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III. Discussion

A. Interim Assistance Disability Analysis

Interim Assistance is a benefit available to individuals while they are waiting for the SSA to approve an application for Supplemental Security Income.⁶ Among other requirements, to receive Interim Assistance an applicant must be “likely to be found disabled by the Social Security Administration.”⁷ Ms. X has the burden of proof on this issue.⁸

The SSA uses a five-step evaluation process in making its disability determinations.⁹ For Alaska’s interim assistance determinations, however, only the first three of these steps are considered.¹⁰

Under the SSA evaluation process, each step is considered in order.¹¹ The first step in this 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.¹² This finding is made regardless of the applicants’ medical condition, age, education, or work experience.¹³

At step two, the SSA considers the severity of the applicant’s impairment. In order to be considered disabled, the impairment, or combination of impairments must be severe, and must be expected to result in death or must have lasted or be expected to last at least 12 months.¹⁴ If the impairment is not severe under this definition, then the applicant is not disabled.

⁴ Exhibit 3.211.

⁵ *Id.*

⁶ 7 AAC 40.170(b); 7 AAC 40.375.

⁷ 7 AAC 40.180(b)(1).

⁸ 7 AAC 49.135

⁹ 20 CFR §416.920. This process is describe in detail in OHA Case No 11-FH-134 (Dept. of Health and Social Services 2011), pages 14 – 17; <http://aws.state.ak.us/officeofadminhearings/Documents/HSS/11-FH-134.pdf>.

¹⁰ *See In re M.H.*, OAH No. 12-0688-APA (Comm’nr Health & Social Services August 20, 2012); <http://aws.state.ak.us/officeofadminhearings/Documents/APA/APA120668.pdf>

¹¹ 20 CFR §416.920(a)(4).

¹² 20 CFR §416.920(a)(4)(i).

¹³ 20 CFR §416.920(b).

¹⁴ 20 CFR § 416.920(a)(4)(ii); 20 CFR §416.909.

At step three, the SSA looks at whether the impairment meets or equals the Listing of Impairments adopted by the SSA.¹⁵ If it does, the applicant is disabled.¹⁶

There is no dispute that Ms. X is not currently performing substantial gainful activity. It is also not disputed that she has a severe impairment that meets the durational requirement. Thus, the primary issue in dispute here is whether Ms. X is likely to be found by SSA to meet the applicable listing in effect in April of 2005.¹⁷

B. Which Edition of SSA's Listing of Impairments Applies?

At the hearing, the division questioned why the most recent version of the listing would not be used. Which version to use was a policy decision made when 7 AAC 40.180(b)(1) was adopted. That regulation specifies that it is the version of the listings in existence as of April 1, 2005 that was adopted by reference. If the Department of Health and Social Services had wanted to rely on future amendments to the listings, then it would have been required to use different language in adopting the listings. The Department would have stated that it was adopting the listings as of a particular date, and then stated “as amended” or “as amended from time to time.”¹⁸ A review of 7 AAC 160.900 shows that sometimes the Department has adopted a document revised as of a certain date, “as amended from time to time,” and other times it has simply been adopted as revised as of a certain date. As noted above, 7 AAC 40.180 adopts the listing as revised as of April 1, 2005.

In determining whether someone is eligible for IA, the division looks to the requirements in 7 AAC 40. The state requirements are followed “unless the requirements of the SSI program specifically supersede inconsistent state program provisions.”¹⁹ The division has not identified any federal requirement that specifically supersedes the Department’s regulation adopting the 2005 version of the listings. Any revisions after that date have not been adopted, and may not be referred to in making IA eligibility determinations.

¹⁵ See 20 CFR § 404, Subpart P, Appendix 1 (listing). The division looks to the version of the listing that was in effect on April 1, 2005. 7 AAC 40.180(b)(1)(B).

¹⁶ 20 CFR § 416.920(a)(4)(iii).

¹⁷ 7 AAC 40.180(b)(1)(B).

¹⁸ Drafting Manual for Administrative Regulations, Chapter 11. The drafting manual is available on line at http://www.law.state.ak.us/pdf/manuals/2009-AugManual_AdminRegs.pdf. Departments are required to follow this drafting manual when preparing regulations. 1 AAC 05.030. See also AS 44.62.245 (requirements for incorporating future versions of documents or regulations). The language in AS 44.62.245(a) is not included in 7 AAC 40.180.

¹⁹ 7 AAC 40.030(a).

C. Reliance on Testimony from Non-Medical Personnel

Ms. X questioned why the division would rely on people who are not doctors or nurses to overrule her physicians' conclusions that she is disabled. The division's disability adjudicator has no formal medical training, and this is taken into consideration by the Commissioner or his delegee in deciding whether to accept her conclusions. On the other hand, the disability adjudicator does have more than ten years of experience working with the Listing of Impairments, and evaluating whether an applicant's medical condition meets one or more of the listing's requirements. Those listings impose very specific requirements. Ms. X's physicians may be using a broader definition of disability than is used in making IA determinations.²⁰ The evidence from Ms. X's treating physicians is given a great deal of weight, but their determinations are not conclusive proof of disability for purposes of IA eligibility.

