

joints. Limited AROM of both knees. Bruise to right lower shin noted. Pt states he fell on the ice.^{7]}

An April 30, 2013, assessment by a Licensed Clinical Social Worker diagnosed him with depression and noted that he might have anxiety disorder or panic disorder.⁸ An April 17, 2013, physical examination revealed that Mr. N had poor posture, slow gait, limited range of motion with severe pain in his lumbar spine, and severely reduced range of motion in both hips.⁹ The comments say “Difficulty lying supine on exam table. Severely limited AROM with flexion of the lumbar spine.”¹⁰

A February 19, 2013, examination by Dr. Sanchez in Arizona noted that Mr. N had chronic knee and hip pain, and depression.¹¹ Dr. Sanchez diagnosed osteoarthritis, depression, and anxiety.¹²

III. Discussion

A. Introduction

Interim Assistance is a benefit available to individuals while they are waiting for the SSA to approve an application for Supplemental Security Income.¹³ Among other requirements, to receive Interim Assistance an applicant must be “likely to be found disabled by the Social Security Administration.”¹⁴ Mr. N has the burden of proof on this issue.¹⁵

The SSA uses a five step evaluation process in making its disability determinations.¹⁶ The division has been using only the first three steps of this process,¹⁷ but a recent Superior Court decision vacated a prior administrative ruling and instructed the division to use all five steps.¹⁸ According to the division, the Superior Court’s decision has been appealed, and it is the division’s position that the interpretation adopted by the Commissioner in *In re*

⁷ Exhibit 2.11.

⁸ Exhibit 2.66.

⁹ Exhibit 2.75.

¹⁰ Exhibit 2.75.

¹¹ Exhibit 2.15.

¹² Exhibit 2.15.

¹³ 7 AAC 40.170(b); 7 AAC 40.375.

¹⁴ 7 AAC 40.180(b)(1).

¹⁵ 2 AAC 64.290(e).

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

¹⁷ See *In re M.H.*, OAH No. 12-0688-APA (Comm’nr Health & Social Services August 20, 2012); <http://aws.state.ak.us/officeofadminhearings/Documents/APA/APA120668.pdf>

¹⁸ The court’s order is available on line at:

<http://aws.state.ak.us/officeofadminhearings/Documents/APA/APA120688%20Superior%20Court%20decision.pdf>

M.H. is still the Department of Health and Social Service’s current interpretation of the regulations. However, the Commissioner has not issued a decision on the three step versus five step question since the Superior Court’s ruling, and it is not assumed that the Commissioner intends to ignore the court’s ruling pending the outcome of the Supreme Court appeal.¹⁹

B. Five Step Process

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.²⁰ 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.²¹ This finding is made regardless of the applicant’s medical condition, age, education, or work experience.²²

Step two 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.²³ If the impairment is not severe under this definition, then the applicant is not disabled.

Step three looks at whether the impairment meets or equals the Listing of Impairments adopted by the SSA.²⁴ If it does, the applicant is disabled.²⁵

For applicants who are not determined to be disabled at step three, the SSA goes on to step four and looks at the applicant’s capacity for work and past relevant work.²⁶ If the applicant is able to perform past relevant work, the applicant is not disabled.

¹⁹ In its post-hearing brief, the division suggests that the Administrative Law Judge (ALJ) should follow just the first three steps because the ALJ is “acting under delegated authority from the Commissioner.” In fact, the ALJ conducts the hearing pursuant to various statutes and regulations, and not by delegated authority. The hearing is conducted on behalf of the Commissioner, and any final decision is made by the Commissioner or a person delegated decision-making authority. But the hearing itself is not a delegated responsibility.

²⁰ 20 CFR §416.920(a)(4).

²¹ 20 CFR §416.920(a)(4)(i).

²² 20 CFR §416.920(b).

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

²⁴ See 20 CFR §404, Subpart P, Appendix 1. The division looks to the version of the listing that was in effect on April 1, 2005. 7 AAC 40.180(b)(1)(B).

²⁵ 20 CFR §416.920(a)(4)(iii).

²⁶ 20 CFR §416.920(a)(4)(iv).

