

**BEFORE THE ALASKA OFFICE OF ADMINISTRATIVE HEARINGS ON REFERRAL
BY THE COMMISSIONER OF HEALTH AND SOCIAL SERVICES**

In the Matter of)
)
 K O)
_____)

OAH No. 13-0979-APA
Agency No.

DECISION

I. Introduction

K O applied for Interim Assistance (IA). The Division of Public Assistance (division) denied his application after concluding that Mr. O was unlikely to be found disabled by the Social Security Administration (SSA). Mr. O appealed.

A hearing was held on August 27, 2013. At that time it was clear that the Commissioner of Health and Social Services wanted to follow a three-step test to determine eligibility, and Mr. O was so instructed. On September 26, 2013, in the case of *M.H. v. Alaska Dept. of Health and Social Services*, the Superior Court reversed and remanded the matter to the division, finding that the division should apply the Social Security Administration's five-step evaluation process.¹

On October 10, 2013, the record in this matter was reopened to provide the parties with an opportunity to address whether a three or five-step test as directed in *M.H.* should be applied and whether the parties wanted to provide additional evidence on steps four and five. Mr. O essentially restated his earlier arguments and the division declined to present any evidence regarding Mr. O's ability to work.

Mr. O presented evidence establishing that he suffers from physical and mental conditions. However, the record does not support a finding that he is likely to be found disabled by the Social Security Administration under either a three-step or five-step process. The division's denial is affirmed.

II. Facts

K O is a 45-year-old carpenter who applied for Interim Assistance (IA) benefits from the State of Alaska while the Federal Social Security Administration (SSA) reviews his disability application. Prior to honing his carpenter skills, Mr. O was in the Marine Corps.

¹ The Superior Court decision may be accessed online at <http://aws.state.ak.us/officeofadminhearings/Documents/APA/APA120688%20Superior%20Court%20decision.pdf>.

He attributes the majority of his disabling conditions (hearing loss, anxiety, shoulder and back pain, etc.) to his military service, but because of the classified nature of his assignments he cannot provide any details establishing how he was injured.²

In support of his request for IA benefits, Mr. O provided some medical records from 2008 forward. These records reveal his medical history of kidney stones, right shoulder pain, degenerative joint disease, back pain (controlled by narcotics), and difficulty hearing accompanied by “intense” ear pressure.³

As part of the application process, Mr. O was required to have his provider complete the division’s AD-2 forms. It is on this form that the healthcare provider notes his disabling diagnoses. Mr. O’s AD-2 form identified post-traumatic stress disorder (PTSD), depression with anxiety, and insomnia as his disabling conditions.⁴ Notably lacking were Mr. O’s claims of hearing loss, back and shoulder pain. Mr. O has had hearing tests that came back normal. He believes they were manipulated to show a normal reading.

On his application and throughout his testimony, Mr. O explained that he is unable to work as a carpenter because his hearing loss makes him unsafe. He testified that when a supervisor discovers his hearing loss he is not called back for the next job. Additionally, Mr. O’s right shoulder makes it difficult for him to use power tools and he is concerned that the narcotics he takes for his back pain or his medical marijuana preclude him from passing a work-place drug test.

The record does not contain a record indicating that Mr. O was advised he was unable to work as a carpenter.

III. Discussion

A. Introduction to the Determination Process

Interim Assistance is a benefit available to individuals while they are waiting for the SSA to approve their application for Supplemental Security Income.⁵ Among other requirements, to receive IA an applicant must be “likely to be found disabled by the [SSA].”⁶ Mr. O has the initial burden of proof.⁷

² O Testimony.

³ Exhibits 2.8 – 2.13, 2.17, 2.21, 2.22-2.37, and 2.41.

⁴ Exhibit 2.46, Mr. O’s AD 2 Form completed by John Boston, D.O. Internist.

⁵ 7 AAC 40.170(b); 7 AAC 40.375.

