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

In The Matter Of:	)	
	)	
[redacted],	)	OHA Case No. 11-FH-134
	)	
Claimant.	)	DPA Case No. [redacted]
	)	

FAIR HEARING DECISION

STATEMENT OF THE CASE

[redacted] (Claimant) applied for Interim Assistance on or about July 22, 2010 (Ex. 3). The State of Alaska Division of Public Assistance (DPA or Division) denied her application on October 1, 2010 (Ex. 3). The Claimant resubmitted, or requested reconsideration of, her application on January 3, 2011 (Ex. 6.0). [1] The Division again denied the Claimant's application on March 29, 2011 (Ex. 6.0). [2] The Claimant requested a hearing to contest the Division's denial of her Interim Assistance application on March 29, 2011 (Exs. 6.1 – 6.3).

This Office has jurisdiction to decide this case pursuant to 7 AAC 49.010.

The Claimant's hearing was held on June 13, 2011 before Hearing Examiner Jay Durych. [redacted], Esq., Legal Director of the Disability Law Center of Alaska, appeared in person to represent the Claimant. Assistant Attorney General [redacted], Esq. appeared in person to represent the Division. The Claimant participated by phone and testified on her own behalf. Health Program Manager II [redacted], M.P.H., the Division's Interim Assistance Medical Reviewer, participated in the hearing by phone and testified on behalf of the Division. All testimony that was offered was received, and all exhibits that were submitted were admitted into evidence. At the end of the hearing the record was closed except for the filing of post-hearing briefs.

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[1] The record is not clear on this point. However, resolution of this procedural issue is not a necessary prerequisite to proper adjudication of this case on its merits.

[2] The Division subsequently issued an amended or supplemental denial notice on May 4, 2011 (Exs. 18, 19). At hearing, the Claimant's counsel stated that the Claimant is not contesting the adequacy of the Division's notice. Accordingly, the legal sufficiency of the Division's notice need not be addressed in this decision.

The parties' post-hearing briefs were timely filed. Following receipt of the last post-hearing brief on July 19, 2011 the record was closed and the case became ripe for decision.

ISSUES

A number of legal and factual issues are raised in this case. However, the parties' positions can be summarized as follows:

1. The Claimant argues that the criteria which must be satisfied in order to qualify for Interim Assistance under the State of Alaska's Interim Assistance statutes, regulations, and policies are *equivalent* to the criteria which must be satisfied in order to qualify for Social Security Supplemental Security Income (SSI) [3] disability benefits pursuant to Title 20 of the Code of Federal Regulations (CFRs), and that the Division erred by failing to follow the analyses used in "Step 4" and "Step 5" of the SSI disability analysis. [4]

2. In contrast, the Division asserts that the substantive requirements of the State of Alaska's Interim Assistance Program are *significantly different* than the substantive requirements of the federal SSI disability program. In particular, the Division asserts that its regulations do not require it to follow the analyses used in "Step 4" and "Step 5" of the SSI disability analysis.

Thus, the primary legal issues in this case can be summarized as follows:

> Are the criteria which must be satisfied in order to qualify for Interim Assistance under the State of Alaska's Interim Assistance statutes, regulations, and policies *equivalent* to the criteria which must be satisfied in order to qualify for Social Security SSI disability benefits pursuant to Title 20 of the Code of Federal Regulations (CFRs), or are the requirements of the State of Alaska's Interim Assistance Program significantly different?

The ultimate issue in this case is whether the Division correctly applied its Interim Assistance statutes, regulations, and policies to the specific facts of the Claimant's case:

> Was the Division correct to deny the Claimant's application for Interim Assistance benefits, most recently on May 4, 2011, based on the assertion that the Claimant did not satisfy the Interim Assistance Program's disability requirements?

SUMMARY OF DECISION

The Division, as part of its Interim Assistance reimbursement agreement with the Social Security Administration, agreed to provide Interim Assistance payments to persons who are "eligible" for

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[3] SSI is a federal income program created in 1972 that provides cash assistance to the needy and disabled for basic necessities, but not for medical expenses. 42 U.S.C.A. Sections 1381 – 1385.

[4] Step 4 of the SSI disability analysis involves determining whether the applicant's severe impairment prevents her from performing her previous relevant work. If it is determined that an applicant cannot perform her past relevant work, then the disability analysis proceeds to Step 5 of the disability analysis, where the applicant's age, education, training, work history, and job skills are examined to determine whether the applicant is capable of performing any other work.

Supplemental Security Income as defined by the Social Security Administration. *See* 20 CFR Sections 416.1901, 1902, and 1910. Similarly, Alaska Interim Assistance regulation 7 AAC 40.030(a) states in relevant part that Adult Public Assistance (and hence Interim Assistance) applicants "must meet the eligibility requirements of the [Supplemental Security Income] program contained in Title XVI of the Social Security Act . . . and in 20 C.F.R. Part 416."

In addition, Alaska Interim Assistance Program regulation 7 AAC 40.180(b)(1) states that, to be found eligible for Interim Assistance, an applicant must be "likely to be found disabled by the Social Security Administration." Finally, the Division's own official policy, set forth in *Alaska Adult Public Assistance Manual* Section 426-2C, states in relevant part that "[t]he APA program uses the same definitions of disability and blindness as SSI."

Thus, the applicable federal regulations, the relevant state Interim Assistance regulations, and the Division's own official policy manual, clearly indicate that the Division is required to adhere to the disability analysis contained in the federal SSI regulations, (located at 20 CFR Part 416), when making eligibility determinations for the State of Alaska's Interim Assistance Program.

Because the criteria which must be satisfied in order to qualify for Interim Assistance are equivalent to the criteria which must be satisfied in order to qualify for Social Security Supplemental Security Income, the Division must determine disability like the Social Security Administration determines disability. Step 4 and Step 5 of the Social Security SSI disability analysis are important and necessary components of the SSI disability analysis. Accordingly, the Division must consider educational and vocational factors, as required by Step 4 and Step 5 of the SSI disability analysis, when determining eligibility for the Interim Assistance Program.

Finally, at Step 5 of the SSI disability analysis, the burden of proof shifts from the applicant to the agency. Thus, if the applicant proves that she can no longer perform her prior work at Step 4 of the disability analysis, then the Division must present evidence demonstrating that the applicant can perform some other type of work at Step 5 of the disability analysis.

In summary, the interpretation of state Interim Assistance regulation 7 AAC § 40.180 urged by the Division in this case is contrary to its own official interpretation of the Interim Assistance Program's eligibility requirements as set forth in Section 426-2C of the Adult Public Assistance Manual. Accordingly, the interpretation of 7 AAC § 40.180 asserted by the Division in this case fails the deferential "reasonable basis" standard of review, and cannot be upheld.

The Claimant carried her burden and proved, by a preponderance of the evidence: (1) that she is not currently engaged in substantial gainful activity; (2) that her mood disorder, post-traumatic stress disorder (PTSD), and her personality disorder, constitute medically severe impairments; and (3) that these same disorders have lasted or can be expected to last for 12 months or longer, satisfying the twelve-month durational requirement.

The Claimant did not carry her burden and failed to prove, by a preponderance of the evidence, that her mood disorder, PTSD, and/or her personality disorder meet the specific requirements of the Social Security Administration's applicable Listing of Impairments. The Claimant likewise did not carry her burden and failed to prove, by a preponderance of the evidence, that all of her impairments, both severe and non-severe, considered alone or in combination, are medically equivalent to any of the Social Security Administration's applicable Listings of Impairments.

The Claimant carried her burden and proved, by a preponderance of the evidence, that she can no longer perform her prior work as a result of her severe and non-severe impairments. The Division then failed to carry its burden and did not prove, by a preponderance of the evidence, that the Claimant can still perform any type of work. The Division was therefore not correct to deny the Claimant's application for Interim Assistance benefits, most recently on May 4, 2011, based on the assertion that the Claimant did not satisfy the Interim Assistance Program's disability requirements.

FINDINGS OF FACT

The following facts [5] were established by a preponderance of the evidence:

I. The Claimant's Physical and Mental Impairments.

1. The Claimant was born in [redacted], [redacted] (Ex. 4.097) and was 48 years old at the time of the hearings held in this case.

2. The Claimant was involved in a motor vehicle accident in 1992, after which she reported pain in her neck, back, and lower left leg (Ex. 4.059); the record does not indicate whether or not the pain also affected the Claimant's left knee. The Claimant had knee surgery in 2000 (Ex. 4.066); the record does not indicate whether or not the knee surgery was necessitated by the 1992 car accident.

3. The Claimant has reported numbness in left side of her body since 2006 (Ex. 4.059). The Claimant had problems with vaginal bleeding in 2008 (Ex. 4.044). She had dilation and curettage surgery on November 25, 2008 to address this (Exs. 4.039, 4.044, 4.066).

4. The Claimant had a chest x-ray on September 14, 2009 (Ex. 4.022). The radiologist's findings were of a "[n]ormal chest x-ray other than mild interval elevation of the right hemidiaphragm. *Id.*

5. A chart note dated May 28, 2010 (Ex. 2.014) states that the Claimant had taken Paxil and Prozac in the past for depression and anxiety "without any problems," but that she had "not been on medication for her anxiety since 1998." *Id.*

6. On June 11, 2010 the Claimant was assessed as being a borderline diabetic (Ex. 4.072).

7. On June 18, 2010 the Claimant was assessed as having, among other things, headaches, tension, and anxiety / panic disorder (Ex. 4.071).

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[5] All of the medical reports in the record (approximately 200 pages total) were reviewed and considered during the preparation of this decision. However, some of the medical records were cumulative, and some were less relevant than others. Accordingly, not every exhibit is specifically referenced in this decision.

Medical reports often abbreviate commonly used medical terms. However, these abbreviations may not be familiar to many readers. Accordingly, abbreviations used in the medical reports have been spelled out in this decision.

8. A mental status examination dated August 4, 2010 (Exs. 4.012 - 4.016) states that, on that date, the Claimant's clothing was disheveled, her grooming was marginal, her motor activity was restless, her posture was stooped, her attention was lacking, her speech was pressured, she was impulsive, her concentration and memory were impaired, her mood was anxious, her coping and decision-making skills were poor, and she was socially naïve (Exs. 4.014 - 4.015). The Claimant was diagnosed as having dysthymia, PTSD, anxiety, and a "mood disorder," and was assessed as having a GAF score of 50 [6] (Exs. 4.012, 4.015, 4.016). The Claimant did not, however, want to try any psychotropic medications at that time (Ex. 4.016).

9. On August 24, 2010 a physician completed the Division's *Preliminary Examination for Interim Assistance* form (Form AD#2) (Exs. 2.001 – 2.002). The physician stated that the Claimant's diagnosis was "[w]heezing, impaired glucose tolerance, depression, anxiety" (Ex. 2.002). The physician also stated that the Claimant was not expected to recover from these conditions (Ex. 2.002).