At step five, for those not found disabled at step four, the SSA looks at the applicant's capacity for work, age, education, and work experience to determine whether the applicant can perform other work in the national economy.²⁷

C. Guidance and Access to Medical Evaluations

Mr. N asserts that the division had an obligation to inform Interim Assistance applicants that the division uses the SSA listings to determine eligibility, inform applicants of the medical tests and other records needed to prove eligibility, and to provide financial assistance in obtaining medical testing. In addition, he asserts that the forms given to doctors to verify impairments should provide guidance to the medical provider as to the type of information the division is seeking.

Mr. N may be correct that some applicants will fail to meet their burden of proof simply because they or their doctors do not fully understand what is needed to prove eligibility. Others will not be able to provide the required medical test results because they cannot afford to pay for those tests.²⁸ However, Mr. N has not cited anything in the current statutes or regulations, and the ALJ has found nothing, that would require this guidance or financial assistance.

D. Acceptable Medical Evidence

Most of Mr. N's medical examinations were performed by medical providers who were not licensed physicians or psychologists. The division took the position at the hearing that it could not rely on that evidence. SSA's regulations say that there must be "evidence from acceptable medical sources to establish whether you have a medically determinable impairment(s)."²⁹ Licensed physicians and psychologists are included in the definition of acceptable medical sources.³⁰

However, as long as there is *some* evidence from an acceptable medical source, evidence from other sources may also be considered. This includes "nurse-practitioners, physicians' assistants, naturopaths, chiropractors, audiologists, and therapists."³¹ Mr. N's physician noted on the AD 2 form that he suffered from "Osteoarthritis, Degenerative Joint

²⁷ 20 CFR §416.920(a)(4)(v).

²⁸ The division will, if asked, provide a coupon to the applicant that pays for completion of the AD 2 form, the form used by doctors to verify impairments. Nothing in the record of this case suggests that that coupon would pay for psychiatric evaluations, x-rays, MRIs or anything other than a physical examination.

²⁹ 20 CFR §416.913(a).

³⁰ 20 CFR §416.913(a)(1) & (2).

³¹ 20 CFR §416.913(d)(1).

Disease in hips and knees – Severe chronic pain.”³² Dr. Sanchez diagnosed osteoarthritis, depression, and anxiety.³³ This evidence fulfills the requirement that there must be evidence from an acceptable medical source. Accordingly, the other evidence from non-physician and non-psychologist providers is also considered.

E. Whether Mr. N is Likely to Be Found Disabled by the SSA

There is no dispute that Mr. N is not currently performing substantial gainful activity. It is also not disputed that he has a severe impairment that meets the durational requirement. Thus, to be eligible for APA benefits, Mr. N must show he is likely to be found by the SSA to meet the applicable listing in effect in April of 2005,³⁴ or establish eligibility at either step four or step five.

Listing 1.02, major dysfunction of a joint or joints due to any cause, is the listing that is most relevant based on Mr. N’s physical condition. The division asserted that he was not eligible under this listing because he did not have the appropriate medical imaging. This listing begins with the following statement

Major dysfunction of a joint(s) (due to any cause): Characterized by gross anatomical deformity (e.g., subluxation, contracture, bony or fibrous ankylosis, instability) and chronic joint pain and stiffness with signs of limitation of motion or other abnormal motion of the affected joint(s), and findings on appropriate medically acceptable imaging of joint space narrowing, bony destruction, or ankylosis of the affected joint(s).^[35]

By using the phrase “characterized by,” this introduction states what would typically be found in the medical records of someone who meets the listing. However, Mr. N is disabled if he meets *or equals* one of the listings. In other words, as long as the condition is similarly severe and results in a similar loss of functional capacity, he may equal the listing and be considered disabled by the SSA. Thus, the lack of medically acceptable imaging is not an automatic bar to a finding of disability. In this case, the objective medical evidence shows joint deformity and limitation in range of motion in the affected joints. The medical

³² Exhibit 2.80.

³³ Exhibit 2.15.

³⁴ 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.

³⁵ Listing 1.02.

records show most of what would typically be found for someone with major dysfunction of a joint.

To meet or equal this listing, Mr. N must also have

A. Involvement of one major peripheral weight-bearing joint (i.e., hip, knee, or ankle), resulting in inability to ambulate effectively, as defined in 1.00B2b[.³⁶]

The inability to ambulate is an extreme limitation of the ability to walk.