⁶ 7 AAC 40.180(b)(1).

The SSA uses a five-step evaluation process in making its disability determinations.⁸ Each step is considered in order.⁹ In 2012, a Commissioner’s level decision held that the Division should only use the first three-steps of the SSA disability determination process, and not the full five-step evaluation process, in deciding whether an applicant qualifies for Interim Assistance.¹⁰ However, that decision was appealed to the Superior Court. The Superior Court “vacate[d] the Commissioner’s decision and remand[ed] [the case] to the Department for a disposition in accordance with requirements set forth by the SSA 5-part test.”¹¹ The Superior Court decision is persuasive authority for the point that the full five-step evaluation process should be used in these Interim Assistance cases. Accordingly, this decision will proceed to steps four and five, if the applicant does not qualify at step three.

Under either the three-step or the five-step process, each step is considered in order, and if the applicant is found eligible or ineligible at any step, subsequent steps are not considered.¹² The first step in this process looks at the applicant’s current work activity. If the applicant is performing “substantial gainful activity,” the applicant is not disabled.¹³ This finding is made regardless of the applicant’s medical condition, age, education, or work experience.¹⁴

At step two, the SSA considers the severity and duration of the applicant’s impairment. The applicable regulation requires more than an applicant’s statement of symptoms to establish an impairment; medical evidence is required.¹⁵ In order to be considered disabled, the impairment or combination of impairments must be severe¹⁶ and must be expected to result in

⁷ 7 AAC 49.135.

⁸ 20 C.F.R. § 416.920.

⁹ Under the SSA disability determination process, an applicant who satisfies both steps one and two goes on to step three. An applicant who does not satisfy step three goes on to step four and possibly step five. 20 C.F.R. § 416.920(a)(4).

¹⁰ *In re M. H.*, OAH Case No. 12-0688-APA. (Commissioner of Health and Social Services 2012) <http://aws.state.ak.us/officeofadminhearings/Documents/APA/APA120668.pdf> at 2.

¹¹ *Gross v. State, Dept. of Health and Social Services*, Anchorage, Alaska Superior Court Case No. 3AN-12-0938 CI (Marston, J., September 26, 2013). While a Petition for Review is currently pending in the Alaska Supreme Court, the Superior Court decision has not been stayed. (Alaska Supreme Court Case No. S-15339).

¹² 20 C.F.R. § 416.920(a)(4).

¹³ 20 C.F.R. § 416.920(a)(4)(i).

¹⁴ 20 C.F.R. § 416.920(b).

¹⁵ 20 C.F.R. § 416.908.

¹⁶ A severe impairment is one that “significantly limits [a person’s] physical or mental ability to do basic work activities.” 20 C.F.R. § 416.920(c).

death or must have lasted or be expected to last at least 12 months.¹⁷ If the impairment is not severe or does not meet the duration requirement, then the applicant is not disabled.

The third step requires the evaluation of whether the impairment meets or equals one of the disability Listings adopted by the SSA. By regulation, the Division does not use the most current version of the SSA disability Listings. Instead, it is required to use the “Social Security Administration disability criteria for the Listings of impairments described in 20 C.F.R. 404, Subpart P, Appendix 1, as revised as of April 1, 2005, and adopted by reference.”¹⁸ If an applicant’s impairment meets or equals one of the applicable SSA disability Listings, the applicant is disabled¹⁹ and qualifies for Interim Assistance. If the applicant’s impairment does not meet or equal one of the SSA Listings, it is necessary to move on to step four.

At step four, which applies to applicants determined not to be disabled at step three, the SSA looks at the applicant’s capacity for work and past relevant work. If the applicant is able to perform his or her past relevant work, the applicant is not disabled.²⁰ If the applicant is unable to perform his or her past relevant work, it is necessary to proceed to step five.