10. During a medical examination on August 25, 2010 the Claimant reported that she had asthma, diabetes, a bad knee from a car accident, gynecological problems, a poor appetite, sleep disruptions, depression, anxiety, panic attacks, frequent nightmares, discomfort being around groups of people, frequent headaches and dizziness, poor concentration, and poor short-term and long-term memory (Exs. 4.095 – 4.096).

11. As of August 25, 2010 the Claimant reported that she had received mental health treatment off and on for several years and had taken Paxil and Prozac during that time with unclear results (Ex. 4.095). As of that date she reported that she had never been hospitalized (Ex. 4.095).

12. As of August 25, 2010 the Claimant was assessed as having a GAF score of 48 and a "guarded" prognosis (Ex. 4.096).

13. In a medical report dated September 23, 2010, the Claimant was assessed as having a then-current GAF score of 40, and a maximum GAF score of 45 within the preceding year (Ex. 4.094).

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[6] The "Global Assessment of Functioning" or "GAF" scale is a scale used to measure psychological, social, and occupational functioning, ranging from 1 (lowest level of functioning) to 100 (highest level of functioning). *See* Mosby's Medical Dictionary, 8th Edition (Elsevier 2009).

According to the Diagnostic and Statistical Manual Of Mental Disorders: DSM-IV-TR (American Psychiatric Association, 2000) at pp. 32 - 37, the Global Assessment of Functioning (GAF) is a numeric scale (0 through 100) used by mental health clinicians and physicians to subjectively rate the social, occupational, and psychological functioning of adults (how well or adaptively one is meeting various problems-in-living). The DSM-IV-TR describes the significance of GAF scores in relevant part as follows:

> **60-51** Moderate symptoms (e.g., flat affect and circumstantial speech, occasional panic attacks) OR moderate difficulty in social, occupational, or school functioning (e.g., few friends, conflicts with peers or co-workers).
>
> **50-41** Serious symptoms (e.g., suicidal ideation, severe obsessional rituals, frequent shoplifting) OR any serious impairment in social, occupational, or school functioning (e.g., no friends, unable to keep a job).

14. Claimant tried taking Zoloft from September 23 – October 6, 2010, but it did not work for her (Ex. 4.090). She began taking Sertraline on November 2, 2010; this seemed to be more effective. *Id.*

15. On October 3, 2010, [redacted], LMFT diagnosed the Claimant's impairments as follows (Ex. 4.098):

> Axis I: PTSD [Post-Traumatic Stress Disorder - DSM-IV TR Code 309.81]
> Mood Disorder NOS [DSM-IV TR Code 296.90]
> Axis II: Deferred.
> Axis III: Diabetes and gynecological problems as reported by the client.
> Axis IV: Problems with the social environment [and] economic problems
> Axis V: [Global Assessment of Function (GAF) scale score] 48.

16. A medical report dated February 9, 2011 indicates that the Claimant complained of musculoskeletal pain, (including chronic knee pain), at that time (Exs. 4.059, 4.061). She reported that the pain was aggravated by sitting and standing but relieved by rest (Ex. 4.059. However, her exam on that date indicated no skeletal tenderness or deformity, mild cervical spine tenderness and mild pain with motion, a normal thoracic spine, a normal lumbar spine, a full range of motion in both knees, no sensory loss, and no motor weakness. *Id.*

17. On February 9, 2011 a physician completed the Division's *Preliminary Examination for Interim Assistance* form (Form AD#2) (Exs. 4.001 – 4.002). On that form the physician stated that the Claimant's diagnosis was "personality disorder, mood disorder, chronic pain, neck pain, knee pain" (Ex. 4.002). The physician also stated that the Claimant was not expected to recover from these conditions (Ex. 4.002).

18. A report from [redacted] Health Center dated March 11, 2011 (Ex. 4.066) lists the Claimant's then-current, active diagnoses as poor dentition, dysphagia, reactive airway disease, chronic pharyngitis and cough, Chronic Obstructive Pulmonary Disease (COPD), impaired fasting glucose, a prolapsed uterus, peri-menopausal, and depression/ anxiety/history of panic disorder.

19. A letter from [redacted], ANP-C dated April 21, 2011 (Ex. A) states in relevant part that the Claimant is currently under her care and on medications for her mental illness, and that the Claimant plans to continue her behavioral health care with a psychiatrist.

20. A letter from [redacted], ANP-C dated May 31, 2011 (Ex. B) states in relevant part:

> [The Claimant] has been under my medical care since 05/28/10. Since being under my care, this patient has been unable to work due to her uncontrolled psychiatric illness. Based on my initial assessment, it was apparent [that] this patient had complex psychiatric disease, and so I referred her for a mental health evaluation. Over the past year she has seen [a psychiatric nurse-practitioner and a psychiatrist]. Her diagnoses based on their evaluations were: Mood disorder unspecified, personality disorder unspecified, and PTSD. She has had some difficulty . . . accessing follow-up psychiatric care due to her financial status and transportation limitations. Due to this, her diagnoses have not been able to be further [delineated], but it is apparent from his note that [the psychiatrist] was considering bipolar disease

> and [was] going to try a mood stabilizer in follow-up. This has not been tried yet to my knowledge. She has shown some improvement in her mood over the past month on Zoloft.
>
> [The Claimant] has been unable to work for the past couple years due to her psychiatric disease. I believe [the Claimant] needs more psychiatric care to help better identify and stabilize her mental disease . . . .

II. The Claimant's Functional Capabilities.

21. In a DPA *Disability and Vocational Report* dated August 12, 2010 (Exs. 2.003 – 2.007), the Claimant described the physical and mental problems which interfered with her ability to work or perform routine daily activities as bad migraine headaches, dizziness, blackouts, severe pain in her left knee, and neck pain (Ex. 2.003). She stated that she believed she had been disabled by these symptoms for the past 1-2 years. *Id.*

22. In the *Disability and Vocational Report* dated August 12, 2010 (Exs. 2.003 – 2.007), the Claimant further stated that she experienced severe pain in her left knee and lower left leg; that she could no longer stand for long periods of time; that she had neck pain; and that she had bad headaches, dizziness, difficulty breathing, occasional blackouts, and tiredness (Ex. 2.003).

23. In a DPA *Disability and Vocational Report* dated February 10, 2011 (Exs. 4.003 – 4.007), the Claimant described the physical and mental problems which interfered with her ability to work or perform routine daily activities as chronic knee pain, an inability to stand for more than 20 minutes, numbness in her "whole left side" from her neck down to her lower leg, poor memory, and an inability to focus (Ex. 4.003). She stated that she believed she had been disabled by these symptoms since the summer of 2009. *Id.*

24. In the *Disability and Vocational Report* dated February 10, 2011 (Exs. 4.003 – 4.007), the Claimant further stated that she experienced sharp pains, an inability to stand, weakness, dizziness, and an inability to think or remember (Ex. 4.003).

III. The Claimant's Education and Work History.

25. The Claimant has a 12th grade education but did not officially graduate from high school; she almost obtained a GED in 1998, but was unable to pass the math portion (Exs. 2.007, 4.007, 4.095, Claimant testimony). Her math abilities are at the seventh-grade level (Claimant testimony).

26. In 1998 the Claimant completed a 10-week marketing and retail sales course at the [redacted] Vocational Institute (Exs. 2.007, 4.007).

27. The Claimant's employment history for the last 15 years has been as follows (Exs. 2.005 – 2.006, 4.005 – 4.006):

a. She worked as a retail store clerk from August 1998 until May 2001 (Ex. 2.005).

b. She worked as a grocery store clerk from August 2001 until October 2001 (Ex. 2.005).

c. She worked performing food demonstrations from June 2002 until February 2005 (Ex. 2.005).

d. She worked at the front counter and the drive-through window of a fast food restaurant from July 2006 until November 2006 (Ex. 2.005, Claimant testimony). She left this job because the restaurant would not give her enough hours (Claimant testimony).

e. She worked as a hotel housekeeper from November 2006 until June 2008 (Ex. 2.005). Her job responsibilities included cleaning hotel rooms, vacuuming hallways, training new housekeepers, doing laundry, and disposing of trash (Ex. 2.006). She had difficulty with this job due to left knee pain (Claimant testimony). She left this job to work at a car rental agency, (discussed below), because the housekeeping work was too physically demanding. *Id.*

f. She worked for a car rental agency from May 2008 until August 2008 (Ex. 2.005). Her job responsibilities included customer service, working the sales counter, filling out car rental agreements, answering the phone, making reservations, checking rental vehicles in and out, and cleaning vehicles inside and out (Ex. 2.006, Claimant testimony). The heaviest item she had to lift during this job was a five (5) gallon bucket of water weighing about forty pounds (Ex. 4.006).

The Claimant had left knee pain on this job (Ex. 4.006). She had difficulties filling-out the rental agreements properly because of her poor math skills (Claimant testimony). She left this job because she relocated (changed her residence). *Id.*

g. She worked as a housekeeper at a hotel from April 2009 until May 2009 (Exs. 2.005, 4.005). Her job responsibilities included cleaning hotel rooms, vacuuming them, cleaning the hotel fitness center, cleaning the hotel restaurant's bathrooms, doing laundry (operating washers and dryers), completing logs and reports, and training others (Exs. 2.005, 4.005).

The Claimant had difficulty with this job due to left knee pain, lower back pain, dizziness, anxiety, and panic attacks (Ex. 4.005, Claimant testimony). Her employment was ultimately terminated because of a disagreement she had with the housekeeping manager (Claimant testimony).

IV. Relevant Procedural History.

28. The Claimant previously applied to the United States Social Security Administration (SSA) for federal disability benefits (Supplemental Security Income or SSI) (Claimant testimony). In December 2010 the Claimant received information indicating that her application for SSI had been denied by SSA. [7] *Id.* SSA determined that the Claimant can still work. *Id.*

[7] The record does not reflect whether the Claimant subsequently appealed the SSA's denial of her SSI application. However, the Division did not allege failure to timely appeal as a basis for its denial of the Claimant's application for Interim Assistance. Accordingly, any issue as to the Claimant's satisfaction of this procedural requirement was waived.

