

significantly limited his physical or mental ability to do basic work activities.⁵ However, the agency also found that he had no impairment or combination of impairments that met or equaled the criteria of any of the listed impairments,⁶ because “[n]o treating or examining physician has mentioned findings equivalent in severity to the criteria of any listed impairment.”⁷ Nonetheless, Mr. C was found to be “unable to perform work-related physical and mental activities in a work setting on a regular and continuing basis, eight hours a day, five days a week, or an equivalent work schedule.”⁸ Accordingly, he was found to be disabled and eligible for SSI benefits.⁹

In 2005, Mr. C’s mother died, and he inherited the house he grew up in as well as some money.¹⁰ Because he had financial resources, he asked that his SSI benefits be discontinued, and they were.¹¹ After he had spent his inheritance, due in part to financial constraints Mr. C had difficulty in obtaining the insulin necessary for treatment of his diabetes.¹² He reapplied for SSI and applied for Interim Assistance benefits.¹³

Mr. C lives alone. His combination of impairments causes him substantial difficulty in his everyday activities, such as driving (due to poor eyesight he does not drive at night; at times he is unable to drive at all), toileting (at times he is unable to get up and get to a bathroom in time to relieve himself without soiling), and walking (he uses a walker or cane and has difficulty with stairs), and he depends on assistance from family and his ex-wife to clean and maintain his premises (for example, he cannot do his own laundry) and, often, to drive him to appointments, and other locations (*e.g.*, shopping) to attend to his affairs.¹⁴ While he can to some degree cook, clean and care for himself, he finds it increasingly difficult to do so.¹⁵

On April 10, 2012, Dr. Andrzej Maciejewski, M.D., an internist and Mr. C’s long-time treating physician for his diabetes, examined Mr. C and diagnosed diabetes mellitus, diabetic neuropathy, diabetic gastroparesis (with chronic vomiting daily), hypertension and asthma.¹⁶

⁵ Ex. A4, A8. *See* 20 C.F.R. §416.920(a)(4)(ii); -.921(a).

⁶ Ex. A5, A8. *See* 20 C.F.R. §920(a)(4)(iii).

⁷ Ex. A5.

⁸ Ex. A5, A8.

⁹ Ex. A8-9.

¹⁰ Ex. 2.23.

¹¹ Ex. 2.23.

¹² Ex. 2.23; Testimony of K. C.

¹³ Ex. 1; Ex. 2.1a; Ex. 2.23; Ex. 2.70-75, 2.77; Ex. 2.95.

¹⁴ Testimony of K. C.

¹⁵ Testimony of K. C.

¹⁶ Ex. 2.50; 2.68-69 (Dr. Andrzej Maciejewski, M.D.). *See also* Ex. 2.66-2.67 (November 5, 2012).

On July 5, 2012, Mr. C was examined by Kelly Foster, ACNS-BC, FNP-BC.¹⁷ She assessed neuropathy of the hands and feet.¹⁸ On November 5, 2012, Dr. Maciejewski diagnosed obesity.¹⁹

On December 30, 2012, Mr. C was seen at the Providence Alaska Medical Center emergency department with a complaint of abdominal pain.²⁰ His blood pH was 5.0.²¹ No visual impairment was noted.²² No neurological symptoms were noted.²³

On January 28, 2013, Mr. C was again examined by Dr. Maciejewski, who suspected diabetic neuropathy.²⁴ On April 16, 2013, Mr. C was interviewed by Dr. William Campbell, M.D., for an SSI disability psychiatric examination.²⁵ Dr. Campbell noted symptoms of chronic depression and diagnosed mild depression.²⁶ At that visit, Mr. C used a cane for walking.²⁷ Mr. C was also examined by a medical doctor for purposes of his SSI disability application, but he did not provide a copy of the medical record from that examination.

III. Discussion

Alaska Public Assistance benefits are payable to eligible needy aged, blind and disabled persons pursuant to AS 47.25.430-.615. Applicants who are under age 65 are required to apply and qualify for federal Supplemental Security Income (SSI) benefits.²⁸ Interim Assistance benefits are paid monthly to eligible Adult Public Assistance applicants while they are waiting for the Social Security Administration to approve their SSI application.²⁹

¹⁷ Ex. 2.49. ACNS-BC and FNP-BC are acronyms for Adult Health Clinical Nurse Specialist – Board Certified, and Family Nurse Practitioner – Board Certified, respectively, certifications issued by the American Nurses Credentialing Center.

¹⁸ Ex. 2.49.

¹⁹ Ex. 2.67.

²⁰ Ex. 2.9-21; Ex. 2.36-37; Ex. 2.53.

²¹ Ex. 2.11. *See also* Ex. 2.51.

²² *Id.*

²³ Ex. 2.11.

²⁴ Ex. 2.47.

²⁵ Ex. 2.23-26.

²⁶ *See* Ex. 2.26. Dr. Campbell’s specific diagnosis was dysthymia. This is, according to the Division, “a mild but long-term form of depression[.]” Ex. 2.1a, note 7.

²⁷ Ex. 2.25.

²⁸ 7 AAC 40.170(a). Adult Public Assistance applicants whose income exceeds the SSI standards are not required to apply for SSI benefits. *Id.*

²⁹ 7 AAC 40.170(a), (b); AS 47.25.455.

