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

In the Matter of)	
)	
J B,)	OHA Case No. 12-FH-14
)	
<u>Claimant.</u>)	Division Case No.

FAIR HEARING DECISION

STATEMENT OF THE CASE

Mr. J B (Claimant) applied for Interim Assistance benefits on September 14, 2011. (Ex. 1) On January 18, 2012, the Division of Public Assistance (Division) sent Claimant written notice his Interim Assistance application was denied and the Social Security Administration (SSA) had denied his Supplemental Security Income (SSI) application. (Ex. 3) On January 27, 2012, Claimant asserted to the Division that he had appealed the Social Security Administrations' (SSA) denial of his federal Supplemental Security Income (SSI) application and he requested a Fair Hearing. (Ex. 4) On February 24, 2012, the Division again denied his September 14, 2011 application.¹ (Ex. 17)

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

A Fair Hearing began on February 14, 2012. Claimant attended the hearing in person, represented himself and testified on his own behalf. Ms. Terri Gagne, Public Assistance Analyst with the Division, attended in person, represented the Division and testified on its behalf. In addition, the Division called Ms. Laura Ladner, the Division's Medical Reviewer and Disability Adjudicator, who participated by telephone and testified on behalf of the Division.

During the hearing, Claimant testified he had tendered several documents to the Division in support of his application that were not in the Division's evidentiary packet and that he had additional documentation to supply. In addition, the Division's denial notice was found to be inadequate. The parties agreed to continue the hearing so the Division could find and consider Claimant's documentation, provide Claimant time to submit additional documentation, have the Division review its decision, and issue a notice meeting the requirements of due process. The hearing was continued to March 29, 2012.

¹ For purposes of this decision, the Division's initial denial on January 18, 2012 is considered the date of denial. The February 24, 2012 denial notice was issued in response to the Division's review of additional information submitted by Claimant and to a procedural Order. *See* Procedural Summary.

Between February 14, 2012 and March 29, 2012, the Division received additional documents in support of Claimant's application, which were marked by the Division as Claimant's exhibits A and B, and the Division submitted an additional document which it marked as exhibit 18.

On February 24, 2012, the Division issued additional notice to Claimant titled "APA Denied – Other Reason." (Ex. 17)

The hearing continued on March 29, 2012, Claimant again appeared in person, represented himself and testified in his behalf. The Division again was represented in person by Ms. Gagne, who testified on its behalf.

ISSUE

Was the Division correct when it denied Claimant's September 14, 2011 application for Interim Assistance?

FINDINGS OF FACT

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

1. Claimant was born XX XX, 1954 and was 57² year old man at the time of his application on September 14, 2011. (Ex. 1; Ex. A12)
2. Claimant's education consists of completion of 12 years of schooling plus an Associate's degree, "business management," and an "AA Automotive Technology Certificate, Welding C & B, School Bus training program Certificate," and an Alaska Driver's license, Class A, Hazmat and Passenger endorsements. (Ex. 2.10)
3. Claimant's past relevant work consists of being a commercial truck driver since about 2005 and before that working security jobs since about 2002. (Ex. 2.8) In 1998-2002, Claimant worked as an auto mechanic. (Ex. 2.8)
4. On September 14, 2011, Claimant applied for Interim Assistance (Application). (Ex. 1) Claimant supported his application with a "Preliminary Examination for Interim Assistance form" (also called an "AD 2") (Exs. 2.3-2.4) and Claimant's Disability and Vocational Report. (Exs. 2.6-2.10) In addition, Claimant supplied reports from NO NAME Hospital concerning his eye surgeries and treatment of his detached retinas and cataracts. (Exs. 2.24-2.29)
5. Claimant described his circumstances on his "Disability and Vocational Report."³ (Ex. 2.6-2.10) Claimant described his impairment as "eye retinal detachment" that disabled him on September

² The evidence concerning Claimant's date of birth is conflicting: the Veteran's Administration documentation records his date of birth as XXXX XX, 1954 (Ex. A 12); Alaska Regional Hospital record it as XXXX XX, 1954, but the Alaska Retinal Consultants records it as XXXX XX, 1956 (Exs. 2.15, 2.17, 2.19, 2.21). For purposes of this decision, Claimant's year of birth is deemed to be 1954.