29. On March 25, 2011 the Division's Interim Assistance Medical Reviewer denied the Claimant's application for Interim Assistance in a memorandum which stated in relevant part as follows (Ex. 4.0):

> [The Claimant's application reported] personality disorder, mood disorder, chronic pain, neck pain, [and] knee pain . . . . Per [the] available medical records, SSI criteria [are] not met. [The Claimant's medical records show] moderate psychiatric symptomology as indicated by Global Assessment of Function Score of around 50. Thinking described as logical and goal-directed. Psychiatric history described as intermittent outpatient care with a hospitalization in 1998. Affect criteria not met; no indication of repeated episodes of decompensation, each of extended duration, no indication of marked impairment [of] concentration, persistence, or pace. No indication of marked impairment to activities of daily living. Physical examination... notes no abnormality to the back, negative straight leg raising test, extremities with full range of motion, motor and sensory intact. Disorders of the spine criteria not met; no indication of gross impairment to fine and gross dexterous movement; no documentation of a nerve root compression. Disorder of a joint criteria not met; no documentation of gross deformity to the knee resulting in a mobility impairment requiring the need for a walker, two canes, or crutches to ambulate. Chronic pain, currently not on medications for this, despite offerings by medical providers; no history of failed treatment in addressing chronic pain issues.

V. Hearing Testimony.

30. At the hearing of June 13, 2011 the Claimant testified in relevant part as follows:

a. Her mental health care providers to date have not given her any tests per se. They have only asked her various questions regarding her mental state.

b. She is not currently seeing anyone regularly for her behavioral health needs because she does not have adequate transportation available. She no longer drives a car due to her anxiety.

c. She is currently taking Zoloft and Sertraline for her depression/anxiety/PTSD. "It helps to a certain extent." She also uses an inhaler for her asthma.

d. The Division's Chronic and Acute Medical Assistance Program (CAMA) is currently paying for her behavioral health appointments and her related medications.

e. She must now use a cane to walk because of the pain in her left knee and hip. She started using the cane about two months prior to the hearing, circa late April, 2011. Prior to using the cane she had fallen several times because her legs had given out.

f. She does not believe that she could perform her prior housekeeping work at this time because of the pain in her left knee and hip, and because of her anger and personality disorders.

g. She does not believe she could perform her prior work at a car rental agency at this time because of the above problems, and also because of her lack of math skills.

h. She does not believe that she could perform her prior work at the front counter and the drive-through window of a fast food restaurant because she uses a cane now, she cannot stand for very long, she cannot move very fast, and her memory has gotten worse.

i. She is not very computer-literate. She knows how to check her e-mail, but she does not know how to use any modern software programs.

31. At the hearing of June 13, 2011 the Division's Interim Assistance Medical Reviewer testified in relevant part as follows:

a. He was an Army medic for four (4) years. He worked in an acute care psychiatric facility for five (5) years and performed medical review for four (4) of those years. He is a nationally licensed Emergency Medical Technician. He holds a Bachelor's Degree in Psychology, and a Master's Degree in Public Health.

b. He has been the Division's Interim Assistance Medical Reviewer since September 2010. He reviews just over 100 Interim Assistance applications each month.

c. When a person applies for Interim Assistance (IA), a DPA Eligibility technician initially determines whether the applicant satisfies the Interim Assistance Program's requirements with regard to income, resources, and similar non-medical criteria. If an applicant satisfies those criteria, the applicant is then examined by a physician, and the DPA's form AD-2 is completed by the physician. The AD-2, and any medical records provided by the applicant up to that point, are then routed to him for a disability determination.

d. He requests medical records from all medical providers identified by the applicant's Release of Information (ROI). He then reviews those records when received.

e. He reviewed the Claimant's two Interim Assistance applications (i.e. those of July 22, 2010 and January 3, 2011), her Form AD-2s, and her medical records. He concluded that the Claimant did not satisfy the Interim Assistance Program's disability requirements. His eligibility determination was based solely on the written information provided to him.

f. He does not construe state Interim Assistance regulation 7 AAC 40.180 as requiring that the Division utilize Steps 4 and 5 of the SSA's SSI disability analysis. However, he also notes that the Division's Form APA#4, (Exs. 2.03 – 2.08), used in this and other IA cases, collects information about the functional, educational, and vocational factors specifically addressed in Steps 4 and 5 of the SSA's SSI disability analysis.

g. He considers the combined effects of multiple impairments, as does the SSA's SSI disability analysis.

h. The Division has access to an SSA database. The database indicates whether an SSI application has been denied, and provides a three-digit code which indicates in very broad

terms why SSA denied an application. However, the database does not provide, and DPA does not otherwise receive, an actual copy of the SSA's decision. Accordingly, the Division never knows the *specific* reason(s) why SSA has denied an SSI application.

i. SSA denied the Claimant's application for SSI at Step 5 of the SSI analysis, meaning that SSA found that the Claimant could still perform work of some kind.

j. With regard to "Step 2" of the SSA disability analysis, he found that the 12-month durational requirement is satisfied in this case.

k. With regard to "Step 3" of the SSA disability analysis, the Claimant's impairments do not meet or medically equal the requirements of any "Listings" impairment. In particular, with regard to the Claimant's mental impairment(s), the criteria of Listing Section 12.08 are not met.

PRINCIPLES OF LAW

Burden of Proof; Standard of Proof.

This case involves an application for Interim Assistance benefits. When an application is denied, the applicant has the burden of proof [8] by a preponderance of the evidence. [9]

The State of Alaska Interim Assistance Program – Overview.

Enacted in 1982, Alaska's Adult Public Assistance (APA) statutes, A.S. §§ 47.25.430 - .615, consolidated separate programs for Old Age Assistance, Aid to the Blind, and Aid to the Permanently and Totally Disabled into one program. *See Moore v. Beirne*, 714 P.2d 1284 (Alaska 1986). The policy and purpose of the APA program is to furnish financial assistance to needy aged, blind, and disabled persons, and in doing so to cooperate and coordinate with federal agencies providing similar aid. *Id*, *see also* A.S. § 47.25.590. The administration of state APA has been closely connected to federal Supplemental Security Income (SSI) administration; for example, applicants for APA must also apply for SSI and must meet SSI eligibility requirements. S*ee* 7 AAC § 40.030, 7 AAC § 40.060.

Interim Assistance (IA) is a benefit provided by the State of Alaska to Adult Public Assistance applicants while they are waiting for the Social Security Administration (SSA) to approve their Supplemental Security Income (SSI) application. *See* A.S. § 47.25.455. Interim Assistance is available to Alaskans who have applied for SSI, but who have not yet received a final decision from SSA on their SSI applications. *See* A.S. § 47.25.455, 7 AAC § 40.140(b), 7 AAC § 40.170(b), and 7 AAC § 40.375(a). Persons found eligible for IA benefits receive $280.00 per month. A.S. § 47.25.455(a).

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[8] "Ordinarily the party seeking a change in the status quo has the burden of proof." *State of Alaska Alcohol Beverage Control Board v. Decker*, 700 P.2d 483, 485 (Alaska 1985).

[9] Preponderance of the evidence is defined as "[e]vidence which is of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not." *Black's Law Dictionary* at page 1064 (West Publishing, 5th Edition, 1979).

If a person is receiving state Interim Assistance benefits, and SSA later finds that person eligible for SSI benefits and begins paying those benefits, the recipient must then repay the state, using the federal SSI benefits, for the state Interim Assistance benefits previously received. *See* 7 CFR § 416.1901 - 7 CFR § 416.1910 A.S. § 47.25.455(c) and 7 AAC § 40.375(c). If a person found eligible for state Interim Assistance *does not* ultimately qualify for SSI benefits, that person *is not* required to repay the state for the Interim Assistance previously received. *See* 7 AAC § 40.480(b). This results in a net financial loss to the state, because the state is then unable to reimburse itself, from the person's SSI payments, for the Interim Assistance payments which the state previously advanced.

Relationship Between Federal SSI Regulations and Alaska Interim Assistance Regulations.

The Social Security Administration's regulations pertaining to disability determinations under the Supplemental Security Income (SSI) Program are set forth in Part 416 of Title 20 of the Code of Federal Regulations (CFRs).

The only sub-part of Part 416 expressly addressed to the state Interim Assistance programs is Subpart S, titled "Interim Assistance Provisions" (20 CFR § 416.1901 - 20 CFR § 416.1922). Federal Interim Assistance regulation 20 CFR § 416.1902 defines "Interim Assistance" in relevant part as "assistance the State gives you . . . *beginning with the first month for which you are eligible for payment of SSI benefits* and ending with, and including, the month your SSI payments begin . . . ." [Emphasis added].

Alaska APA regulation 7 AAC § 40.030 provides in relevant part as follows:

> (a) An applicant must meet the eligibility requirements of the SSI program contained in Title XVI of the Social Security Act, as amended (42 U.S.C. 1381 - 1383) and in 20 C.F.R. Part 416, and the eligibility requirements set forth in this chapter. If the requirements of this chapter conflict with requirements of the SSI program, the requirements of this chapter apply unless the requirements of the SSI program specifically supersede inconsistent state program provisions.

The State of Alaska Interim Assistance Program – Substantive Requirements.

The state regulation setting forth the substantive criteria which must be satisfied in order to qualify for Interim Assistance is 7 AAC § 40.180. That regulation provides in relevant part:

> (a) An applicant whose disability is being determined by the department under 7 AAC 40.170(b) must be examined by a psychiatrist or other physician who has entered into a current provider agreement under 7 AAC 43.065. The results of the examination must be provided on a form approved by the department.
>
> (b) The department will make a determination of whether the applicant is disabled 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

(A) The SSI program's presumptive disability criteria under 20 C.F.R. 416.934, as revised as of April 1, 2005, and adopted by reference; or

(B) 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;

(2) medical evidence provided by the applicant or obtained by the department;

(3) other evidence provided by the applicant under 7 AAC 40.050, if applicable; and

(4) a review of the written results of the psychiatrist's or other physician's examination under (a) of this section.

(c) In determining whether an applicant's disability meets the criteria set out in (b)(1)(B) of this section, the department will consider whether the

(1) the applicant's condition is listed as an impairment category described in (b)(1)(B) of this section;

(2) medical information obtained under (b) of this section documents the applicant's impairment;

(3) impairment affects the applicant's activities of daily living;

(4) the applicant can perform any other work, including sedentary work; and

(5) the applicant's impairment has lasted or is expected to last for a continuous period of not less than 12 months.

Interim Assistance regulation 7 AAC § 40.180 (above) does not itself define the term "disabled." However, A.S. § 47.25.615(5) defines "disabled" as "being unable to engage in substantial gainful activity by reason of a medically determinable physical or mental impairment that can be expected to result in death or that has lasted or can be expected to last for a continuous period of not less than 12 months." [10]

[10] Alaska's statutory definition of "disabled" (above) is virtually identical to the SSA's definition of "disability" for purposes of its SSI program. Pursuant to 20 C.F.R. § 416.905(a), "disability" is defined as "the inability to do any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months."

The Division's Official Interpretation of its own Interim Assistance Regulations.