An applicant qualifies for Interim Assistance benefits if the Division determines the applicant to be disabled under 7 AAC 40.180.³⁰ The applicant must submit to an examination by a physician³¹ (in this case, Dr. Maciejewski) and the Division's determination as to whether the applicant is disabled is based on:

- (1) a medical review by the department as to whether the applicant is likely to be found disabled by the Social Security Administration, including whether the applicant's impairment meets... (B) Social Security Administration disability criteria for the listings of impairments....;
- (2) medical evidence provided by the applicant or obtained by the department;
- (3) other evidence provided by the applicant...; and
- (4) a review of the written results of the... physician's examination...^[32]

In determining whether the applicant's disability meets the Social Security Administration's disability criteria, the Division considers whether the:

- (1) ...applicant's condition is listed as an impairment category...;
- (2) medical information...documents the applicant's impairment;
- (3) impairment affects the applicant's activities of daily living;
- (4) ...applicant can perform any other work, including sedentary work; and
- (5) ...applicant's impairment has lasted or is expected to last for a continuous period of not less than 12 months.^[33]

A. The April 1, 2005 Listings Apply

In making its determination, the Division applied the most recent version of the listings. At the hearing in this case, the Division asserted that it properly followed a hyperlink in an editor's note to 7 AAC 40.180 that displays the most recent version of the listings, rather than applying the version of the listings specified in 7 AAC 40.180(b)(1)(B). However, the Division's assertion that the most recent version applies has been considered and rejected, and the April 1, 2005, version of the listings will therefore be applied.³⁴

³⁰ 7 AAC 40.170(b). 7 AAC 40.180 in its current form was adopted in 2006, after an internal policy to similar effect was found to have been adopted in violation of the Administrative Procedures Act. See State, Department of Health and Social Services v. Okuley, 214 P.3d 247, 250 note 6 (Alaska 2009).

³¹ 7 AAC 40.180(a).

³² 7 AAC 40.180(b)(1)(B), (2), (3), (4).

³³ 7 AAC 40.180(c)(1)-(4). 7 AAC 40.180(c) calls for consideration of these factors "in determining whether an applicant's disability meets the criteria set out in [7AAC 40.180(b)(1)(B)]." The criteria set out in that subsection are the disability criteria for the Social Security Administration's listings of impairments described in 20 C.F.R. §404, Subpart P, Appendix 1, as revised as of April 1, 2005. Specific listings are referred to in the text as "Section #").

³⁴ In Re W.W., at 3-4, OAH No. 13-0481-APA (Commissioner of Health and Social Services 2013). See also In Re D.M., at 5, OAH No. 12-0285-APA (Commissioner of Health and Social Services 2013); In Re S.T., at 4, OAH No. 12-0750-APA (Commissioner of Health and Social Services 2012); In Re O.M. at 4, OAH No. 12-0748-APA (Commissioner of Health and Social Services 2013).

B. The Division Applies Steps 1-3 of the SSA Process

As previously observed, the Division's disability determination for purposes of Interim Assistance is based, in part, on a medical review of whether the applicant is likely to be found disabled by the Social Security Administration, including whether the impairment meets the criteria stated in the disability listings.³⁵ The Social Security Administration follows a five evaluation process to determine whether a person is disabled.³⁶ The Division follows the first three steps of that process in determining whether a person is likely to be found disabled by the Social Security Administration.³⁷ At Step 1, the Social Security Administration considers whether the person is performing substantial gainful activity.³⁸ At Step 2, the Social Security Administration considers whether the impairment prevents the applicant from performing basic work activities and has lasted, or is expected to last, for at least 12 months.³⁹ At Step 3, the Social Security Administration considers whether the person meets or equals the disability listings.⁴⁰ If a person meets these first three steps of the Social Security Administration's process the Division will consider that person "likely" to be found disabled by the Social Security Administration, for purposes of eligibility for Interim Assistance benefits.⁴¹ In this case, the Division concedes that Mr. C meets the first two steps of the Social Security Administration's test, in that he is not performing substantial gainful activity, and that he suffers from multiple severe medical determinable impairments, including diabetes mellitus, hypertension, obesity, diabetic neuropathy,

³⁵ 7 AAC 40.180(b)(1)(B).

³⁶ 20 C.F.R. §416.920 (SSI [Title XVII]); 20 C.F.R. §404.1520 (Federal Old Age, Survivors, and Disability Insurance [Title II]). These regulations are substantially the same.

³⁷ In Re M.H., OAH No. 12-0688-APA (Commissioner of Health and Social Services 2012), *appeal pending* (Alaska Superior Court No. 12-09837 CI). In that case, the commissioner overruled prior decisions adopting the full five part process. See OHA No. 11-FH-134 (2011); OHA No. 11-FH-188 (2011), at 18. See also In Re D.L.X., OAH No. 12-0591-APA (Commissioner of Health and Social Services 2012).

³⁸ 20 C.F.R. §416.920(a)(4)(i).

³⁹ 20 C.F.R. §416.920(a)(4)(ii). See 20 C.F.R. §416.909, -.921(a).