D. Income Eligibility

The division asserts that Ms. X's monthly income exceeds the eligibility limit for receiving IA.²¹ Her application was received on December 31, 2012.²² In December, Ms. X received \$676 in unemployment benefits.²³ She received no unemployment benefits in January, and received \$774 in February.²⁴ As of March of 2013, she has been receiving \$1,453 per month.²⁵ This is more than the eligibility limit of \$1,319 per month.²⁶ For the months prior to March of 2013, Ms. X's income from unemployment did not exceed the eligibility limit. Accordingly, Ms. X was income-eligible for Interim Assistance during the period December 31, 2012 - February 28, 2013.

E. Ms. X Does Not Meet or Equal Any Listing

1. *Mental Health Diagnoses*

Dr. Baines indicated that Ms. X's mental health problems may be the most significant.

²⁰ The physician's testimony could come into play when the SSA evaluates Ms. X at step 5 of its five step process, but for IA purposes, only the first three steps are applied.

²¹ Exhibit 5.1.

²² Application submitted by division after close of hearing.

²³ Exhibit 2.2.

²⁴ *Id.*

²⁵ *Id.*

²⁶ Exhibit 2.3.

Mental health diagnoses are most significantly disabling for [patient – symptoms] wax & wane, causing disruption in her plans.^[27]

Mental health diagnoses are covered in section 12.00 of the listings. Ms. X's diagnoses of bipolar disorder and depression are covered by listing 12.04. The PTSD and anxiety disorders are covered by listing 12.06.²⁸ Each of these listings requires specific medically documented findings to support the diagnoses.²⁹ In addition, the illness must result in at least two of the following symptoms:

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[. ^{30]}

A marked restriction or difficulty means more than moderate, but less than extreme.³¹

There is some evidence in the record that Ms. X has restrictions in activities of daily living that might be considered more than moderate. Assuming she does have marked restrictions, the evidence in the record does not show more than a moderate difficulty in social functioning, or in maintaining concentration, persistence, or pace.

Repeated episodes of decompensation is defined as a temporary increase in symptoms with a loss of adaptive functioning, occurring three times within a year, each lasting for at least two weeks.³² Neither the medical records nor Ms. X's testimony support a finding of repeated episodes of decompensation. Accordingly, Ms. X has not proven that her mental disorders have met at least two of the four listed symptoms.

An alternative way to show significant symptoms and establish disability under these mental health listings is to show

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

²⁷ Exhibit 3.184 (AD 2 Form dated November 9, 2011).

²⁸ Ms. X also has a history of substance addiction. To the extent she may still have addiction related symptoms, the severity of those symptoms is analyzed under the listing that fits that symptom. *See* Listing 12.09, Substance Addiction Disorders.

²⁹ Listings 12.04(A) and 12.06(A).

³⁰ Listings 12.04(B) and 12.06(B).

³¹ Listing 12.00(C).

³² Listing 12.00(C)(4).

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.^[33]

Or by showing “the complete inability to function independently outside the area of one’s home.”³⁴

As stated above, Ms. X has not had repeated episodes of decompensation. Although it is not easy for her, Ms. X is able to function outside of the home, and the evidence presented at the hearing does not show that an increase in mental demands or a change in the environment would cause her to decompensate. Ms. X does not meet or equal the strict requirements to establish a disability under the mental health listings.

2. *Chronic Pain*

Dr. Clark expressed the opinion that Ms. X’s chronic pain might be the more significant factor in her disability. She stated:

Once her pain is under control – which would probably happen w/ weight loss surgery – she believes she could function again. The pain is aggravating her psychiatric disorders.³⁵

Pain is an important factor in determining whether a person is disabled for purposes of the IA program.³⁶ Ms. X has hip pain, low back pain, and “other musculoskeletal issues.”³⁷ She also has carpal tunnel syndrome.³⁸ She fractured her left leg in 2007.³⁹ Ms. X testified that she has difficulty walking, and can only walk for short distances. She is not able to stand for long periods of time. She can drive a car, and she is able to do her own shopping, though with some difficulty.

Joint dysfunction due to chronic pain is considered under listing 1.02. A disability may be found if there is “Involvement of one major peripheral weight-bearing joint (i.e. hip,

³³ Listing 12.04(C) (applicable to affective disorders).

³⁴ Listing 12.06(C) (applicable to anxiety related disorders).

³⁵ Exhibit 3.209.

³⁶ Listing 1.00(B)(2)(d).

³⁷ Exhibit 3.136.

³⁸ Exhibit 3.137.

³⁹ Exhibit 3.153.

knee, or ankle), resulting in inability to ambulate effectively as defined in 1.00B2b[.]”⁴⁰
Under 1.00B2b:

(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.^[41]

Ms. X has not met her burden of proving that she is unable to ambulate effectively as defined in this listing. She uses one cane, rather than two, and she is able to walk a block on her own.

IV. Conclusion

There is no doubt that Ms. X has significant medical problems. Her pain and other medical conditions are not sufficiently severe, however, to meet the strict standards of the interim assistance program. She may reapply at any time, however, if her condition changes, or if she has additional medical evidence that would add support to her claim.⁴² Because Ms. X has not met her burden of proof, the division’s determination is upheld.

Dated this 9th day of May, 2013.

Signed

Jeffrey A. Friedman
Administrative Law Judge

⁴⁰ Listing 1.02(A).

⁴¹ Listing 1.00(B)(2)(b).

⁴² She would have to meet the other eligibility requirements as well, including the income limit.

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 23rd day of May, 2013.

By: Signed _____
Name: Jeffrey A. Friedman
Title: Administrative Law Judge

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