Adult Public Assistance Manual Section 426-2C is the Division's official interpretation of the Interim Assistance Program's substantive disability requirements (i.e. the Division's interpretation of A.S. § 47.25.615(5) and 7 AAC § 40.180). Section 426-2C of the Division's Manual provides in relevant part:

> *The APA program [11] uses the same definitions of disability and blindness as SSI*. [Emphasis added]. The Division will obtain and use medical and other information *to determine whether an applicant is likely to meet the SSI disability/blindness criteria, and is eligible for Interim Assistance.* [Emphasis added].
>
> * * * * * * * * * * * *
>
> When making a disability assessment, the Medical Reviewer will consider whether the:
>
> > Applicant's condition meets the SSI presumptive disability criteria or another impairment category used by Social Security to determine a person's disability status;
> >
> > Medical information provided by the applicant or received by the Department documents the applicant's impairment;
> >
> > Impairment affects the individual's activities of daily living;
> >
> > Applicant can work, including sedentary work;
> >
> > Impairment has lasted, or is expected to last, for a continuous period of at least 12 months.

The Social Security Administration's Five Step SSI Disability Analysis.

The Social Security Administration's SSI disability analysis involves a sequential multistep evaluation. *Briscoe ex rel. Taylor v. Barnhart*, 425 F.3d 345, 351-352 (7th Cir. 2005). This evaluation considers (1) whether the claimant is presently engaged in substantial gainful activity; (2) whether the claimant has a severe impairment or combination of impairments (the duration of the impairment is an aspect of this severity requirement); (3) whether the claimant's impairment meets or equals any impairment listed in the regulations as being so severe as to preclude substantial gainful activity; (4) whether the claimant's residual functional capacity leaves him unable to perform his past relevant work; and (5) whether the claimant is unable to perform any other work existing in significant numbers in the national economy. 20 C.F.R. § 416.920. A finding of disability requires an affirmative answer at either step three or step five.

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[11] The Interim Assistance Program is a sub-program within the Adult Public Assistance (APA) Program (see discussion at page 10, above).

"Step 1" - Substantial Gainful Activity.

The first step in the analysis is to determine whether the applicant is performing "substantial gainful activity" as defined by the applicable Social Security regulations. "[S]ubstantial gainful activity" means "work that (a) involves doing significant and productive physical or mental duties, and (b) is done (or intended) for pay or profit." 20 CFR § 416.910.

The regulations state that work may be substantial even if it is done on a part time basis. 20 CFR §§ 416.971 - .974. If the applicant is engaged in "substantial gainful activity" based on these criteria, then he is not disabled. 20 CFR § 416.920(a)(4)(i). If, however, the Claimant is not performing "substantial gainful activity" as defined by the above-quoted regulations, it is necessary to proceed to the next step of the disability analysis and determine whether the Claimant has a severe impairment.

"Step 2" - Severe Impairment.

The second step in the analysis is to determine whether the applicant's impairment is "severe" as defined by the applicable Social Security regulations. A severe impairment is one that significantly limits a person's physical or mental ability to perform "basic work activities." 20 C.F.R. § 416.920(c); 20 C.F.R. § 416.921(a). 20 C.F.R. § 416.921(b) defines "basic work activities." That regulation states in relevant part as follows:

> When we talk about basic work activities, we mean the abilities and aptitudes necessary to do most jobs. Examples of these include - (1) physical functions such as walking, standing, sitting, lifting, pushing, pulling, reaching, carrying, or handling; (2) capacities for seeing, hearing, and speaking; (3) understanding, carrying out, and remembering simple instructions; (4) use of judgment; (5) responding appropriately to supervision, co-workers and usual work situations; and (6) dealing with changes in a routine work setting.

Evidence from acceptable medical sources is necessary to establish whether a claimant has a medically determinable impairment. 20 C.F.R. §§ 416.908, 416.912, 416.913. Acceptable medical sources include licensed physicians and psychologists. 20 C.F.R. § 416.913(a). A claimant's own statement of symptoms alone will not suffice. 20 C.F.R. § 416.908.

If the impairment is not severe, the applicant is not disabled. 20 C.F.R. § 416.920(a)(4)(ii). If an applicant is severely impaired, then it is necessary to proceed to the next step of the disability analysis and determine whether the Claimant's impairment meets the 12-month durational requirement.

"Step 2" - Duration.

The next step in the analysis is to determine whether the applicant's severe impairment has already lasted for a continuous period of at least twelve (12) months, or can be expected to last for a

continuous period of at least twelve (12) months. [12] 20 C.F.R. § 416.909. If the severe impairment does not satisfy this duration requirement, the applicant is not disabled. 20 C.F.R. § 416.920(a)(4)(ii). If the severe impairment satisfies this duration requirement, then it is necessary to proceed to the next step of the disability analysis and determine whether the Claimant's impairment meets or equals the specific criteria set forth in the Social Security Administration's Listing of Impairments.

"Step 3 - Severe Impairment That Meets or Equals "The Listings."

The next step in the analysis is to determine whether the applicant's severe impairment meets or medically equals the listing of impairments contained in the SSA's regulations at 20 C.F.R. Part 404, Subpart P, Appendix 1. The claimant bears the burden of establishing that his or her impairments satisfy the requirements of a "listings" impairment. *Tackett v. Apfel*, 180 F.3d 1094, 1098-1099 (9th Cir.1999); *Sullivan v. Zebley*, 493 U.S. 521, 530-531, 110 S.Ct. 885, 107 L.Ed.2d 967 (1990). To meet a listing, an impairment must meet *all* of the listing's specified criteria. *Sullivan*, 493 U.S. at 530 ("an impairment that manifests only some of these criteria, no matter how severely, does not qualify").

A finding of disability may be based on the combined effect of multiple impairments which, if considered individually, would not be of the requisite severity. *See* 20 C.F.R. § 416.906; 20 C.F.R. § 416.911; 20 C.F.R. § 416.923; and *Loza v. Apfel*, 219 F.3d 378, 393 (5th Cir. 2000).

An impairment is *medically equivalent* to a listed impairment "if it is at least equal in severity and duration to the criteria of any listed impairment." 20 CFR 416.926(a) (emphasis added). Medical equivalence must be based on medical findings. *Sullivan*, 493 U.S. at 531 ("a claimant . . . must present medical findings equal in severity to *all* the criteria for the one most similar listed impairment"). Responsibility for determining medical equivalence rests with the hearing officer. 20 C.F.R. § 416.926(e).

If the applicant's severe impairment meets or medically equals a listing of impairments contained in the SSA's regulations at 20 CFR Part 404, Subpart P, Appendix 1, the applicant is deemed disabled and no further inquiry is required. 20 CFR 416.920(a)(4)(iii). However, if the severe impairment *does not* meet or medically equal the listing of impairments, then it is necessary to proceed to the next step in the analysis and determine whether the applicant can perform his or her prior relevant work.

"Step 4" - Capability of Performing Previous Relevant Work.

The next step is to determine whether the applicant's severe impairment prevents him or her from performing his or her previous relevant work. If the applicant is not prevented from performing his or her previous relevant work, the applicant is not disabled. 20 C.F.R. § 416.920(a)(4)(iv). Otherwise, it is necessary to proceed to the next step in the analysis and determine whether the applicant can perform any other work.

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[12] Although the issue of duration is technically separate and distinct from the issue of severity, the Social Security Disability analysis, as set forth in federal regulation 20 C.F.R. § 416.920(a)(4)(ii), treats the durational requirement as part of the "step two" severity analysis.

"Step 5" - Capability of Performing Other Work.

Pursuant to 20 C.F.R. § 416.960(c), if it is determined that a claimant cannot perform his or her past relevant work, it is then necessary to decide whether the applicant "can make an adjustment to any other work that exists in the national economy" or, in other words, to determine whether the applicant is capable of performing other jobs. At this stage, however, the burden of proof shifts from the claimant to the agency. *See* 20 C.F.R. § 416.920(a)(4)(v); *Bowen v. Yuckert,* 482 U.S. 137, 144 (1987); *Kail v. Heckler,* 722 F.2d 1496, 1498 (9th Cir.1984); *Embrey v. Bowen,* 849 F.2d 418, 422 (9th Cir.1988); *Smolen v. Chater*, 80 F.3d 1273, 1289 (9th Cir.1996); *Tackett v. Apfel*, 180 F.3d 1094, 1099 (1999); *Bustamante v. Massanari*, 262 F.3d 949, 953–954 (9th Cir.2001); *Valentine v. Comm'r Soc. Sec. Admin.*, 574 F.3d 685, 689 (9th Cir.2009).

Whether an applicant is capable of performing other work 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. If the applicant is not capable of performing other work, he or she is disabled. 20 C.F.R. § 416.920(a)(4)(v).

ANALYSIS

Introduction: The Parties' Respective Arguments.

A. The Claimant's Contentions. The Claimant basically asserts that:

1. The criteria which must be satisfied in order to qualify for Interim Assistance under the State of Alaska's Interim Assistance statutes, regulations, and policies are *equivalent* to the criteria which must be satisfied in order to qualify for Social Security Supplemental Security Income (SSI) disability benefits pursuant to Title 20 of the Code of Federal Regulations (CFRs); and

2. The Division erred in this case by failing to follow the analysis used in "Step 4" and "Step 5" of the SSA's Supplemental Security Income (SSI) disability analysis.

B. The Division's Contentions. The Division contends, on the other hand, that the substantive requirements of the State of Alaska's Interim Assistance Program are substantially different than the substantive requirements of the federal SSI program. Specifically, the Division contends:

1. Federal Medicaid regulation 42 C.F.R. § 435.541(b), [which concerns the effect of SSA determinations on *state Medicaid eligibility*], makes the SSA's determination of an applicant's eligibility for SSI binding on the State for purposes of the State's determination of the applicant's eligibility for Interim Assistance (DPA brief of July 8, 2011, p. 2 note 5).

2. "The Division has always maintained that IA benefits should only be awarded to those persons found to be presumptively eligible for SSI" (DPA brief of July 8, 2011 at p. 8). The Division relies on an *Affidavit of* [redacted] in support of this assertion. The affidavit was originally prepared for use in the litigation, at the trial court level, (Anchorage Superior Court case 3AN-05-10788), of *State of Alaska Department of Health and Social Services v. Okuley*, 214 P.3d 247 (Alaska 2009).

3. State regulation 7 AAC § 40.180 only incorporates the SSA's SSI presumptive disability categories, and the SSA's SSI Listing of Impairments (DPA argument at hearing). DPA never intended the IA process to be 'turned into a full-blown SSI disability review" (DPA brief of July 8, 2011 at p. 7). Rather, 7 AAC § 40.180(b)(1) limits the scope of the IA review to a medical review. *Id.* "7 AAC § 40.180(b) specifically limits the DPA review to the following: the SSI presumptive disability criteria, the SSA listing of impairments, the DPA's [AD#2 form], any medical evidence provided by the applicant or obtained by the department, or any other evidence provided by the applicant as a part of the application for APA." *Id.* "No other SSA rules are incorporated by reference." *Id.* 7 AAC § 40.180 'does not require the medical reviewer to examine any vocational information." *Id.* The state regulations do not require or authorize application of the SSA's 5-step disability analysis. (DPA argument at hearing).