⁴⁰ 20 C.F.R. §416.920(a)(4)(iii).

⁴¹ See generally In Re M.H., OAH No. 12-0688-APA (Commissioner of Health and Social Services 2012). 7 AAC 40.180(b)(1)(B) states that the Division's determination of disability for purposes of Interim Assistance will be based, in part, on whether the person meets the criteria. This is substantially different from the standard applied by the Social Security Administration in making a disability determination in Step 3 of its disability analysis. In Step 3, the Social Security Administration considers whether the person meets or equals the criteria stated in a listing. 20 C.F.R. §416.920(a)(4)(iii); -.925(c)(5); -.926(a), (b).

In Re M.H. adopts the first three steps of the Social Security Administration's evaluation process. It does not specifically address whether an applicant whose condition does not meet a listing, but is nonetheless equal to a listing, should be considered to have met the listing for purposes of Interim Assistance. See *infra*, at p. 15.

diabetic gastroparesis with chronic vomiting, and asthma.⁴² The Division argues, however, that his conditions do not meet the criteria for any of the disability listings.

C. Mr. C Does Not Meet The Disability Criteria For A Listed Impairment

Mr. C's application identified a variety of conditions as contributing to his disability, including fibromyalgia, diabetes, angina, neuropathy, nausea and chronic vomiting, abdominal pain, and spinal pain.⁴³ These conditions, he asserted, caused chronic fatigue, weakness, dizziness and shortness of breath.⁴⁴ Medical conditions diagnosed in the medical records beginning in April, 2012, include diabetes mellitus, diabetic neuropathy,⁴⁵ diabetic gastroparesis (with chronic vomiting daily), obesity, hypertension, asthma and depression.⁴⁶

The foregoing conditions are potentially within the scope of several different 2005 listings, including Section 3.03 (asthma), Section 4.03 (hypertensive cardiovascular disease), Section 4.04 (ischemic heart disease), Section 9.08 (diabetes mellitus), Section 11.14 (peripheral neuropathies), and Section 12.04 (affective disorders).⁴⁷ The Division reviewed Mr. C's medical records to determine if his conditions met the criteria for the 2012 listings.⁴⁸ In this decision, for the reasons previously stated, the 2005 version is applied.

1. *Section 3.03 (asthma)*

To meet the disability criteria for asthma, the applicant must have asthma with either chronic asthmatic bronchitis meeting the criteria for chronic obstructive pulmonary disease or asthmatic attacks in spite of prescribed treatment and requiring physician intervention.⁴⁹ Spirometric testing is required in order to show that an individual meets the criteria for chronic obstructive pulmonary disease.⁵⁰ Because he has not been provided such a test, Mr. C has not shown that he meets those criteria. As for asthmatic attacks, they must have occurred at least once every two months or six times a year.⁵¹ Mr. C did not testify that he had asthmatic attacks.

⁴² See Ex. 2.1b.

⁴³ Ex. 2.70.

⁴⁴ Ex. 2.70.

⁴⁵ See e.g., Ex. Ex. 2.47, 2.49.

⁴⁶ Ex. 2.50; 2.68-69 (Dr. Andrzej Maciejewski, M.D.). See also Ex. 2.66-2.67 (November 5, 2012).

⁴⁷ 20 C.F.R. §404, Subpart P, Appendix 1 (2005).

⁴⁸ See Ex. 2.1c-f.

⁴⁹ Section 3.03A, B.

⁵⁰ See Section 3.00E (documentation of pulmonary function testing); Section 3.02A (table of FEV₁ values).

⁵¹ Section 3.03B.

2. *Sections 4.03 and 4.04 (hypertensive cardiovascular disease; ischemic heart disease)*

Mr. C has been diagnosed with hypertension. Hypertension is a condition manifesting as persistently high blood pressure.⁵² Hypertensive cardiovascular disease, Section 4.03, is the listing that applies to such a condition. The listing for hypertensive cardiovascular disease incorporates the criteria for Section 4.02 (chronic heart failure), Section 4.04 (ischemic heart disease), or the criteria for listings applicable to specified affected body systems. The only specified body system affected in Mr. C's case is his eyesight.⁵³ To meet the disability criteria for that system, one must provide medical documentation of a loss of visual acuity, peripheral vision, or visual efficiency.⁵⁴ Mr. C testified that his eyesight was tested when he was examined in connection with his application for SSI benefits, but he did not provide a copy of the results of that examination. Absent any medical documentation, he does not meet the disability criteria for that system. Thus, in order to meet the disability criteria for hypertensive cardiovascular disease, Mr. C must meet the criteria for Section 4.02 or 4.04.

To meet the disability criteria for Section 4.02 (chronic heart failure) and Section 4.04 (ischemic heart disease), a person must be on a regimen of prescribed treatment, or be excused from compliance,⁵⁵ and still have documented symptoms.⁵⁶ In addition, diagnostic testing in the form of electrocardiography, exercise testing, cardiac catheterization, or other

⁵² See Dorland's Illustrated Medical Dictionary (27th Ed. 1988), p. 799 (hereinafter, "Dorland's"); Taber's Cyclopedic Medical Dictionary (17th Ed. 1993) at p. 940 (hereinafter, "Taber's").

