

referred to a pain specialist, Dr. Lawrence Stinson, who evaluated her on February 13, 2012.⁷ After ruling out other possible causes and treatment options, Dr. Stinson recommended spinal cord stimulation through an implanted device. He noted “I believe that implantation to restore function is absolutely necessary.”⁸

On June 19, 2012, Dr. Stinson performed surgery to implant the spinal cord stimulator.⁹ The day after her surgery, Ms. K’s symptoms had improved dramatically, and she was able to walk almost normally for the first time in a year.¹⁰ Based on this success, the stimulator was converted to a permanent implant on June 22, 2012.¹¹

A few days later, Ms. K noted that the stimulator was less effective, and she returned to the pain clinic to have it reprogrammed.¹² On July 23, 2012, the stimulator had to be reprogrammed again, but Ms. K had been hiking, and was no longer using a wheelchair or cane.¹³

On September 7, 2012, Ms. K’s physical therapist noted that the pain had decreased and her gait was within normal limits.¹⁴ However, on October 8, 2012, she returned to Dr. Stinson because the stimulator was no longer effective. Her left foot had become cool, painful, and swollen.¹⁵ Dr. Stinson performed a second surgery to revise the stimulator system.¹⁶ This surgery resulted in some improvement, though she continued to have pain and a mildly antalgic gait.¹⁷ Her stimulator was reprogrammed on November 4, 2012,¹⁸ February 21, 2013,¹⁹ and on March 6, 2013.²⁰

Ms. K also continued to see Dr. Edwards. He noted in July of 2012 that the nerve stimulator had greatly improved her symptoms. She had visited Los Angeles, and had been able to walk around the city and the zoo.²¹ On January 2, 2013, Ms. K reported that she still

⁷ Exhibit 2.339.

⁸ Exhibit 2.333. *See also* Exhibit 2.329 (June 19, 2012 evaluation).

⁹ Exhibit 2.326.

¹⁰ Exhibit 2.324.

¹¹ Exhibit 2.318.

¹² Exhibit 2.315.

¹³ Exhibit 2.307.

¹⁴ Exhibit 2.305.

¹⁵ Exhibit 2.302.

¹⁶ Exhibit 2.298.

¹⁷ Exhibit 2.289.

¹⁸ Exhibit 2.285.

¹⁹ Exhibit 2.280.

²⁰ Exhibit 2.263.

²¹ Exhibit 2.117.

had chronic pain, with some days better and some worse.²² On March 20, 2013, she had some allodynia to light touch, and a weakened left ankle.²³ Dr. Edwards referred Ms. K to physical therapy and prescribed a cane to help her walk.²⁴ He noted that Ms. K's attitude was as good as "is possible under the current circumstances with this debilitating condition."²⁵

At the hearing, Ms. K testified that her pain is controlled by the stimulator, but never actually goes away. She has to turn the stimulator up high to get the necessary relief, which means it must be recharged every other day instead of the recommended once every month. Her foot swells up frequently. She is currently enrolled in two college classes. She attends one class two days a week for four hours, and the second class for two hours on Saturdays.

Ms. K testified that her stimulator is effective intermittently. It might work for two or three days in a row, but then might only be effective for a couple of hours before it stops being effective. When the stimulator is not providing pain relief, Ms. K is not able to do anything. When it does work, she estimated that she could walk up to ½ mile, but with two or three stops along the way. Ms. K also testified that she could walk to the gas station two or three blocks down the street, but has to rest along the way. When she shops, she generally uses the store's electric cart. While she is able to get to her classroom in school, she testified that she doesn't go anywhere at the school except to her classroom, and that only occurs three days per week.

III. Discussion

A. The Interim Assistance Program

Interim Assistance is a benefit available to individuals while they are waiting for the Social Security Administration (SSA) to approve an application for Supplemental Security Income.²⁶ Among other requirements, to receive Interim Assistance an applicant must be "likely to be found disabled by the Social Security Administration."²⁷ Ms. K has the burden of proof on this issue.²⁸

²² Exhibit 2.84.

²³ Exhibit 2.35.

²⁴ *Id.*

²⁵ *Id.*

²⁶ 7 AAC 40.170(b); 7 AAC 40.375.

²⁷ 7 AAC 40.180(b)(1).

²⁸ 2 AAC 64.290(e).

The SSA uses a five-step evaluation process in making its disability determinations. For Alaska’s interim assistance determinations, however, only the first three of these steps are considered.²⁹

Under the SSA evaluation process, each step is considered in order.³⁰ 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.³¹ This finding is made regardless of the applicant’s medical condition, age, education, or work experience.³²

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.³³ If the impairment is not severe under this definition, or will not meet the duration requirements, then the applicant is not disabled.

At step three, the SSA looks at whether the impairment meets or equals the Listing of Impairments adopted by the SSA.³⁴ If it does, the applicant is disabled.³⁵

In this case, the division agrees that Ms. K meets the requirements of the first two steps in this process.³⁶ Thus, the issue in dispute is whether she meets or exceeds one or more of the Listings.