In order to establish the proper analytical framework to be applied to the facts of this case, it is first necessary to address the parties' legal arguments. Because the legal issues raised by DPA are the most far-reaching, they will be addressed first in the order stated above. Because the issues raised by the Claimant pertain primarily to educational, functional, and vocational issues, those issues will be addressed later in the sections of the Analysis which deal specifically with those issues.

I. Does Federal Medicaid Regulation 42 C.F.R. § 435.541(b) Makes the SSA's SSI Eligibility Determination Binding on the State for Purposes of its Interim Assistance Program?

Federal Medicaid regulation 42 C.F.R. § 435.541(b) makes SSA determinations as to SSI eligibility binding on state agencies for purposes of those *Medicaid* categories as to which disability is a pre-requisite to eligibility. The Division contends that 42 C.F.R. § 435.541(b) makes the SSA's SSI eligibility determination binding on the State *for purposes of its Interim Assistance Program* (DPA brief of July 8, 2011 at p. 2 note 5). However, 42 C.F.R. § 435.541, by its express terms, concerns the effect of SSA determinations on *state Medicaid eligibility, not on state Interim Assistance eligibility*. Accordingly, 42 C.F.R. § 435.541 does not require that either the Division or this Office defer to a non-final federal SSI determination for purposes of the Interim Assistance Program.

II. Is the *Affidavit of* [redacted] Persuasive as to how the Interim Assistance Program's Statutes, Regulations, and Policies Should be Interpreted?

The Division's position relies in part on an *Affidavit of* [redacted] which was prepared for use at the trial court level in the case *State of Alaska Department of Health and Social Services v. Okuley*, 214 P.3d 247 (Alaska 2009). At page 3, Paragraph 4 of this affidavit, Ms. [redacted] asserts that "the Division has always maintained that IA benefits should only be awarded to those persons found to be presumptively eligible for SSI benefits." *See* Attachment "A" to DPA brief of July 8, 2011.

There are several major problems with the assertion at Paragraph 4 of the [redacted] affidavit. First, as the Claimant correctly notes at page 5, note 4 of her July 19, 2011 post-hearing brief, "presumptive eligibility," (defined at 20 CFR 416.934), is a term of art as used in the SSA's SSI regulations. 20 C.F.R. § 416.934 provides in relevant part as follows:

> We may make findings of presumptive disability and presumptive blindness in specific impairment categories without obtaining any medical evidence. These specific impairment categories are -
>
> (a) Amputation of a leg at the hip;
>
> (b) Allegation of total deafness;
>
> (c) Allegation of total blindness;
>
> (d) Allegation of bed confinement or immobility without a wheelchair, walker, or crutches, due to a longstanding condition, excluding recent accident and recent surgery;
>
> (e) Allegation of a stroke (cerebral vascular accident) more than 3 months in the past and continued marked difficulty in walking or using a hand or arm;
>
> (f) Allegation of cerebral palsy, muscular dystrophy or muscle atrophy and marked difficulty in walking (e.g., use of braces), speaking, or coordination of the hands or arms.
>
> (g) Allegation of Down syndrome.
>
> (h) Allegation of severe mental deficiency made by another individual filing on behalf of a claimant . . . .
>
> (i) Allegation of amyotrophic lateral sclerosis (ALS, Lou Gehrig's disease).

As demonstrated above, 20 CFR § 416.934 pertains only to a few specific categories of medical problems which are generally so serious that they are *presumed* to be disabling (hence the term "*presumptive* disability"). As the Division's Medical Reviewer testified, the SSA's list of presumptively disabling medical conditions roughly equals the medical conditions listed at page 1 of the Division's Form AD#2. Only a small number of persons qualifying for SSI and/or IA actually do so on the basis of presumptive disability.

The plain text of 7 AAC § 40.180 clearly requires that the Division consider numerous criteria in addition to the presumptive eligibility categories. *See* Principles of Law at page 11, above, and the extensive discussion in Section III(B), below. If the Division had meant to make its IA determinations based *solely* on whether an applicant is presumptively disabled, it would have ended 7 AAC § 40.180 at subsection (b)(1), and completely omitted or deleted subsections (b)(2-4) and (c)(1-5). [13] Based on the position now asserted by DPA, those later subsections, (comprising the majority of the regulation), would be completely unnecessary. Such an interpretation would violate the well settled rule of construction that no clause, sentence or word of a statute or regulation be

[13] A state regulation limiting Interim Assistance to persons with presumptive disabilities might, however, violate the federal regulations pertaining to the Interim Assistance Program. *See* discussions at Analysis Sections III(A) and III(D) at pages 19 and 23, below.

construed as inoperative or superfluous, void, or insignificant if an interpretation exists which will give effect to and preserve all of the words of the regulation. [14]

Second, the interpretation urged in Ms. [redacted]'s affidavit is contrary to Adult Public Assistance Manual Section 426-2C, which is *the Division's own official Policy Manual's interpretation of its interim assistance regulation. See* Principles of Law at page 12, above; *see also* discussion in Analysis Section III(B) at page 20, below. An agency policy, even if not properly promulgated as a formal administrative rule, may nevertheless be binding on an administrative agency. *See Wynn v. Coler*, 512 N.E.2d 1066 (Ill. App. 4th Dist. 1987); *Broadgate Inc. v. U.S. Citizenship & Immigration Services*, 730 F.Supp.2d 240 (D.D.C. 2010) ("an agency's interpretation of its own regulations is binding"); *Burke v. Houston NANA, L.L.C.*, 222 P.3d 851, 868 – 869 (Alaska 2010) (administrative agencies are bound by their regulations just as the public is bound by them").

Third, Ms. [redacted]'s affidavit, prepared in the midst of litigation, constitutes what is known as a "litigating position," not an established policy formalized in any regulation. Positions on the interpretation of regulations adopted by agencies during litigation, which positions (as discussed above) contradict established agency regulations and policy, are not owed deference. [15]

In summary, the *Affidavit of* [redacted] (1) misconstrues the established meaning of the term-of-art "presumptive eligibility;" (2) fails to give effect to most of the numerous subsections of 7 AAC § 40.180; (3) is contrary to the Division's official interpretation of its Interim Assistance regulation as stated in its own policy manual; and (4) is suspect because it was prepared for use in litigation. The *Affidavit of* [redacted] is therefore not persuasive as to the intended meaning of 7 AAC § 40.180.

III. Does State IA Regulation 7 AAC § 40.180 Incorporate Only the SSA's Presumptive SSI Disability Categories and the Listing of Impairments?

The Division asserts that it never intended the Interim Assistance eligibility review process to be 'turned into a full-blown SSI disability review" (DPA brief of July 8, 2011 at p. 7). Rather, DPA asserts that 7 AAC § 40.180(b)(1) limits the scope of the Interim Assistance eligibility review to a medical review. *Id.* DPA argues that "7 AAC § 40.180(b) specifically limits the DPA review to the following: the SSI presumptive disability criteria, the SSA listing of impairments, the DPA's [AD#2 form], any medical evidence provided by the applicant or obtained by the department, or any other evidence provided by the applicant as a part of the application for APA." *Id.* DPA asserts that "no other SSA rules are incorporated by reference" *Id.* DPA contends that 7 AAC § 40.180 "does not require the medical reviewer to examine any vocational information." *Id.* In summary, the Division argues that the state Interim Assistance regulations do not require or authorize application of the SSA's 5-step disability analysis. (DPA argument at hearing).

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[14] *See City of St. Mary's v. St. Mary's Native Corp.,* 9 P.3d 1002, 1008 (Alaska 2000), *Alascom Inc., v. North Slope Borough Board of Equalization*, 659 P.2d 1175, 1178 n.5 (Alaska 1983), 2A C. Sands, *Statutes and Statutory Construction*, § 46.06 (4th ed.1973), and 2A N. Singer, *Sutherland Statutory Construction and Statutory Interpretation*, § 46:6 at 244-47(6th Ed. 2002).

[15] See *Totemoff v. State*, 905 P.2d 954, 967-968 (Alaska 1995); *Bowen v. Georgetown University Hospital*, 488 U.S. 204, 212-213, 109 S.Ct. 468, 102 L.Ed.2d 493 (1988).

The Division's current position regarding the proper interpretation of the Interim Assistance Program's statutes, regulations, and policies is incorrect, as explained below.

A. The Social Security Administration's Interim Assistance Regulations Indicate That State Agency Disability Determinations Should Be Consistent With the SSI Analysis.

The Social Security Administration's regulations pertaining to disability determinations under the Supplemental Security Income (SSI) Program are set forth in Part 416 of Title 20 of the Code of Federal Regulations (CFRs). Are these regulations meant to apply to state Interim Assistance determinations?

The only sub-part of Part 416 expressly addressed to the state Interim Assistance programs is Subpart S, titled "Interim Assistance Provisions" (20 CFR § 416.1901 - 20 CFR § 416.1922).

Federal Interim Assistance regulation 20 CFR § 416.1902 defines "Interim assistance" in relevant part as "assistance the State gives you . . . *beginning with the first month for which you are eligible for payment of SSI benefits* and ending with, and including, the month your SSI payments begin . . . ." [Emphasis added]. In other words, Interim Assistance is a benefit provided to *persons who are eligible for SSI* while their SSI application is being processed by SSA.

In addition, Interim Assistance is subject to an agreement between the state and with SSA pursuant to which SSA has agreed to refund money to the State for Interim Assistance payments made by the state *to recipients who ultimately qualify for SSI*. *See* 20 CFR § 416.1910.

It is clear from the language of 20 CFR § 416.1902 and 20 CFR § 416.1910 that SSA *intends* that Interim Assistance benefits be paid *only to persons who are eligible for SSI.* And there is no better way of determining SSI eligibility in Interim Assistance cases than to apply the SSI regulations themselves.

In summary, the federal Interim Assistance regulations presume that state Interim Assistance programs will apply SSI disability regulations in determining eligibility for Interim Assistance. Accordingly, the state's Interim Assistance regulations should be interpreted in a manner consistent with the federal SSI regulations.

B. Regulation 7 AAC § 40.180(b)(1) Incorporates the Entire SSI Disability Analysis.

The Division asserts that state Interim Assistance regulation 7 AAC § 40.180 incorporates only the SSA's SSI presumptive disability categories, and the SSA's SSI Listing of Impairments (DPA argument at hearing).

It is true that state Interim Assistance regulation 7 AAC § 40.180 does not *expressly* require that the Division determine whether an applicant is currently involved in substantial gainful employment (i.e. "Step 1" of the 5-step SSI analysis). Likewise, 7 AAC § 40.180 does not *expressly* require that the Division determine whether an applicant's impairment is "medically severe" (i.e. "Step 2" of the 5-step SSI analysis). Finally, 7 AAC § 40.180 does not *expressly* require that the Division determine whether an applicant can still perform his prior work (i.e. "Step 4" of the 5-step SSI analysis).

