. Part 404, Subpart P, Appendix 2, rule 203.00; 20 C. F.R. § 416.967(c). Medium work “involves lifting no more than 50 pounds at a time with frequent lifting or carrying of objects weighing up to 25 pounds.” *See* 20 C.F.R. § 416.967(c).

Claimant’s “Physical Work Performance Evaluation” (Evaluation) results, obtained in January 2012, are that Claimant can do work within the “Medium range,” at minimum, and can exert “20 to 50 pounds of force occasionally, and/or 10-25 pounds of force frequently, and/or greater than negligible up to 10 pounds of force constantly to move objects.” In addition, the Evaluation report noted that Claimant’s “self-limiting behavior” meant a “maximum overall level of work” could not be determined, and it may be possible for Claimant to do work requiring more than “medium” exertional strength.

Applying Claimant’s characteristics to Table 3 considers that Claimant is between 45-47 years old. Claimant thus falls within the group of “younger individual between 44-49 years old.” 20 C.F.R. Part 404, Subpart P, Appendix 2, 201.00. Claimant does not (yet) have a high school education or General Equivalency Diploma (GED). He has work skills limited to farming and the fishing industry, which are considered unskilled or semiskilled, or skills not transferable to other work. Claimant has been evaluated as capable of performing “medium work.” Considering these characteristics with data in Table 3 results in Claimant falling within rules 203.25 through 203.27 of Appendix 2, 20 C.F.R. Part 404, Subpart P. According to Table 3, Claimant is not disabled.

More generally, Claimant’s characteristics were described by his treating physician’s diagnosis of spinal stenosis and degenerative disc disease. These diagnoses were confirmed by Claimant’s MRI tests that proved Claimant’s back pain is due to bulging discs and degenerative changes of his spine. Claimant’s impairment is treated with pain relieving medication and physical therapy. Claimant acknowledged his impairment is temporary, that he is engaged in vocational rehabilitation with an aim to reemployment, and that he is continuing his education. Claimant’s treating physician referred Claimant for vocational rehabilitation. This indicates Claimant’s treating physician, as well as Claimant, believe he is impaired from doing his past work but can still work.

Consequently, Claimant’s doctor, Claimant, and the results of Claimant’s Evaluation all make clear that Claimant has the residual functional capacity to perform work, probably work requiring “medium” exertional strength. The fact that Claimant can perform work means he is not totally and permanently disabled and therefore is not eligible for SSI.

Therefore, the Division was correct to determine the SSA was unlikely to find Claimant permanently and totally disabled and was correct to deny Claimant's October 21, 2011 application. 7 AAC 40.180; 7 AAC 40.030.

Claimant has not met his burden of proving, by a preponderance of the evidence, that he is eligible for Interim Assistance and did not prove the Division's denial of his application for Interim Assistance was incorrect.

CONCLUSIONS OF LAW

1. Claimant failed to prove by a preponderance of the evidence that he is likely to be found disabled by the Social Security Administration and therefore eligible for Interim Assistance benefits. 7 AAC 40.030(a).
2. Claimant did not prove by a preponderance of the evidence that the Division of Public Assistance erred when it denied Claimant's application for Interim Assistance because:
 - a. Claimant did not show the Social Security Administration's initial denial of his application for Supplemental Security Income was overturned on appeal or that he was likely to meet the definition of disability in 42 U.S.C. 1382c(a)(3). 7 AAC 40.030(a).
 - b. Claimant failed to meet the eligibility requirements for Adult Public Assistance Interim Assistance because Claimant is capable of performing work. 7 AAC 40.030.
 - c. Claimant did not prove that the Division erred in determining that Claimant's severe impairment of his back, including his back pain, depression and asthma do not meet or equal any listed impairment in the SSA's listing of medical impairments found at 20 C.F.R. Part 404, Subpart P, Appendix 1. 7 AAC 40.180(b)(1)(B).

DECISION

The Division was correct when it denied Claimant's October 21, 2011 Interim Assistance application on November 29, 2011 and February 7, 2012.

APPEAL RIGHTS

If for any reason Claimant is not satisfied with this decision, Claimant has the right to appeal by requesting a review by the Director. If 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 May 31, 2012.

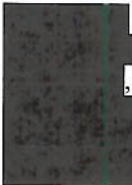
Claire Steffens
Hearing Authority

Certificate of Service

I certify that on May 31, 2012, true and correct copies of the foregoing were sent to:

Claimant by U.S.P.S First Class Certified Mail, Return Receipt Requested

and to the following by secure, encrypted e-mail:

 Public Assistance Analyst
, Public Assistance Analyst
, Staff Development & Training
, Admin. Assist. Dir.
, Policy & Program Development
, Admin. Asst. Policy

J. Albert Levitre, Jr., Law Office Assistant I