⁵³ The specified body systems are the eyes (Sections 2.02-2.04), the kidneys (Section 6.02), and the central nervous system vascular accident (*i.e.*, stroke) (Section 11.04). See Section 4.03 ("Evaluate...under the criteria for the affected body system (2.02 through 2.04, 6.02, or 11.04A or B.)).

⁵⁴ See Section 2.00A(2), (3), (5).

⁵⁵ See 20 C.F.R. §416.930(c). The Social Security Administration has ruled that a person is excused from compliance with a treatment regimen if financially unable to comply. Social Security Ruling No. 82-59 (available at www.socialsecurity.gov/OP_Home/rulings). This policy has frequently been confirmed in court rulings. See, e.g., *Gamble v. Chater*, 68 F.3d 319, 321 (9th Cir. 1195); *Aldridge v. Astrue*, 880 F.Supp. 2d 695, 699-700 (E.D.N.C. 2012).

⁵⁶ See Section 4.02, 4.04. A person who is not on a regimen of prescribed treatment may be found disabled by the Social Security Administration, even though not meeting the criteria of the listing for purposes of the Social Security Administration's disability determination. See Section 4.00(A) ("Even though an individual who does not receive treatment may not be able to show an impairment that meets the criteria of these listings, the individual may have an impairment(s) equivalent in severity to one of the listed impairments, or be disabled because of a limited residual functional capacity."). See *infra*, at p. 15.

studies is generally necessary in order to meet any of the disability criteria for the cardiovascular system.⁵⁷

In this case, Mr. C testified that he takes nitroglycerin for his heart condition and that Dr. Maciejewski had prescribed medication for his hypertension that it was difficult for him to obtain due to financial constraints.⁵⁸ However, he has not provided medical documentation showing either a cardiac enlargement or ventricular dysfunction, one of which is necessary in order to meet the disability criteria for Section 4.02 (chronic heart failure).⁵⁹ Similarly, he has not provided medical documentation required to meet the disability criteria for Section 4.04 (ischemic heart disease).⁶⁰ Accordingly, Mr. C does not meet the disability criteria for hypertensive cardiovascular disease.

3. *Sections 9.08 and 11.14 (diabetes mellitus; peripheral neuropathies)*

The listing for diabetes mellitus requires the diagnosis of diabetes mellitus with any one of three specified symptoms, addressed in Sections 9.08A (neuropathy), 9.08B (acidosis), and 9.08C (retinitis proliferans).⁶¹

(a) *Neuropathy*

Mr. C has been diagnosed with diabetic neuropathy, which is addressed in Section 9.08A of the listings. To meet the disability criteria for Section 9.08A, the neuropathy must be “demonstrated by significant and persistent disorganization of motor function in two extremities resulting in sustained disturbance of gross and dexterous movements, or gait and station.”⁶² Gait and station refer, respectively, to a person’s manner of walking⁶³ (gait) and standing (station).⁶⁴ Those symptoms would also meet the disability criteria for Section 11.14, the listing for peripheral neuropathies.⁶⁵

⁵⁷ See Section 4.00(C)(1)-(4).

⁵⁸ K. C testimony (0:13-0:15).

⁵⁹ See Section 4.02(A), (B), (C).

⁶⁰ See Section 4.04(A), (B), (C).

⁶¹ Section 9.08A, -B, -C.

⁶² Section 9.08A.

⁶³ Dorland’s at p. 670 (“the manner or style of walking”); Taber’s at p. 771 (“Manner of walking.”).

⁶⁴ Dorland’s at p. 1577 (“The position assumed in standing; the manner of standing...”); Taber’s at p. 1868 (“The manner of standing.”).

⁶⁵ Section 11.14 is met by “disorganization of motor function as described in 11.04B.” Section 11.04B reads: “Significant and persistent disorganization of motor function in two extremities, resulting in sustained disturbance of gross and dexterous movements, or gait and station (see 11.00C.”).

Persistent disorganization of motor function manifests “in the form of paresis or paralysis, tremor or other involuntary movements, ataxia and sensory disturbances[.]”⁶⁶ Mr. C has some sensory disturbance, in the form of numbness, in his extremities, and perhaps some paresis or ataxia.⁶⁷ He has difficulty walking, and to that extent it is established that he has a sustained disturbance in gait, but the medical findings do not indicate that he has difficulty in standing, that is, that he has a sustained disturbance in station. Moreover, while several examiners have reported neuropathy, none of them described a sustained disturbance of gross and dexterous movements, or gait and station. Rather, his emergency room examination noted “[n]ormal gross motor function.”⁶⁸ The medical findings for Mr. C do not reflect significant and persistent disorganization of motor function in his arms or legs.⁶⁹

(b) Acidosis

To meet the listing for Section 9.08B, acidosis must be “occurring at least on the average of once every 2 months documented by appropriate blood chemical tests (pH or PCO₂ or bicarbonate levels.”⁷⁰

The only blood chemistry test in the record is from December 30, 2012, and it shows a pH level of 5.0, within stated normal limits. Accordingly, Mr. C has not shown that he meets the listing under Section 9.08(B).