However, state Interim Assistance regulations clearly strive to be consistent with the Social Security Administration's disability determination process. For example, 7 AAC 40.030 states that an applicant for Interim Assistance "must meet the eligibility requirements of the SSI program contained in Title XVI of the Social Security Act, as amended (42 U.S.C. 1381-1383) and in 20 C.F.R. Part 416." Similarly, 7 AAC 40.030(b) states that "[c]opies of federal statutes and regulations governing the SSI program be seen upon request at the central office of the division. In addition, 7 AAC § 40.180(b)(1) specifically states that "[t]he department will make a determination of whether the applicant is disabled 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* . . . ." [Emphasis added]. Stated simply, the only possible way to determine whether an "applicant is likely to be found disabled by the Social Security Administration" *is to apply the same analysis utilized by the Social Security Administration.*

The conclusion that 7 AAC § 40.180 incorporates the SSA's 5-step SSI disability analysis is also compelled by the relevant state statutes and by the Division's own policy manual provisions. First, Alaska statute A.S. § 47.25.615(5) defines "disabled" as "being unable to engage in substantial gainful activity by reason of a medically determinable physical or mental impairment that can be expected to result in death or that has lasted or can be expected to last for a continuous period of not less than 12 months." Alaska's statutory definition of "disabled" (above) is virtually identical to the SSA's definition of "disability" for purposes of its SSI program (see Principles of Law, above). This is an indication that the Alaska Legislature either intended, or presumed, that the eligibility criteria for the Interim Assistance Program would be equivalent to the eligibility criteria for SSI.

Second, *the Division's own Adult Public Assistance Manual provision relevant to the Interim Assistance Program's substantive disability requirements*, Manual Section 426-2C, specifically states that "[t]he APA program [of which Interim Assistance is a sub-program] *uses the same definitions of disability and blindness as SSI*." [Emphasis added].

In summary, state Interim Assistance regulation 7 AAC § 40.180, viewed in isolation, is not a model of clarity. However, it must be interpreted based both on the federal regulations and state statutes which authorize it, as well as the Division policy manual provision which interprets and implements it. Those authorities (20 CFR § 416.1902, A.S. § 47.25.615(5), and Adult Public Assistance Manual § 426-2C), make clear that the overall intent of the state's Interim Assistance Program is to apply substantially the same disability analysis as utilized by SSA in making its SSI eligibility determinations.

C. A Line-By-Line Analysis of 7 AAC § 40.180 Demonstrates That Its Substantive Requirements Are Virtually Identical To Those of the Federal SSI Disability Regulations.

In order to properly address the Division's contentions, it is appropriate to compare state Interim Assistance regulation 7 AAC § 40.180 with the Social Security Administration's (SSA's) SSI regulations on a subsection-by-subsection basis. The results of this comparison are as follows:

7 AAC § 40.180 - Subsection (a)

7 AAC § 40.180(a) essentially requires that a claimant be examined by a physician or psychiatrist, and that the results of the examination be provided on a form approved by the department. Federal

SSI regulation 20 CFR § 416.919s similarly allows the SSA to require that claimants submit to a medical examination. Further, Federal SSI regulation 20 CFR § 416.908 requires medical evidence in order to establish an applicant's impairment. The only difference between the state and federal requirements is that the state requires the use of its own form. This difference is not substantive.

7 AAC § 40.180 - Subsection (b)(1)

7 AAC § 40.180(b)(1) requires that the DPA's medical reviewer determine "whether the applicant is likely to be found disabled by the Social Security Administration." Because (as discussed above) 7 AAC § 40.180(b)(1) requires an applicant to meet the SSA's disability criteria, its requirements are identical to the SSA regulations in that regard.

7 AAC § 40.180 - Subsection (b)(2)

7 AAC § 40.180(b)(2) adds nothing to the requirements of the federal regulations. Subsection (b)(2) requires the consideration of "medical evidence provided by the applicant or obtained by the department." So do Federal SSI regulations 20 CFR § 416.912 - 20 CFR § 416.916 and 20 CFR Pt. 404, Subpart P, Appendix 1.

7 AAC § 40.180 - Subsection (b)(3)

7 AAC § 40.180(b)(3) requires the consideration of "evidence provided by the applicant under 7 AAC § 40.050." That regulation allows the applicant's submission of "written statements of persons who have knowledge of his financial and other circumstances relating to eligibility," requires "adequate evidence to demonstrate [the claimant's] eligibility for assistance," allows the division to interview an applicant, requires that claimants be "examined by an appropriate medical professional," who must "furnish a written report of the examination on a form provided by the division;" and allows the Division to "require each applicant . . . to submit evidence concerning his education and training, work experience, activities before and after onset of the claimed disability, efforts to engage in gainful employment, and other related matters."

The federal SSI regulations likewise require proof of financial eligibility (20 CFR § 416.207). The federal SSI regulations likewise allow for face-to-face interviews with applicants (20 CFR § 422.103 and 20 CFR § 422.107). The federal SSI regulations likewise require that claimants be "examined by an appropriate medical professional" (20 CFR § 416.919s). The federal SSI regulations likewise require consideration of a claimant's education (20 CFR § 416.964), training (20 CFR § 416.964), work experience (20 CFR § 416.965), activities before and after onset of the claimed disability (20 CFR § 416.920), efforts to engage in gainful employment (20 CFR § 416.974), and the like. Thus, subsection (b)(3) neither adds nor subtracts from the requirements of the federal regulations.

7 AAC § 40.180 - Subsection (b)(4)

7 AAC § 40.180(b)(4) requires "a review of the written results of the psychiatrist's or other physician's examination." However, so does federal SSI regulation 20 CFR § 416.993.

7 AAC § 40.180 - Subsection (c)(1)

7 AAC § 40.180(c)(1) requires consideration of "whether . . . the applicant's condition is listed as an impairment category described in (b)(1)(B) of this section" (i.e. the Social Security Administration's disability criteria or "listings of impairments" described in 20 C.F.R. 404, subpart P, appendix 1). However, so does federal SSI regulation 20 CFR § 416.925.

7 AAC § 40.180 - Subsection (c)(2)

7 AAC § 40.180(c)(2) requires consideration of whether "medical information obtained under (b) of this section documents the applicant's impairment." However, this requirement is redundant with the requirements of subsection (b)(2-4), discussed above, and (as also discussed above) neither adds nor subtracts anything from the requirements of federal SSI regulations 20 CFR § 416.912 - 20 CFR § 416.916 and 20 CFR Part 404, Subpart P, Appendix 1.

7 AAC § 40.180 - Subsection (c)(3)

7 AAC § 40.180(c)(3) requires consideration of whether the claimant's "impairment affects the applicant's activities of daily living." However, this is also required by the federal SSI regulations (*see* 20 CFR § 416.929). The Social Security regulations do not appear to explicitly define "activities of daily living". However, other federal regulations do. For example, 24 CFR § 891.205 states that "activities of daily living (ADL) means eating, dressing, bathing, grooming, and household management activities." This is consistent with the definition contained in the Alaska Statutes. *See* AS § 47.33.990(1) ("activities of daily living" means walking, eating, dressing, bathing, toileting, and transfer between a bed and a chair").

7 AAC § 40.180 - Subsection (c)(4)

7 AAC § 40.180(c)(4) requires consideration of whether the claimant "can perform any other work, including sedentary work." [Note that contrary to the Division's current position, this subsection explicitly requires the consideration of vocational evidence]. The federal SSI regulations require the same thing. *See* 20 CFR § 416.920, 20 CFR § 416.945, and 20 CFR § 416.966.

7 AAC § 40.180 - Subsection (c)(5)

7 AAC § 40.180(c)(5) requires consideration of whether "the applicant's impairment has lasted or is expected to last for a continuous period of not less than 12 months." This requirement is identical to the durational requirement contained in the federal SSI regulations. *See* 20 CFR § 416.909 and 20 CFR § 416.920(a)(4)(ii).

D. Applying the Five-Step SSI Analysis is not Inconsistent With 7 AAC § 40.030(a).

Alaska APA regulation 7 AAC § 40.030(a) provides in relevant part as follows:

> (a) An applicant must meet the eligibility requirements of the SSI program contained in Title XVI of the Social Security Act, as amended (42 U.S.C. §§ 1381 - 1383) and in 20 C.F.R. Part 416, and the eligibility requirements set forth in this chapter. If the

> requirements of this chapter conflict with requirements of the SSI program, the requirements of this chapter apply unless the requirements of the SSI program specifically supersede inconsistent state program provisions.

It has been argued that 7 AAC § 40.030(a) requires that this Office apply 7 AAC § 40.180, to the exclusion of the 5-step SSI disability analysis, based on the assertion that the analysis under 7 AAC § 40.180 is materially different than the 5-step SSI disability analysis. This argument fails for four reasons.

First, as demonstrated in subsection B of this analysis, above, 7 AAC § 40.180 specifically incorporates the SSI disability analysis by reference. Thus, the requirements of the Interim Assistance Program do not conflict with requirements of the SSI program.

Second, as demonstrated in subsection C of this analysis, above, the various subsections of 7 AAC § 40.180 contain, in the aggregate, essentially the same requirements as the SSI disability analysis. For this additional reason, the requirements of the Interim Assistance Program do not conflict with requirements of the SSI program.

Third, to the extent that there was any material conflict between the substantive requirements of the Interim Assistance Program and the SSI program, the federal regulations would take precedence under the Supremacy Clause of the Constitution of the United States. However, it is a fundamental rule of statutory construction that statutes and regulations be construed to avoid constitutional infirmity wherever possible. [16] Accordingly, because (as demonstrated in subsections B and C, above) the Interim Assistance and SSI regulations *can* be interpreted harmoniously, pursuant to this rule of statutory construction, they *must* be interpreted harmoniously.

Fourth, the fact that A.S. § 47.25.615(5) defines "disabled" in terms virtually identical to the SSA's definition of "disability" for purposes of its SSI program (see Principles of Law, above) is a strong indication that the Alaska legislature intended that the State Interim Assistance scheme be administered in cooperation with and conformity to the federal SSI statutes and regulations. In such situations, courts have held that the state and federal statutes should be construed together to maintain institutional harmony. *See Ind. Commission v. Board of County Commissioners*, 690 P.2d 839, 844 (Colo. 1984); *see also Sorlien v. North Dakota Workmen's Compensation Bureau*, 84 N.W.2d 575 (N.D. 1957) (recognizing the rule of construction that state statutes should be construed to harmonize with federal legislation on the same subject). [17]

For all of these reasons, interpreting 7 AAC § 40.180 to require application of the five-step SSI disability analysis is in no way inconsistent with 7 AAC § 40.030(a).