9, 2011 and prevented him from doing his regular work driving “C.D.L. Hasmet Class Semi-Trucks.” (Ex. 2.6) Claimant listed Dr. David S. Zumbro,⁴ 3500 LaTouche Street, Suite 250 in Anchorage, AK. (Ex. 2.6) Claimant identified the VA Hospital in Anchorage, AK as another treating source. (Ex. 2.7) In response to the question “Reason for Hospitalization or Outpatient Visits,” Claimant wrote: “Follow up from retinal detachment eye surgery on both eyes – more surgery to follow.” (Ex. 2.7)

6. In support of his application, Claimant submitted an AD 2 form from Dr. David E. Swanson, M.D., with Alaska Retinal Consultants, signed on October 17, 2011. (Ex. 2.3-2.4) Dr. Swanson wrote Claimant had been diagnosed with a detached retina of the left eye. (Ex. 2.4) Dr. Swanson wrote Claimant was expected to recover from this condition within about 3 months, and that he was unable to drive commercially. (Ex. 2.4)

7. On September 8, 2011, Claimant was evaluated by Dr. Zumbro of Alaska Retinal Consultants. (Ex. 2.24, 2.29) Dr. Limstrom, M.D., also of Alaska Retinal Consultants, wrote Claimant “was found to have temporal retinal detachment with giant retinal tear.” (Ex. 2.29) In addition, he wrote: “[Claimant] is scheduled for sclera buckle and vitrectomy with Dr. Zumbro tomorrow.” (*Id.*)

8. On September 9, 2011, Claimant underwent surgery performed by Dr. Zumbro. (Ex. 2.23, 2.25-2.26) The surgery disclosed:

- a. “There is lattice degeneration in both eyes. There was a giant retinal tear in the left eye....”
- b. Claimant’s right eye was treated for lattice degeneration by laser surgery.
- c. The detached retina in Claimant’s left eye was surgically corrected.

9. Claimant’s detached retina has been corrected. This finding is based on the following facts:

- a. On September 9, 2011, the day after surgery, Dr. Zumbro examined Claimant. (Ex. 2.21- 2.22, 2.26) Claimant was noted to be “doing well.” (Ex. 2.22)
- b. Claimant had a follow up visit on September 19, 2011 and the report notes Claimant’s left eye (OS) “looks good” without slippage, and a cataract is noted as starting to form. (Ex. 2.20; Ex. 2.19)
- c. On October 10, 2011, Claimant had another follow-up visit during which the doctor noted Claimant’s left retina was “flat 360° - looks good.” (Ex. 2.17)
- d. On the November 15, 2011 follow-up visit notes the remarks are that the repaired left eye detached retina is “doing well, somewhat inflamed.” (Ex. 2.16) Also the notes show “retina flat 360°.” (Ex. 2.15)

³ This form was completed by Claimant and is also called form APA # 4.

⁴ Dr. Zumbro, M.D. with Alaska Retinal Consultants, performed surgery on Claimant’s eye. (Ex. 2.25-2.26; 2.29)

10. On December 15, 2011, the Division's Medical Reviewer⁵ determined that Claimant's "current application does not appear likely to be approved for Social Security Disability based on the available documentation." (Ex. 2.1)

11. On January 17, 2012, the Division confirmed that Claimant's application for Supplemental Security Income (SSI) had been denied on November 7, 2011 by the Social Security Administration (SSA) and that Claimant had appealed the denial on November 28, 2011. (Ex. 2.0; Exs. 2.32-2.33) The Division denied Claimant's application for Interim Assistance. (Ex. 2.0)

12. On January 18, 2012, the Division issued a written notice to Claimant informing him of its denial of his Interim Assistance application. (Ex. 3) The explanation given to Claimant was written as: "The State Medical Reviewer denied you Interim Assistance and Social Security has denied your SSI claim." (Ex. 3)

13. On January 27, 2012, Claimant requested a Fair Hearing, asserting that the SSA had not denied his appeal of their initial denial. (Ex. 4)

14. Claimant supplied additional documentation after the February 14, 2012 Fair Hearing.⁶ The additional documentation included records concerning the care he received from the Veteran's Administration (VA). (Exs. A1-A59; B1-B2)

15. Included in the documentation from the VA were additional reports from Alaska Retinal Consultants concerning Claimant's eye, dated November 28, 2011 and January 4, 2012. (Exs. A36-A39) On November 28, 2011, the doctor's remarks are that Claimant's left eye has "good silicon oil fill flat 360°." (Ex. A38) On January 4, 2012, the doctor makes no notation except to "see drawing" and the drawing page notes a plan for further surgery, including plans to remove a cataract in the left eye. (Ex. A37) The VA documents make clear that Claimant first sought treatment from the VA ophthalmology clinic and then received surgical treatment from Alaska Retinal Consultants. (Exs. A52-A59; A40-A47)