Step five requires an answer to the question of whether the applicant is capable of performing other work. Answering this question requires the application of the Social Security medical vocational guidelines that include the evaluation of the applicant’s residual functional capacity, age, education, English literacy, and previous work experience.²¹ If the applicant is not capable of performing other work, he or she is disabled.²² At step five the division has the burden of proving the applicant is capable of performing other work.

The division has agreed that Mr. O meets the first two steps of the evaluation process; he is not working and he has a severe impairment that meets the durational requirement.²³ Thus, to be eligible for IA benefits, Mr. O must show he is likely to be

¹⁷ 20 C.F.R. § 416.920(a)(4)(ii); 20 C.F.R. § 416.909.

¹⁸ 7 AAC 40.180(b)(1)(B). The SSA disability Listings are located at 20 C.F.R. Part 404, Subpart P, Appendix 1. The version of those Listings in effect as of April 1, 2005 is located online at <http://www.gpo.gov/fdsys/pkg/C.F.R.-2005-title20-vol2/pdf/C.F.R.-2005-title20-vol2-part404-SubpartP-app1.pdf>. 7 AAC 40.180(b)(1)(B) was amended effective December 7, 2013 to incorporate the SSA disability Listings which were in effect as of September 1, 2013. However, since the Division’s action in this case occurred before December 7, 2013, the decision uses the April 1, 2005 SSA disability Listings.

¹⁹ 20 C.F.R. § 416.920(a)(4)(iii) and (d).

²⁰ 20 C.F.R. § 416.920(a)(4)(iv).

²¹ See 20 C.F.R. Pt. 404, Subpt. P, App. 2, § 201.

²² 20 C.F.R. § 416.920(a)(4)(v).

²³ Exhibits 2.2, 2.2a.

found by SSA to meet the applicable Listing in effect in April of 2005,²⁴ or be found eligible at step four or five.

B. Step 3

1. Mental Impairments at Step 3

Mr. O has mental diagnoses of post-traumatic stress disorder, depression with anxiety, and insomnia.²⁵ The division argued that the evidence in the record is insufficient to support a finding that Mr. O's mental impairments meet or equal the criteria of the Listing of impairments contained in the SSA's regulations at 20 C.F.R. Part 404, Subpart P, Appendix 1, revised as of April 1, 2005, and adopted by reference ("the Listings").²⁶ To meet a Listing, an impairment must meet *all* of the Listing's specified criteria; an impairment that manifests only some of these criteria, no matter how severely, does not qualify.²⁷

Mental health diagnoses are covered in section 12.00 of the Listings. Mr. O's diagnosis of depression is covered by Listing 12.04. The PTSD and anxiety disorders are covered by Listing 12.06. Insomnia is not a separate impairment, but rather a symptom of depression.²⁸ Each of these Listings requires medical evidence "consisting of signs, symptoms, and laboratory findings, not only by [Mr. O's] statement of symptoms."²⁹ Insomnia alone does not meet the requirement for medically documented findings.³⁰

a. Depression

Listing 12.04 is for Affective Disorders. For these disorders, "the required level of severity . . . is met when the requirements in both A and B are satisfied, or when the requirements in C are satisfied." Therefore, if Mr. O fails to meet one of the requirements, he does not meet the Listing.

Listing 12.04(A), depressive syndrome requires medical documentation of continuous or intermittent presence of four of nine identified symptoms:

²⁴ 7 AAC 40.180(b)(1)(B). This regulation contains an editor's note with a citation to a web site for the Listings. Unfortunately, that web site has been updated with the current Listings rather than the version adopted by reference. The editor's note does not amend the regulation to adopt the current Listings. However, there does not appear to be any change in the Listings relevant to this decision.

²⁵ Exhibit 2.46.

²⁶ 7 AAC 40.180(b)(1)(B) (emphasis added).

²⁷ *Sullivan, supra*, 493 U.S. at 530.

²⁸ 12.04(a)(1)(C) (identifying sleep disturbance as a characteristic of depression).

²⁹ 20 C.F.R. §4041508.