Ineffective ambulation is defined generally as having insufficient lower extremity functioning (see 1.00J) to permit independent ambulation without the use of a hand-held assistive device(s) that limits the functioning of both upper extremities.^[37]

This general definition is clarified by examples that show who can be found to lack the ability to ambulate effectively:

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.^[38]

The division takes the position that someone like Mr. N, who uses one cane to ambulate, can ambulate effectively because he does not need a walker, two crutches, or two canes.

However, the need to use a walker, two crutches, or two canes is only one of the five examples of ineffective ambulation provided by the listings. According to the listing, any one of these examples shows that the individual is not capable of effective ambulation.

The central theme of the definition of effective ambulation is whether Mr. N is “capable of sustaining a reasonable walking pace over a sufficient distance to be able to carry out activities of daily living.”³⁹ Based on the examples of ineffective ambulation contained in the listings, a person who cannot climb a few steps at a reasonable pace with the use of a hand rail is not capable of effective ambulation. This is true even if that person does not use any assistive devices when walking on level ground. Similarly, and relevant to the claim in this case, the

³⁶ Listing 1.02A. The listing may also be met by showing involvement of a major joint in each upper extremity, but that basis is not relevant in this case.

³⁷ Listing 1.00B2b(1).

³⁸ Listing 1.00B2b(2).

³⁹ *Id.*

“inability to walk a block at a reasonable pace on rough or uneven surfaces” establishes an inability to ambulate effectively even if the person only uses one cane.

Mr. N walks with a pronounced limp on both sides.⁴⁰ His medical examinations have revealed crepitus, joint deformities on the lateral aspects of both knees,⁴¹ and limited range of motion in both knees.⁴² Mr. N has also been diagnosed with joint instability, joint locking, and joint tenderness.⁴³ He has severely reduced range of motion in both hips.⁴⁴

A functional capacity form was completed by Mr. N’s physician in 2012. Mr. N was diagnosed with osteoarthritis and degenerative joint disease in his hips and knees.⁴⁵ Objective findings included reduced range of motion and trigger points, joint instability, and abnormal gait.⁴⁶ The level of pain reported was sufficient to constantly interfere with Mr. N’s ability to concentrate.⁴⁷ His doctor indicated that he could not walk more than 20 feet without rest or severe pain.⁴⁸

Mr. N testified that he can drive himself to the store or other places. When he shops, he uses one of the store’s electric carts. He has difficulty walking, and is in constant pain. He does not believe he could walk more than about 25 feet on an uneven surface. He cannot stand for more than five to ten minutes at a time. His knee goes out of joint when he walks, and sometime he will wake at night with a dislocated knee.

Based on all of the evidence presented, Mr. N has met his burden of proving that he meets or equals Listing 1.02, because he is unable to ambulate effectively.⁴⁹ He is therefore likely to be found disabled by the SSA. Because he is eligible at step three under this listing, it is not necessary to determine whether Mr. N is also eligible based on his mental health diagnoses. It is also not necessary to make a determination in this case as to whether the division should follow the three step or the five step process.

⁴⁰ Exhibit A, page 4.

⁴¹ The deformity is sufficiently severe to be noticeable on physical examination without the need for an X-ray.

⁴² Exhibit 2.11.

⁴³ Exhibit 2.74.

⁴⁴ Exhibit 7.75.

⁴⁵ Exhibit 2.18.

⁴⁶ *Id.*

⁴⁷ Exhibit 2.19.

⁴⁸ Exhibit 2.20.

⁴⁹ He says he cannot walk a block on an uneven surface, and this testimony is consistent with the objective medical findings.

IV. Conclusion

When all of the relevant medical evidence is considered, Mr. N has met his burden of proving that the Social Security Administration is likely to find he meets the listing for disability based on a musculoskeletal impairment.

Dated this 26th day of November, 2013.

Signed _____

Jeffrey A. Friedman
Administrative Law Judge

Non-Adoption Options

D. The undersigned, by delegation from the Commissioner of Health and Social Services and in accordance with AS 44.64.060(e)(5), rejects, modifies or amends the interpretation or application of a statute or regulation in the decision as follows and for these reasons:

The record and records of treatment do not demonstrate objective observations beyond the simple allegations of the individual. There is no evidence to measure or document the severity of joint impairment or its interference with performing activities of daily living or performing alternate means of employment. Mr. N can submit an application anew when and if he can assemble the findings needed to fulfill his burden of proof.

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 10th day of January, 2014.

By: *Signed* _____

Name: Ree Sailors
Title: Deputy Commissioner, DHSS

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