16. The VA medical notes record that on September 8, 2011, Claimant reported having a headache and gradual vision loss in the left eye during the prior two days resulting in "sudden visual loss" on September 8, 2011. (Ex. A13)

17. According to VA treatment notes of February 13, 2012, on March 6, 2012, Claimant was scheduled for additional surgery by Dr. Zumbro for removal of a cataract from Claimant's left eye. (Ex. A12) There is no evidence Claimant's cataract surgery was not successful.

⁵ The Medical Reviewer making this determination is not the same Medical Reviewer/Disability Adjudicator who testified at the Fair Hearing; the former Medical Reviewer no longer was employed in that position at the time of the Fair Hearing.

⁶ Claimant submitted another completed Disability and Vocational Report (APA #4 form), signed October 31, 2011 and received by the Division of Public Assistance on March 1, 2012. (Exs. B4-B8)

18. On February 24, 2012, the Division issued additional notice to Claimant titled “APA Denied – Other Reason” the text of which stated, in relevant part, (Ex. 17):

1) Social Security has denied your SSI claim.

2) After review of medical evidence from the VA and Dr. Zumbro, we have determined your eye condition is not expected to last at the current severity leve [sic] for greater than 12 months, required under the social security disability criteria. The medical evidence does not indicate you have been diagnosed and treated for asthma. However, this condition is not at the severity level that has prevented you from working. Therefore, we have determined you do not meet the disability criteria for the interim assistance program.

19. The following facts were established at the Fair Hearing on February 14, 2012 and March 29, 2012 by Claimant’s testimony:

a. He is not able to see well enough to drive as a commercial truck driver and therefore cannot do his past work.

b. He is scheduled to have additional corrective surgery to remove a cataract from his left eye.⁷

c. He is able to see with eyeglasses, to read, and to drive occasionally, but not as a full time job.

d. He first suffered eye problems causing him to be unable to drive for his work about September 6, 2011.

e. He has asthma for which he takes medication but it is not a disabling condition.

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.”⁸ 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

⁷ This surgery was to take place March 6, 2012. (Ex. A12)

⁸ 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)

preponderance of the evidence. *State, Alcoholic Beverage Control Board v. Decker*, 700 P.2d 483, 485 (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 47.25.455. 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 40.375⁹ 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)

⁹ 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.

& 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.

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. § 416.920.¹⁰ 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

¹⁰ 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.

939, 950 (S.D.Tex. 2006). If the applicant's impairment has met the criteria of a listing in Appendix 1 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. 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.* 2.00 Special Senses and Speech, and 2.01 Category of Impairments, Special Senses and Speech, ... 2.04 Loss of visual efficiency.

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).

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 Guidelines¹¹, 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.*)

¹¹ Appendix 2 is sometimes called "the grids" or the "grid rules" because it contains tables. See *Draeger 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

On January 18, 2012 and February 24, 2012, was the Division correct when it denied Claimant's September 14, 2011 application for Interim Assistance?

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 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 his vision loss caused by a detached retina.

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. Claimant testified he was unable to work as a truck driver. It is undisputed that Claimant is not employed.

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). Claimant has had a severe medically determinable physical impairment of his vision because it significantly impairs Claimant’s ability to do basic work activities between September 8, 2011 and at least March 6, 2012 (the date of his cataract surgery). However, Claimant’s severe medically determinable physical impairment does not meet the duration requirement.

Claimant’s visual impairment began on or about September 6, 2011, approximately 8 days before he filed his application for Interim Assistance. As of the final date of the Fair Hearing, March 29, 2012, a full 12 month period had not elapsed. Therefore, Claimant has not met the duration requirement of having a severe medically determinable physical or mental impairment that has existed for at least 12 months in the past. Moreover, there is no evidence that Claimant’s visual impairment will last or is expected to last for 12 months in the future. Instead, the evidence is that the causes of Claimant’s visual impairment have been and are being treated by surgical intervention and that Claimant is expected to recover within about 3 months, according to the Alaska Retinal Consultants. Claimant’s doctors at Alaska Retinal Consultants reported on the AD 2 form that that Claimant’s vision problems related to his detached retina should be resolved in less than one year.