(c) Retinitis Proliferans

A person with diabetes mellitus meets the listing for Section 9.08C if the person also has retinitis proliferans. Retinitis proliferans is demonstrated by the existence of fibrous tissue in the vitreous, typically as a result of intraocular hemorrhage.⁷¹ Mr. C testified that his eyesight is poor, but the record is devoid of any evidence of retinitis proliferans.

⁶⁶ See Section 11.0C.

⁶⁷ Paresis is “slight or incomplete paralysis.” Dorland’s, p. 1231. Ataxia is a “failure of muscular coordination; irregularity of muscular action.” Dorland’s, p. 161.

⁶⁸ Ex. 2.11.

⁶⁹ Cf. In Re S.D., at 4, OAH No. 12-0202-APA (Commissioner of Health and Social Services 2012) (“Disorganization is defined as a profound change in the tissues of an organ or structure which causes the loss of most or all of its proper characters.”) (citation omitted).

⁷⁰ Section 9.08B.

⁷¹ Dorland’s, p. 1456 (“a condition sometimes resulting from intraocular hemorrhage, with neovascularization and the formation of fibrous tissue bands extending into the vitreous from the surface of the retina.”); Taber’s, p. 1711 (“Vascularized masses of connective tissue that project from the retina into the vitreous. End result of recurrent hemorrhage from retina into the vitreous.”).

4. Section 12.04 (affective disorders)

Mr. C exhibits symptoms of depression, which is addressed in Section 12.04 of the listings. To meet the disability criteria for depressive syndrome, an individual must have medically documented persistence of at least four of nine specified symptoms. Dr. Campbell's psychiatric examination assessed Mr. C as mildly depressed.⁷² However, Dr. Campbell's report documents, through Mr. C's own report, the existence of five of the specified symptoms of depressive syndrome: pervasive loss of interest in almost all activities;⁷³ sleep disturbance;⁷⁴ decreased energy;⁷⁵ difficulty concentrating or thinking;⁷⁶ and thoughts of suicide.⁷⁷ These symptoms have resulted in a marked restriction in Mr. C's daily activities, as well as marked difficulties in maintaining social functioning.⁷⁸ However, in order to constitute acceptable medical evidence of an affective disorder, the medical evidence must include confirming psychiatric signs and psychological testing.⁷⁹ Dr. Campbell's report does not include reference to psychiatric signs or psychological testing that confirms Mr. C's own reports. To the contrary, in several respects Dr. Campbell's observations show normal rather than abnormal psychological signs.⁸⁰ In the end, Dr. Campbell's diagnosis was of only mild depression. Mr. C has not provided medical evidence sufficient to support a finding that his depression is of a severity that meets the disability criteria for depression.

⁷² Dr. Campbell diagnosed dysthymia, which is "a mild but long-term form of depression." Ex. 2.1a, note 7. See Ex. 2.25-2.26. The Division appears to have concluded that Mr. C's depression is not a severe impairment, that is, that it does not meet Step 2. See Ex. 2.1a-2.1b.

⁷³ Section 12.04A(1)(a). See Ex. 2.23-2.24 ("He has not worked since 1990." "He has not dated in years. He lives alone. He sometimes goes for weeks without speaking to anyone." "He has not gone fishing since his friend died in 2009." "He spends most of the day at home, resting and watching television.").

⁷⁴ Section 12.04A(1)(c). See Ex. 2.24 ("Mr. C has obstructive sleep apnea." "His sleep is restless.").

⁷⁵ Section 12.04A(1)(e). See Ex. 2.24 ("He complains of chronic fatigue."). Dr. Campbell notes that Mr. C's sleep apnea and medications contribute to his chronic fatigue. Ex. 2.26.

⁷⁶ Section 12.04A(1)(g). See Ex. 2.23 ("He has episodes of confusion associated with low blood sugar if he takes too much insulin.").

⁷⁷ Section 12.04A(1)(h). See Ex. 2.23. ("He has thought of suicide."). Dr. Campbell also notes that Mr. C denies suicidal ideation. Ex. 2.25.

⁷⁸ See note 73, *supra*.

⁷⁹ See Section 12.00B:

We must establish the existence of a medically determinable impairment(s) of the required duration by medical evidence consisting of symptoms, signs, and laboratory findings (including psychological test findings). Symptoms are your own description of your physical or mental impairment(s). Psychiatric signs are medically demonstrable phenomena that indicate specific psychological abnormalities, e.g., abnormalities of behavior, mood, thought, memory, orientation, development, or perception, as described by an appropriate medical source.

⁸⁰ See Ex. 2.25 (behavior not abnormal; memory normal; alert and oriented to person, place, date).