³⁰ Depressive syndrome requires at least four documented symptoms. 12.04(a)(1).

- a. Anhedonia or pervasive loss of interest in almost all activities; or
- b. Appetite disturbance with change in weight; or
- c. Sleep disturbance; or
- d. Psychomotor agitation or retardation; or
- e. Decreased energy; or
- f. Feelings of guilt or worthlessness; or
- g. Difficulty concentrating or thinking; or
- h. Thoughts of suicide; or
- i. Hallucinations, delusions, or paranoid thinking....

Listing 12.04(B) requires that the four symptoms identified in (A) result in two of the following:

- 1. Marked restriction of activities of daily living; or
- 2. Marked difficulties in maintaining social functioning; or
- 3. Marked difficulties in maintaining concentration, persistence, or pace; or
- 4. Repeated episodes of decompensation, each of extended duration....

Listing 12.04(C) requires Mr. O provide

Medically documented history of a chronic affective disorder of at least 2 years' duration that has caused more than a minimal limitation of ability to do basic work activities, with symptoms or signs currently attenuated by medication or psychosocial support, and one of the following:

- 1. Repeated episodes of decompensation, each of extended duration; or
- or
- 2. A residual disease process that has resulted in such marginal adjustment that even a minimal increase in mental demands or change in the environment would be predicted to cause the individual to decompensate; or
- 3. Current history of 1 or more years' inability to function outside a highly supportive living arrangement, with an indication of continued need for such an arrangement.³¹

An internist, John Boston, D.O., conducted the preliminary examination and completed the AD-2 form.³² Dr. Boston's intake evaluation contains Mr. O's self-reported difficulties. These include issues when in public or around people as well as problems sleeping.³³ Mr. O takes Valium for anxiety (not prescribed by Dr. Boston) and a sleep aid.

Dr. Boston assessed Mr. O as suffering from depression with anxiety; however, it is important to note that Dr. Boston's plan of treatment included referrals to psychiatry and

³¹ 20 C.F.R. Pt. 404, Subpt. P, App. 1, § 12.04.

³² Exhibit 2.41 – 2.46

³³ Exhibit 2.41.

psychotherapy. These recommendations were repeated by Dr. Boston on the AD-2 form.³⁴ From this it is reasonable to conclude that while Dr. Boston identified these diagnoses, he believes others are better suited to treat Mr. O.

Assuming for purposes of this decision that Mr. O can establish he meets Listing 12.04(A), he does not meet the second prong of the test, Listing 12.04(B). Listing 12.04(B) talks of marked and repeated manifesting behaviors. The evidence presented consisting of Mr. O's testimony and medical records do not support a finding of marked and repeated manifestations.

"Marked" restriction or difficulties means more than moderate, but less than extreme.³⁵ "Repeated episodes of decompensation, each of an extended duration" is defined in the Listings as a temporary increase in symptoms with a loss of adaptive functioning, occurring three times within a year and lasting for at least two weeks.³⁶

There is some evidence in the record that Mr. O has restrictions in social functioning that might be considered more than moderate, such as his self-reported difficulty in a crowd. Assuming he does meet Listing 12.04(B)(2), he does not meet the remaining 12.04(B) Listings. The evidence in the record is insufficient to establish more than a moderate difficulty in the activities of daily living, or in maintaining concentration, persistence, or pace.³⁷ Additionally, although it may not be easy for him, Mr. O is able to function outside of the home. The evidence presented at the hearing does not establish episodes of decompensation lasting at least two weeks.

b. Anxiety/Posttraumatic Stress

Listing 12.06 addresses anxiety-related disorders. The level of severity is met when the requirements in section 12.06(A) and (B) or 12.06(A) and (C) are met.³⁸ Therefore, if Mr. O does not meet the requirements of 12.06(A), he is unable to meet this Listing.