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[16] *See State v. Fairbanks North Star Borough*, 736 P.2d 1140, 1142 (Alaska 1987); *Veco International, Inc. v. Alaska Public Offices Commission*, 753 P.2d 703, 713 (Alaska 1988); and *Municipality of Anchorage v. Anchorage Police Department Employees Association*, 839 P.2d 1080, 1083 (Alaska 1992).

[17] These rules of construction are simply more specific versions of the more general rule, (adopted by the Alaska Supreme Court), that statutes *in pari materia* should be construed together. 2A C. Sands, Sutherland Statutory Construction § 51.01, at 449 (4th Edition 1973). Statutes are deemed to be *in pari materia* when they relate to the same purpose or thing or have the same purpose or object. *See Morton v. Hammond*, 604 P.2d 1 (Alaska 1979). If statutes are *in pari material*, and one section covers the subject in general terms, and the other covers a part of the same subject in more detail, then the two statutes should be harmonized if possible. *Id.* at 3.

E. The Interpretation of 7 AAC § 40.180 Asserted by the Division in this Case Fails the "Reasonable Basis" Test,

In cases such as this, raising legal questions involving agency expertise or fundamental policy questions, this Office must apply the "reasonable basis" standard of review. *See Burke v. Houston Nana, L.L.C.*, 222 P.3d 851 (Alaska 2010). Under this standard, this Office must defer to the agency's interpretation of its regulations unless its interpretation is plainly erroneous and inconsistent with the regulations. *Hidden Heights Assisted Living, Inc. v. State of Alaska Department of Health and Social Services, Division of Health Care Services,* 222 P.3d 258, 267-268 (Alaska 2009).

Were this Office called upon to interpret 7 AAC § 40.180 *in the absence of a controlling DPA policy manual provision*, there might be several possible interpretations of the regulation, (potentially including the interpretation currently urged by the Division), which might pass the reasonable basis test. However, 7 AAC § 40.180 does not come before this Office on a clean slate. Rather, the Division itself has previously issued an official policy, set forth in its Adult Public Assistance Manual, interpreting this regulation.

Adult Public Assistance Manual Section 426-2C is *the Division's official interpretation* of the Interim Assistance Program's substantive disability requirements (i.e. the Division's interpretation of A.S. § 47.25.615(5) and 7 AAC § 40.180). Section 426-2C clearly states in relevant part that "the APA program uses the same definitions of disability and blindness as SSI," and that "the Division will obtain and use medical and other information to determine whether an applicant is likely to meet the SSI disability/blindness criteria, and is eligible for Interim Assistance." The Division's *official interpretation* of the Interim Assistance Program's substantive disability requirements is thus *completely at odds* with the interpretation of 7 AAC § 40.180 asserted by DPA in this case.

The Division is free to amend its policy manuals to make them better reflect a reasonable interpretation of the Division's regulations. Were the Division's policy manual provision as to the proper interpretation of 7 AAC § 40.180 *consistent* with the position taken by the Division in this case, it is at least *possible* that such an interpretation could be upheld. However, where (as here) an agency asserts a position *which is at odds with its own formal interpretation of its regulations*, the agency's position is unreasonable *per-se*. Accordingly, the interpretation of 7 AAC § 40.180 urged by the Division in this case fails the "reasonable basis" test and therefore cannot be adopted.

F. Summary.

The criteria which must be satisfied in order to qualify for Interim Assistance under the State of Alaska's Interim Assistance statutes, regulations, and policies must be construed as equivalent to the criteria which must be satisfied in order to qualify for Social Security Supplemental Security Income (SSI) disability benefits pursuant to Title 20 of the Code of Federal Regulations (CFRs). Accordingly, the remainder of this decision will apply the 5-step SSI analysis to determine whether the Claimant is eligible to receive Interim Assistance benefits.

IV. Is The Claimant Performing Substantial Gainful Activity?

The first element of the disability analysis is whether the claimant is performing "any substantial gainful activity". Pursuant to 20 C.F.R. § 416.972, "substantial gainful activity" means work that (a) involves doing significant and productive physical or mental duties, and (b) is done (or intended) for pay or profit.

The Claimant's vocational records and testimony indicate that she is not currently working, and that she had not worked since May 2009 (Exs. 2.005, 4.005, Claimant testimony). This evidence was not disputed by the Division (DPA Medical Reviewer's testimony). Accordingly, the Claimant has carried her burden and has proven, by a preponderance of the evidence, that she is not performing substantial gainful activity as defined by to 20 C.F.R. § 416.972.

V. Does The Claimant Have a Severe Impairment?

At hearing, the impairments on which the Claimant based her disability claim were those stated on the February 9, 2011 *Preliminary Examination for Interim Assistance* form (Form AD#2) (Exs. 4.001 – 4.002). On that form the physician stated that the Claimant's diagnosis was "personality disorder, mood disorder, chronic pain, neck pain, knee pain" (Ex. 4.002).

In order to avoid being found to be *not disabled* at this stage, the Claimant must prove that at least one of her impairments is medically severe pursuant to 20 CFR § 416.920(c). A "severe impairment" is one that "significantly limits [a person's] physical or mental ability to do basic work activities." 20 CFR § 416.920(c). 20 CFR § 416.921(b) defines "basic work activities." That regulation states:

> [B]asic work activities [mean] the abilities and aptitudes necessary to do most jobs. Examples . . . include - (1) physical functions such as walking, standing, sitting, lifting, pushing, pulling, reaching, carrying, or handling; (2) capacities for seeing, hearing, and speaking; (3) understanding, carrying out, and remembering simple instructions; (4) use of judgment; (5) responding appropriately to supervision, co-workers and usual work situations; and (6) dealing with changes in a routine work setting.

The criteria used by the Social Security disability regulations to analyze physical impairments are different than the criteria used to analyze mental impairments, as explained below. Accordingly, the Claimant's alleged physical and mental impairments must be analyzed separately.

A. The Claimant's Physical Impairments - Chronic Neck/Back Pain and Knee/Hip Pain.

The Claimant was involved in a motor vehicle accident in 1992, after which she reported pain in her neck, back, and lower left leg (Ex. 4.059). The Claimant had knee surgery in 2000 (Ex. 4.066). The Claimant has reported numbness in left side of her body since 2006 (Ex. 4.059). The Claimant has consistently reported musculoskeletal pain, (including neck/back pain and knee/hip pain), since August 2010 (see Findings of Fact at Paragraphs 16, 21 – 24). Finally, the Claimant presented credible testimony regarding her musculoskeletal pain (see Findings of Fact at Paragraph 31(e)).

If the sole criterion for determining the severity of an impairment were the Claimant's own testimony, she would clearly qualify as severely impaired pursuant to 20 C.F.R. § 416.920(c) and 20 C.F.R. § 416.921(b). However, for purposes of a disability determination, a claimant's own statement of symptoms, by itself, will not suffice. 20 C.F.R. § 416.908. *Evidence from acceptable medical sources is necessary to establish the severity of an impairment*. *See* 20 C.F.R. § 416.908.

Although the Claimant's reports of pain to her medical providers, her reports of pain on her disability/vocational reports, and her hearing testimony as to her pain, appear credible, there is no medical evidence in the record substantiating a medical cause for the Claimant's reports of pain. *See* Findings of Fact at Paragraph 16. Accordingly, the Claimant's physical impairments do not satisfy the requirements of 20 C.F.R. § 416.908. Thus, the Claimant's neck/back pain and knee/hip pain do not qualify as "medically severe" for purposes of 20 C.F.R. § 416.920(c).

B. The Claimant's Mental Impairments.

Initially, the Claimant's mental impairments, unlike her physical impairments, are supported by acceptable medical evidence. *See* psychological evaluation dated August 4, 2010 (Exs. 2.033 – 2.037; Exs. 4.012 – 4.016); mental status exams (Exs. 4.091 – 4.098). Accordingly, the Claimant's mental impairments satisfy the threshold requirement of 20 C.F.R. § 416.908 (discussed above).

Mental impairments are evaluated under 20 C.F.R. § 404.1520a and 20 C.F.R. § 416.920a, which regulations are essentially identical. 20 C.F.R. § 404.1520a provides in relevant part as follows:

> (c) Rating the degree of functional limitation.
>
> * * * * * * * * * * * *
>
> > (3) We have identified four broad functional areas in which we will rate the degree of your functional limitation: Activities of daily living; social functioning; concentration, persistence, or pace; and episodes of decompensation. *See* 12.00C of the Listing of Impairments.
> >
> > (4) When we rate the degree of limitation in . . . (activities of daily living; social functioning; and concentration, persistence, or pace), we will use the following five-point scale: None, mild, moderate, marked, and extreme. When we rate the degree of limitation in . . . (episodes of decompensation), we will use the following four-point scale: None, one or two, three, four or more. The last point on each scale represents a degree of limitation that is incompatible with the ability to do any gainful activity.
>
> (d) Use of the technique to evaluate mental impairments. After we rate the degree of functional limitation resulting from your impairment(s), we will determine the severity of your mental impairment(s).
>
> > (1) If we rate the degree of your limitation in the first three functional areas as "none" or "mild" and "none" in the fourth area, we

> will generally conclude that your impairment(s) is not severe, unless the evidence otherwise indicates that there is more than a minimal limitation in your ability to do basic work activities (*see* § 404.1521).

Thus, pursuant to 20 C.F.R. § 404.1520a and 20 C.F.R. § 416.920a, the next step is to rate the degree to which the Claimant's mental impairments affect (1) her activities of daily living; (2) her social functioning; (3) her concentration, persistence, or pace; and (4) whether the Claimant has episodes of decompensation.

1. Do the Claimant's Mental Impairments Restrict Her Activities of Daily Living? [18]

The Claimant reported to her doctors during a medical examination on August 25, 2010 that she had a poor appetite, sleep disruptions, depression, anxiety, panic attacks, frequent nightmares, discomfort being around groups of people, frequent headaches and dizziness, poor concentration, and poor short-term and long-term memory (Exs. 4.095 – 4.096). However, there is no evidence in the record that the Claimant's mood disorder, personality disorder, and/or PTSD prevent her from performing her activities of daily living. Accordingly, the degree of limitation on the Claimant's ability to perform her activities of daily living must be characterized as "none" (1 on a scale of 1-5).

2. Do the Claimant's Mental Impairments Restrict Her Social Functioning? [19]

The Claimant has reported discomfort being around groups of people (Exs. 4.095 – 4.096). In addition, her last employment was ultimately terminated in part because of a disagreement she had with the housekeeping manager (Claimant testimony; see Findings of Fact at Paragraph 27(g)). Accordingly, the degree of limitation on the Claimant's social functioning must be characterized as "moderate" (3 on a scale of 1-5).