B. Listing of Impairments

CRPS is not one of the conditions contained in the Listing of Impairments. However, guidance issued by the Social Security Administration states that a disability may be found at step 3 of the evaluation process if the applicant’s condition is of equal severity to a specific listing.³⁷ The guidance also notes that transient findings are typical in this

²⁹ See *In re M.H.*, OAH No. 12-0688-APA (Commissioner of Health and Social Services 2012); <http://aws.state.ak.us/officeofadminhearings/Documents/APA/APA120668.pdf>.

³⁰ 20 CFR §416.920(a)(4).

³¹ 20 CFR §416.920(a)(4)(i).

³² 20 CFR §416.920(b).

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

³⁴ See 20 CFR § 404, Subpart P, Appendix 1. The division uses the Listing of Impairments as it existed as of April 1, 2005. 7 AAC 40.180(b)(1)(B). All references in this decision to the listings refer to the 2005 version.

³⁵ 20 CFR § 416.920(a)(4)(iii).

³⁶ Exhibit 2.1b.

³⁷ Exhibit 2.9.

syndrome, and “do not influence a finding that a medically determinable impairment is present.”³⁸

Ms. K’s impairment may be considered equal in severity to two different listings. Under Listing 1.02, for musculoskeletal system, the impairment to her foot or ankle would be disabling if it resulted in “inability to ambulate effectively, as defined in 1.00B2b.”³⁹ If the impairment is viewed as a neurological problem, the assessment of the degree of impairment would also depend “on the degree of interference with locomotion and/or interference with the use of fingers, hands, and arms.”⁴⁰ Thus, whether she qualifies for IA benefits depends on her ability to walk.⁴¹

The Listing of Impairments describes what is meant by the ability to walk.

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.^[42]

Ms. K has the burden of proof. She must prove that it is more likely true than not true that her condition is of sufficient severity to constitute a disability under the listings.

The fact that her CRPS symptoms are better controlled on some days than on others does not preclude a finding that Ms. K does have a severe impairment. The intermittent nature of her condition might affect whether the impairment is sufficiently severe to equal the listing requirement. In this case, however, it is not necessary to determine whether an intermittent functional impairment qualifies at step 3 of the determination process. Even on her good days, Ms. K is not able to ambulate effectively as defined in the Listing of

³⁸ Exhibit 2.7.

³⁹ Listing 1.02A.

⁴⁰ Listing 11.00C

⁴¹ Although her syndrome may not meet all the required elements of 1.02 or 11.00, her condition would equal the impairment described in those listings if her inability to walk was of the same severity. Her inability to walk need not be caused by the same physical condition, e.g., gross anatomical deformity, as long as the resulting functional impairment is the same.

⁴² Listing 1.00B2b(2).

Impairments. She is limited in her ability to shop since she uses an electric cart for that purpose, and while she can walk about one block without resting, that is on a level sidewalk. She is able to go to class three days a week, but all she can do is get to her classroom. There is no evidence that getting to her classroom requires a longer walk than one block on a sidewalk that Ms. K said she could manage.

The division's disability adjudicator evaluated the same medical records, but reached a different conclusion. However, the adjudicator did not have the benefit of hearing Ms. K's testimony. She also appears to have placed more weight on the dramatic improvement Ms. K experienced shortly after the stimulator was implanted, and less weight on the difficulties she experienced when the stimulator became less effective a few months later.⁴³ Ms. K could ambulate effectively shortly after both the first and second operations. She likely did not qualify for IA benefits at that time. Unfortunately, the improvement she experienced was only temporary, and she is not able to ambulate effectively now.

IV. Conclusion

Ms. K has a severe impairment that has lasted or is expected to last more than 12 months. She is not able to ambulate effectively. Accordingly her impairment equals the severity level contained in the Listing of Impairments, and is likely to be found disabled by the Social Security Administration. The division's determination is reversed, and Ms. K is eligible for Interim Assistance benefits.

Dated this 21st day of May, 2013.

Signed

Jeffrey A. Friedman
Administrative Law Judge

⁴³ See Exhibit 2.1.

Non-Adoption Options

C. The undersigned, by delegation from the Commissioner of Health and Social Services and in accordance with AS 44.64.060(e)(4), rejects, modifies or amends one or more factual findings as follows, based on the specific evidence in the record described below:

Ms. K has the burden of proof in this matter. 7 AAC 49.135. In light of her testimony and the medical evidence that she can attend school and walk short distances, I find that Ms. K has not proven by a preponderance of the evidence that she is unable to ambulate effectively as defined by the Listing of Impairments. Because she has not proven this, she has not shown that she meets or equals one of the Listing of Impairments, and therefore has not shown by a preponderance of the evidence that she is likely to be found disabled by the Social Security Administration.

With this change to the factual findings, the division's determination is upheld and Ms. K's application for Interim Assistance was properly denied. She may reapply if her condition changes.

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 27th day of June, 2013.

By: Signed _____
Ree Sailors
Deputy Commissioner
Health and Social Services

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