Listing 12.06(A) requires "[m]edically documented findings" of one of five manifestations. The record establishes that Mr. O has been diagnosed with anxiety issues. Many people suffer from anxiety and depression, but before a person is eligible for IA, the symptoms and severity of the condition must meet the minimum requirement for the SSA.

³⁴ Exhibit 2.46.

³⁵ Listing 12.00(C).

³⁶ Listing 12.00(C)(4).

³⁷ Listing 12.04(B)(1), (3).

³⁸ Listing 12.06

The Listings require “medical evidence consisting of symptoms, signs, and laboratory findings (including psychological test findings)” that a condition is so disruptive that it is considered disabling.³⁹ The record lacks the type of medical evidence reasonable people would find sufficient to meet Listing 12.06(A).

Consequently, Mr. O fails to establish a disability under the mental health Listings at step 3.

2. Sensory Impairment – Loss of Hearing at Step 3

Mr. O contends that when exposed to background noise he loses the ability to hear. His hearing loss is self-reported and has not been medically established in this record.

Hearing impairments are covered in Listing 2.0(B)(1). The specific Listings governing hearing are 2.07 (disturbance of labyrinthine-vestibular function) and 2.08 (Hearing impairments (hearing not restorable by a hearing aid). Both require a quantitative determination by testing that can objectively establish the type and amount of hearing loss.

Mr. O confirmed that he has had audiology exams that tested him as having normal hearing; however, he believes the results were manipulated. Without the supporting documentation of hearing loss, Mr. O does not meet or equal the strict requirements to establish a disability under loss of hearing at step 3.

3. Physical Impairment at Step 3

Mr. O’s physical impairment consists of the injury to his right shoulder. This falls within the SSA Listing for musculoskeletal impairments, Listing 1.01.

The specific Listing for upper extremities, which would include shoulder injuries, requires that there be “[i]nvolvement of one major joint *in each* upper extremity (*i.e.*, shoulder, elbow or wrist hand), resulting in inability to perform fine and gross movements effectively.”⁴⁰ The evidence in this case shows that only one shoulder, the right shoulder, is involved. As a result, he does not satisfy step three of the SSA disability determination process based upon his physical impairment, which means he does not qualify for Interim Assistance benefits based upon his right shoulder injury.

C. Steps 4 and 5

If a person is not eligible at step three, the next step is to determine whether he or she can perform his or her previous relevant work. To resolve this, it is important to review the medical

³⁹ 20 C.F.R. Part 404, Subpart P, App. 1, § 12.00B, C, and D.

⁴⁰ 20 C.F.R. § Pt. 404, Subpt. P, App. 1, § 1.02(B) (April 2005) (emphasis added).

records provided to determine whether Mr. O's medical providers support Mr. O's claim that he perform the physical requirements of a carpenter.

His medical records establish he has a history of kidney stones and a right shoulder injury. A carpenter is required to perform physical work. Although both parties were provided an opportunity to supplement the record with evidence specific to steps four and five, neither presented new evidence.

The medical records contained in the record do not corroborate Mr. O's assertion that he is unable to perform his previous relevant work as a carpenter. At this step, by its very nature, any assertion by an IA applicant is self-serving. Therefore, when Mr. O's inability to work as a carpenter is not obvious, it is important to provide independent corroborating evidence of the claim.

Because Mr. O has failed to meet his burden of proof, the record supports a finding that he can perform his previous relevant work, so it is not necessary to proceed to step five of the SSA disability process, whether he can perform other work.

IV. Conclusion

A person is eligible to receive interim assistance benefits if he or she is likely to be found disabled by the Social Security Administration. Mr. O has not met his burden of proving he is likely to be found disabled. Accordingly, he is not currently eligible to receive these benefits, and the division's determination is upheld.

Dated this 11th day of March, 2013.

Signed

Rebecca L. Pauli
Administrative Law Judge

Adoption

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

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

DATED this 25th day of March, 2014.

By: Signed _____
Name: Rebecca L. Pauli
Title: Administrative Law Judge

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