D. Other Considerations

As the commissioner noted In Re M.H.,⁸¹ in determining whether a person meets the criteria set out in 7 AAC 40.180(b)(1)(B) the Division is required by 7 AAC 40.180(c) to consider whether: (1) the condition is listed;⁸² (2) the impairment is medically documented;⁸³ (3) the impairment affects the person's activities of daily living;⁸⁴ (4) the person can perform any work (including sedentary work) other than their former work;⁸⁵ and (5) whether the impairment will last twelve months.⁸⁶

1. *Listing*

The fact that a person's condition is or is not listed has no readily discernible significance for purpose of determining whether the person's findings meet the disability criteria for a listing: the findings either do, or do not, meet the criteria whether a condition is a listed impairment or not.⁸⁷ However, in this particular case, two unlisted conditions that Mr. C has been diagnosed with, sleep apnea and obesity, warrant particular attention. The Division considered obesity in connection with Mr. C's ability to ambulate effectively.⁸⁸ The Division did not, however, consider the effects of obesity on Mr. C's pulmonary and cardiovascular systems. Both sleep apnea and obesity are described in the listings as conditions that are potentially disabling due to their effect on the respiratory system.⁸⁹ In addition, obesity is described as potentially disabling due to its effect on the cardiovascular system and the musculoskeletal system. In particular, with respect to obesity, the listings state:

Obesity is a medically determinable impairment that is often associated with disturbance of the respiratory[, cardiovascular, and musculoskeletal] system[s], and disturbance of this system can be a major cause of disability in individuals with obesity. The combined effects of obesity with respiratory[, cardiovascular and musculoskeletal] impairments can be greater than the effects of each of the impairments considered separately. Therefore, when determining whether an individual with obesity has a listing-level impairment

⁸¹ See In Re M.H., at 2, note 5, OAH No. 12-0688-APA (Commissioner of Health and Social Services 2012).

⁸² 7 AAC 40.180(c)(1).

⁸³ 7 AAC 40.180(c)(2).

⁸⁴ 7 AAC 40.180(c)(3).

⁸⁵ 7 AAC 40.180(c)(4).

⁸⁶ 7 AAC 40.180(c)(5).

⁸⁷ That a condition is or is not listed has some significance for purposes of the Social Security Administration's determination that a person's findings are medically equivalent to the disability criteria of a listed impairment. See 20 C.F.R. §416.920(b)(1)-(3); *infra*, at p. 15.

⁸⁸ Ex. 2.1e.

⁸⁹ See Section 3.00H (Sleep-related disorders), 3.00I (Effects of obesity); Section 4.00F (Effects of obesity). Until 1999, obesity was a listed impairment. See Ex. A4.

or combination of impairments...adjudicators must consider any additional and cumulative effects of obesity.^[90]

In Mr. C's case, in addition to being diagnosed with sleep apnea and asthma, Mr. C reports shortness of breath. Furthermore, his obesity, chronic fatigue, diabetic neuropathy, and shortness of breath adversely affect his ability to carry on everyday activities, such as driving, toileting, walking and cleaning.⁹¹ Consideration of this factor (whether a condition is listed or not) increases the likelihood that the Social Security Administration will find that he is disabled, even though it does not establish that he meets the disability criteria for a listing.

2. *Medical Documentation*

The medical documentation in this case is sparse. Most of the records provided were created in 1998-2003. Mr. C failed to provide medical records from the physical examination conducted in connection with his application for SSI benefits, or any medical records from Dr. Maciejewski, or any other provider, for the period from 2003-2012, even though, according to his testimony, he regularly visited physicians during that period of time. The medical records that were provided date from 2012-2013 and consist of a cursory summaries of diagnoses by Dr. Maciejewski in April and November, 2012, and January, 2013, an examination by a nurse in July, 2012, an emergency room visit in December, 2012, and Dr. Campbell's psychiatric report from April, 2013. The only blood testing was performed in connection with the emergency room visit. As previously described, the medical evidence is insufficient to establish that Mr. C's condition is of the severity that meets the disability criteria for a listing. Consideration of this factor adds no weight to the probability that the Social Security Administration will find him to be disabled, because there is no indication in the record that the absent medical records include diagnostic tests or other findings establishing that he meets the disability criteria for a listed impairment.

3. *Activities of Daily Living*

The phrase "activities of daily living" is not defined for purposes of 7 AAC 40.180(c)(3). However, some of the disability listings specifically include matters that, in common understanding, would qualify as "activities of daily living." For example, for purposes of Section 4.02, one of the listings applicable to Mr. C, chronic heart failure may be considered to

⁹⁰ Section 1.00Q (Musculoskeletal System); Section 3.00I (Respiratory System); Section 4.00F (Cardiovascular System).

⁹¹ See *supra*, pp. 2-3.

have been established (given appropriate medical documentation, absent in this case) when “symptoms occur with ordinary daily activities, *i.e.*, activity restriction as manifested by a need to decrease activity or pace, or to rest intermittently...”.⁹² Mr. C’s symptoms restrict his ordinary daily activities, in that he must decrease activity and pace, and rest intermittently. Similarly, for purposes of Section 1.00, a person cannot ambulate effectively if the person cannot sustain “a reasonable walking pace over a sufficient distance to carry out activities of daily living[,]” for example, walking a block on rough or uneven surfaces, shopping, or banking.⁹³ As another example, for purposes of Section 12.04, another of the listings applicable to Mr. C, for depression, “activities of daily living” are defined as including:

adaptive activities such as cleaning, shopping, cooking, taking public transportation, paying bills, maintaining a residence, caring appropriately for your grooming and hygiene, using telephones and directories, and using a post office....^[94]

Mr. C’s testimony establishes that his ability to engage in these types of activities has been significantly and adversely affected by his combination of impairments.⁹⁵