Claimant’s surgical repair of retinal detachment was reported as successful. Although there is no doctor’s report, or report of tests, or laboratory findings concerning surgery to remove the cataract from Claimant’s left eye, had it been unsuccessful when the surgery was performed on March 6, 2012, Claimant would have been expected to provide proof it was unsuccessful at the hearing on March 29, 2012. At the hearing, Claimant was able to see to read and participate, even though he was still having difficulty with his vision. However, his cataract surgery took place about three weeks before and this could explain his difficulties. Although Claimant had continuing problems with his vision, he provided no documentation showing that his vision would not improve by September 2012.

Therefore, Claimant has not met the required duration requirement to be deemed permanently and totally disabled by the SSA or by the State.¹² The Division was correct to deny Claimant’s application

¹² Even had Claimant met the duration requirement, Claimant’s severe impairment of his vision does not meet or equaled one or more of the impairments listed in Appendix 1 of 20 C.F.R. Part 404, Subpart P. Claimant’s medical evidence shows his visual condition does meet or equal the criteria in the SSA Appendix of disabling impairments. For example, at Step 3, the evaluation asks if 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).

a. Visual Impairment.

The category of impairments applicable to Claimant’s visual impairment is category 2.00 Special Senses and Speech including subcategories 2.02, loss of visual acuity; or 2.03, contraction of the visual field in the better eye; or 2.04, loss of visual efficiency, listed in Appendix 1 of 20 C.F.R. Part 404, Subpart P. (Appendix 1) This category of impairment describes disorders of vision as:

for Interim Assistance on January 18, 2012 and on February 24, 2012. 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); 7 AAC 40.180.

Abnormalities of the eye, the optic nerve, the optic tracts, or the brain that may cause a loss of visual acuity or visual fields. A loss of visual acuity limits your ability to distinguish detail, read, or do fine work. A loss of visual fields limits your ability to perceive visual stimuli in the peripheral extent of vision.

Appendix 1, 2.00 A. 1.

Within this category of impairments is "statutory blindness," which is defined as a visual disorder that "meets the criteria of 2.02 or 2.03A" but is not present if the visual disorder "medically equals the criteria of 2.02 or 2.03A, or if it meets or medically equals 2.03B, 2.03C, or 2.04." Appendix 1, 2.00, A, 2.

Moreover, if an applicant has a visual disorder that "medically equals the criteria of 2.02 or 2.03A or if it meets or medically equals 2.03B, 2.03C, or 2.04," the disorder constitutes "a disability" of a visual disorder that meets the "duration requirement."

If an applicant's "visual disorder does not satisfy the criteria in 2.02, 2.03, or 2.04," the applicant is requested to provide "a description of how [the applicant's] visual disorder impacts [the applicant's] ability to function." Appendix 1, 2.00, A, 4 c.

Category 2.02 "Loss of visual acuity" is described as:

Remaining vision in the better eye after best correction is 20/200 or less.

Category 2.03 "Contraction of the visual field in the better eye" is described as: "with"

A. The widest diameter subtending an angle around the point of fixation no greater than 20 degrees;

OR

B. A mean deviation of -22 or worse, determined by automated static threshold perimetry as described in 2.00A6a(v);

OR

C. A visual field efficiency of 20 percent or less as determined by kinetic perimetry (see 2.00A7b)

Category 2.04 "Loss of visual efficiency" is described as:

Visual efficiency of the better eye of 20 percent or less after best correction (see 2.00A7c).

There is no evidence that Claimant meets any of these criteria after having corrected his detached retina and subsequent cataract surgery. Moreover, there is no evidence of Claimant's ability to see with corrective lenses.

2. Claimant failed to meet the duration requirement to be eligible for Adult Public Assistance Interim Assistance. 7 AAC 40.180(c)(5).

3. 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.

DECISION

The Division was correct when it denied Claimant's September 14, 2011 Interim Assistance application on January 18, 2012 and February 24, 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 June 11, 2012.

/Signed/

Claire Steffens
Hearing Authority

Certificate of Service

I certify that on June 11, 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:

Jeff Miller, Public Assistance Analyst
Terri Gagne, Public Assistance Analyst
Joy Dunkin, Staff Development & Training
Kari Lindsey, Admin. Assist. Dir.
Erin Walker-Tolles, Policy & Program Development
Courtney Wendell, Admin. Asst. Policy

/Signed/

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