Outside the context of the disability listings, for purposes of determining whether a person requires a personal care attendant, the phrase “activities of daily living” includes personal hygiene and grooming (bathing, dressing, *etc.*),⁹⁶ bladder and bowel routines,⁹⁷ eating,⁹⁸ and moving about.⁹⁹ Mr. C’s testimony establishes that his ability to engage in these types of activities has been significantly and adversely affected by his combination of impairments.¹⁰⁰

In light of Mr. C’s need to decrease activity and pace and to rest intermittently, and the significant adverse impacts his combination of impairments has had on his ability to engage in common everyday activities, consideration of this factor provides substantial support for the probability that the Social Security Administration will find that he is disabled, but, largely because of the absence of medical documentation of required signs and laboratory findings for

⁹² Section 4.00E(1)(b).
⁹³ Section 1.00(A)(2)(b)(2).
⁹⁴ Section 12.00(C)(1).
⁹⁵ *See supra*, pp. 2-3.
⁹⁶ 7 AAC 125.030(a)(1)(A).
⁹⁷ 7 AAC 125.030(a)(1)(B),
⁹⁸ 7 AAC 125.030(a)(1)(C).
⁹⁹ *See* 7 AAC 125.030(1)(D), (E).
¹⁰⁰ *See supra*, p. 2-3.

his listed impairments, it does not establish that he meets the disability criteria for a listed impairment.

4. *Ability to Perform Work (including sedentary work)*

The Social Security Administration defines sedentary work as follows:

Sedentary work involves lifting no more than 10 pounds at a time and occasionally lifting or carrying articles like docket files, ledgers, and small tools. Although a sedentary job is defined as one which involves sitting, a certain amount of walking and standing is often necessary in carrying out job duties. Jobs are sedentary if walking and standing are required occasionally and other sedentary criteria are met.^[101]

Because he has met Step 2, Mr. C has shown that his impairments significantly limit his ability to perform basic work activities, including physical functions such as walking, standing, sitting, lifting, pushing, pulling, reaching, carrying or handling.¹⁰² Mr. C has not shown by a preponderance of the evidence that he lacks the capacity to perform sedentary work at all. However, the preponderance of the evidence is that he could not do so on a regular basis,¹⁰³ just as he could not when the Social Security Administration found him to be disabled, because the preponderance of the evidence is that his condition is at least as bad, and likely worse, than it was at that time. Consideration of this factor makes it likely that the Social Security Administration will find that Mr. C is disabled, just as it did previously, even though he did not then and does not now meet the disability criteria for a listed impairment.

5. *Duration*

Whether an impairment will last for twelve months or more is considered in connection with Step 2 of the Social Security Administration's test for disability.¹⁰⁴ In this case, the Division concedes that Mr. C meets Step 2, and thus it concedes that his impairment will last longer than twelve months. Consideration of this factor supports the probability that the Social Security Administration will find that he is disabled, but does not provide additional support for finding that his condition meets the disability criteria for a listed impairment.

¹⁰¹ 20 C.F.R. §416.967(a).

¹⁰² See 20 C.F.R. §416.921(b)(1).

¹⁰³ In making a disability determination, the Social Security Administration considers a person's ability to perform work on a regular and continuing basis, that is, eight hours a day, five days a week or an equivalent schedule. See SSA Ruling No.96-8p.

¹⁰⁴ 20 C.F.R. §416.920(a)(4)(ii) ("If you do not have a[n] impairment] that meets the duration requirement in §416.909,...we will find that you are not disabled."); §416.909 ("Unless your impairment is expected to result in death, it must have lasted or must be expected to last for a continuous period of at least 12 months."). See, e.g., In Re C.B.G., OAH No. 13-0098-APA (Commissioner of Health and Social Services 2013).

6. *Condition of Equal Severity*

7 AAC 40.180(b)(1) provides that the Division's determination is disabled based on "a medical review...as to whether the applicant is likely to be found disabled by the Social Security Administration, including whether the applicant's impairment meets [the disability criteria] [emphasis added]." This wording permits the Division to consider whether an applicant's condition is equal to a listed impairment, even if it does not meet the disability criteria for any listed impairment, just as the Social Security Administration does. To consider medical equivalence would be consistent with Step 3 (which, under a prior ruling, has been deemed incorporated into 7 AAC 40.180¹⁰⁵), the Division's decision in this case,¹⁰⁶ and prior rulings by the commissioner.¹⁰⁷ Thus, whether Mr. C's condition equals a disability listing will be considered for purposes of determining whether he is likely to be found disabled by the Social Security Administration.

The Social Security Administration considers an impairment to be medically equivalent to a listed impairment if the applicant's findings are "at least equal in severity and duration to the criteria of any listed impairment."¹⁰⁸ A determination of medical equivalence may be made in three distinct circumstances: (1) the applicant's impairment is listed, but the applicant does not exhibit all specified findings in required severity;¹⁰⁹ (2) the applicant's impairment is not listed;¹¹⁰ or (3) the applicant has a combination of impairments, no one of which meets a listing.¹¹¹ Mr. C falls into the third category: he has a combination of impairments, no one of which meets a listing. In that situation, the Social Security Administration will consider whether an applicant's findings (from all medical conditions) "are at least of equal medical significance to those of a listed impairment." In making that determination, the Social Security Administration considers "all evidence in [the] case record about [the] impairment(s) and its

¹⁰⁵ In Re M.H. at 2 ("Rather, 7 AAC 40.180 incorporates...steps 1, 2, and 3 of the SSI disability analysis.").

¹⁰⁶ *See* Ex. 2.1f ("Currently, the applicant does have multiple severe impairments, however, he does not meet or equal any of the SSA listing[s]. Thus, IA believes that claimant's case will not 'likely' meet or equal any of the SSA listings at this time.").

¹⁰⁷ *See, e.g., In Re S.T.*, at 4-5, OAH No. 12-0750-APA (Commissioner of Health and Social Services 2012) ("If an applicant's impairment meets or equals one of the applicable SSA disability listings, the applicant is disabled and qualifies for Interim Assistance.") (footnote omitted); In Re M.H., at 3 OAH No. 12-0688-APA (Commissioner of Health and Social Services 2012) ("The ALJ's proposed decision correctly concluded that Mr. H'[s] impairments do not meet or equal any of the listings...").

¹⁰⁸ 20 C.F.R. §416.926(a).

¹⁰⁹ 20 C.F.R. §416.926(b)(1).

¹¹⁰ 20 C.F.R. §416.926(b)(2).

¹¹¹ 20 C.F.R. §416.920(b)(3).

effects.”¹¹² The applicant’s symptoms, signs, and laboratory findings must be at least equal in severity to the symptoms, signs and laboratory findings of a listing in order to find medical equivalence.¹¹³

In this case, the Division did not expressly consider whether Mr. C’s condition was medically equivalent to a listed impairment, but it did note that it had “look[ed] at issues caused by the obesity, including ability to ambulate effectively”¹¹⁴ A person who is unable to ambulate has an impairment that is equal in severity (that is, in its effect on the person’s functional ability) to the listings for an impairment of musculoskeletal system.¹¹⁵

The inability to ambulate effectively is defined in Section 1.00(A)(2)(b) as follows:

(1) Inability to ambulate effectively means an extreme limitation of the ability to walk; *i.e.*, an impairment(s) that interferes very seriously with the individual’s ability to independently initiate, sustain, or complete activities. Ineffective ambulation is defined generally as 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.

...

(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.

As previously observed, in determining whether Mr. C is disabled, his obesity must be considered in light of its effects on his musculoskeletal system, his cardiovascular system, and his pulmonary system.¹¹⁶ Mr. C testified that he uses a walker or a cane to get around. To the extent that he is able to independently ambulate with a cane, that is, with a hand-held assistive device that does not limit the functioning of both upper extremities, he does not meet the general definition of ineffective ambulation. Nevertheless, he is unable to effectively ambulate if he is

¹¹² 20 C.F.R. §416.920(c).

¹¹³ 20 C.F.R. §416.929(c)(3)

¹¹⁴ Ex. 2.1e.

¹¹⁵ See §1.00(A)(2)(a) (“[F]unctional loss for purposes of these listings is defined as the inability to ambulate effectively on a sustained basis for any reason...or the inability to perform fine and gross movements effectively on a sustained basis for any reason....”).

¹¹⁶ *Supra*, at 10-11.

not capable, with the use of a single cane, of “sustaining a reasonable walking pace over a sufficient distance to carry out activities of daily living.”¹¹⁷ The clear preponderance of the evidence is that Mr. C’s ability to ambulate has been significantly and adversely affected by his combination of impairments. However, Mr. C did not prove by a preponderance of the evidence that he cannot, with a cane, sustain a reasonable walking pace over a sufficient distance to carry out the activities of daily living. Accordingly, his combined impairment is not medically equivalent to the disability criteria for a musculoskeletal impairment.

IV. Conclusion

The Division determines whether an applicant is disabled based (in light of the evidence specified in 7 AAC 40.180(b)(2)-(4)) on a medical review as to whether the applicant is likely to be found disabled by the Social Security Administration. In making that determination, the Division considers whether the applicant is likely to be found disabled under Steps 1-3 of the Social Security Administration’s process for determining disability, but does not consider whether an applicant is likely to be found disabled under Steps 4 or 5. The Division considers the factors listed in 7 AAC 40.180(c) for purposes of determining whether an applicant meets the disability criteria for a listing, but does not otherwise consider them (except insofar as they affect the determination of whether an applicant is likely to be found disabled under Steps 1-3). In this case, because Mr. C’s condition does not meet or equal the disability criteria for a listed impairment he is not likely to be found disabled under Steps 1-3. He is therefore ineligible for Interim Assistance. The Division’s decision is sustained.

DATED July 22, 2013

Signed _____
Andrew M. Hemenway
Administrative Law Judge

¹¹⁷ §1.00(A)(2)(b)(2).

Adoption

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

Judicial review of this decision may be obtained by filing an appeal in the Alaska Superior Court in accordance with AS 44.62.560 and Alaska R. App. P. 602(a)(2) within 30 days after the date of this decision.

DATED this 7th day of August, 2013.

By: Signed
Signature
Andrew M. Hemenway
Name
Administrative Law Judge
Title

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