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[18] The Social Security Regulations define "activities of daily living" in relevant part as follows (20 C.F.R., Part 404, Subpart P, Appendix 1, Section 12.00(C)(1):

> Activities of daily living include 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.

[19] The Social Security Regulations define "social functioning" in relevant part as follows (20 CFR, Part 404, Subpart P, Appendix 1, Section 12.00(C)(2):

> Social functioning refers to your capacity to interact independently, appropriately, effectively, and on a sustained basis with other individuals. Social functioning includes the ability to get along with others . . . . You may demonstrate impaired social functioning by, for example, a history of altercations, evictions, firings, fear of strangers, avoidance of interpersonal relationships, or social isolation . . . . Social functioning in work situations may involve interactions with the public, responding appropriately to persons in authority . . . or cooperative behaviors involving coworkers.

3. Do Claimant's Mental Impairments Restrict Concentration, Persistence, or Pace?[20]

During a medical examination on August 25, 2010 the Claimant reported that she had sleep disruptions, depression, anxiety, panic attacks, frequent nightmares, discomfort being around groups of people, frequent headaches and dizziness, poor concentration, and poor short-term and long-term memory (Exs. 4.095 – 4.096). The Claimant has also reported occasional blackouts and tiredness (Ex. 2.003) and an inability to focus (Ex. 4.003). These symptoms are consistent with the Claimant's mental health diagnoses as shown in the medical reports. Accordingly, the degree of limitation on the Claimant's concentration, persistence, or pace must be characterized as at least "marked" (4 on a scale of 1-5).

4. Has the Claimant Had Episodes of Decompensation? [21]

There is one reference in the record to a psychiatric hospitalization in 1998 (Ex. 4.0). However, there is no evidence in the record of any other episodes of decompensation. Thus, the Claimant's only episode of decompensation occurred 13 years ago – too long ago to be relevant to any determination of the Claimant's current level of mental impairment. Accordingly, the degree of the Claimant's decompensation must be graded as "none" (1 on 20 C.F.R. § 404.1520a's scale of 1-4).

5. Summary – The Claimant's Mental Impairments Qualify as Severe.

1. The Claimant scored a "none" (1 out of 5) with regard to "activities of daily living."

2. The Claimant scored "moderately impaired" (3 out of 5) with regard to "social functioning."

3. The Claimant scored "markedly impaired" (4 out of 5) with regard to "concentration, persistence, and pace."

4. The Claimant scored "none" (1 out of 4) with regard to "episodes of decompensation."

As noted above, the Claimant scored "moderately impaired" in one category, and "markedly impaired" in another. In *Webb v. Barnhart*, 433 F.3d 683, 686 (9th Cir. 2006), the court stated that a

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[20] The Social Security Regulations define "concentration, persistence, or pace" in relevant part as follows (20 CFR, Part 404, Subpart P, Appendix 1, Section 12.00(C)(3):

> Concentration, persistence, or pace refers to the ability to sustain focused attention and concentration sufficiently long to permit the timely and appropriate completion of tasks commonly found in work settings . . . . [M]ajor limitations in this area can often be assessed through clinical examination or psychological testing . . . .

[21] The Social Security Regulations define "episodes of decompensation" in relevant part as follows (20 CFR, Part 404, Subpart P, Appendix 1, Section 12.00(C)(4):

> Episodes of decompensation are exacerbations or temporary increases in symptoms or signs accompanied by a loss of adaptive functioning . . . . Episodes of decompensation may be demonstrated by an exacerbation in symptoms or signs that would ordinarily require increased treatment or a less stressful situation (or a combination of the two). Episodes of decompensation may be inferred from medical records showing significant alteration in medication; or documentation of the need for a more structured psychological support system (e.g. hospitalizations, placement in a halfway house, or a highly structured and directing household); or other relevant information in the record about the existence, severity, and duration of the episode.

medically determinable impairment or combination of impairments may be found to be "not severe *only if* the evidence establishes a slight abnormality that has no more than a minimal effect on an individual's ability to work." *See also Smolen v. Chater*, 80 F.3d 1273, 1290 (9th Cir. 1996); *Yuckert v. Bowen*, 841 F.2d 303, 306 (9th Cir. 1988). The Claimant's mental impairments can fairly be rated as more than a "slight abnormality." Accordingly, they qualify as "medically severe" pursuant to 20 C.F.R. § 404.1520a(d)(1) and 20 C.F.R. § 416.920(c). The Claimant has therefore carried her burden and proven, by a preponderance of the evidence, that her mood disorder, PTSD, and personality disorder constitute "severe impairments" as defined by 20 CFR §§ 416.920(c) and 416.921(b).

VI. Do the Claimant's Severe Impairments Satisfy the Durational Requirement?

The next step, pursuant to 20 C.F.R. § 416.909, is to decide whether or not the Claimant's mental impairments – (i.e. her mood disorder, PTSD, and personality disorder) - have lasted, or can be expected to last, for a continuous period of at least twelve (12) months.

[redacted], ANP-C opined, in her letter dated May 31, 2011 (Ex. B), that the Claimant has suffered from her mental impairments for at least two (2) years. Further, at the hearing of June 13, 2011, the Division's Interim Assistance Medical Reviewer agreed that the Claimant satisfied the 12-month durational requirement (see Findings of Fact at Paragraph 32(k). Accordingly, the Claimant has proven, by a preponderance of the evidence, that her mood disorder, PTSD, and personality disorder have lasted, or can be expected to last, for a continuous period of at least twelve (12) months.

VII. Do the Claimant's Severe Impairments Meet the Requirements of "the Listings?"

The next step is to decide whether or not the Claimant's severe mental impairments meet the criteria of the Listing of Impairments contained in the Social Security regulations at 20 C.F.R. Part 404, Subpart P, Appendix 1. The Claimant bears the burden of establishing, by a preponderance of the evidence, that her impairments satisfy the requirements of a "Listings" impairment. *See* Principles of Law, above. An impairment cannot be found to meet the criteria of a Listing based solely on a diagnosis. 20 CFR § 416.925(d).

The Claimant's mood disorder and PTSD are both categorized under SSA Impairment Listing No. 12.06). The Claimant's personality disorder is categorized under SSA Impairment Listing No. 12.08. Because the impairments are categorized under different Listings, they must be analyzed separately.

A. The Claimant's Mood Disorder and PTSD (SSA Impairment Listing No. 12.06).

The SSA's Listing for anxiety-related disorders, including mood disorders and PTSD, states:

> 12.06 Anxiety Related Disorders: In these disorders anxiety is either the predominant disturbance or it is experienced if the individual attempts to master symptoms; for example, confronting the dreaded object or situation in a phobic disorder or resisting the obsessions or compulsions in obsessive compulsive disorders.

The required level of severity for these disorders is met when the requirements in both A and B are satisfied, or when the requirements in both A and C are satisfied.

A. Medically documented findings of at least one of the following:

1. Generalized persistent anxiety accompanied by three out of four of the following signs or symptoms: (a) Motor tension; or (b) Autonomic hyperactivity; or (c) Apprehensive expectation; or (d) Vigilance and scanning; or

2. A persistent irrational fear of a specific object, activity, or situation which results in a compelling desire to avoid the dreaded object, activity, or situation; or

3. Recurrent severe panic attacks manifested by a sudden unpredictable onset of intense apprehension, fear, terror and sense of impending doom occurring on the average of at least once a week; or

4. Recurrent obsessions or compulsions which are a source of marked distress; or

5. Recurrent and intrusive recollections of a traumatic experience, which are a source of marked distress; and

B. Resulting in at least 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, or

C. Resulting in complete inability to function independently outside the area of one's home.

Initially, there is no evidence in the record to support a positive finding with regard to the criteria stated in subsections A-1, A-2, or A-4, above.

With regard to subsection A-3, (recurrent severe panic attacks), the Claimant has reported having panic attacks. However, there is no evidence indicating that these attacks have occurred on the average of at least once a week. Accordingly, the Claimant does not satisfy the criteria of subsection A-3.

With regard to subsection A-5 (recurrent and intrusive recollections of a traumatic experience, which are a source of marked distress), the Claimant reported sleep disruptions and nightmares on occasion (Exs. 4.095 – 4.096). However, there is no evidence in the record that these concern a specific past traumatic experience, or that these are regularly recurring. Accordingly, the Claimant does not satisfy the criteria of subsection A-5.

With regard to the factors listed in section B, there is no evidence that the Claimant's mental impairments are causing a marked restriction of activities of daily living (subsection B-1), or marked difficulties in maintaining social functioning (subsection B-2), or that the Claimant has repeated episodes of decompensation, each of extended duration (subsection B-4). The Claimant has *reported* some difficulties in maintaining concentration (subsection B-3). However, even were the Claimant's reports substantiated by psychological evaluation, (and currently they are not), the Claimant would still need to also satisfy section A, in addition to section B, to meet the listing. As discussed above, the Claimant does not satisfy the criteria of section A.

Finally, with regard to section C, there is no evidence in the record indicating that the Claimant's mental impairments make her completely unable to function independently outside of her home.

In summary, in order for the Claimant's mood disorder and PTSD to meet the criteria of Listing 12.06, she must satisfy the requirements of *both* sections A and B, or *both* sections A and C. At best, the Claimant satisfies the requirements of section B alone. Accordingly, the Claimant fails to satisfy the criteria of Listing 12.06.

B. The Claimant's Personality Disorder (SSA Impairment Listing No. 12.08).

The SSA's Listing for personality disorders states as follows:

> 12.08 Personality Disorders: A personality disorder exists when personality traits are inflexible and maladaptive and cause either significant impairment in social or occupational functioning or subjective distress. Characteristic features are typical of the individual's long-term functioning and are not limited to discrete episodes of illness.
>
> The required level of severity for these disorders is met when the requirements in both A and B are satisfied.
>
> A. Deeply ingrained, maladaptive patterns of behavior associated with one of the following:
>
> 1. Seclusiveness or autistic thinking; or
>
> 2. Pathologically inappropriate suspiciousness or hostility; or
>
> 3. Oddities of thought, perception, speech and behavior; or
>
> 4. Persistent disturbances of mood or affect; or
>
> 5. Pathological dependence, passivity, or aggressivity; or

6. Intense and unstable interpersonal relationships and impulsive and damaging behavior; and

B. Resulting in at least 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.

Initially, there is no evidence in the record to support a positive finding as to the criteria stated in subsections A-1, A-2, A-3, A-5, or A-6, above. With regard to the factors listed in subsection A-4, the Claimant *reports* persistent mood disturbances. However, these are not as yet confirmed by any psychological evaluation. Accordingly, the Claimant does not meet the requirements of any subsection of Section A.

With regard to the factors listed in section B, there is no evidence that the Claimant's mental impairments are causing a marked restriction of activities of daily living (section B-1), or marked difficulties in maintaining social functioning (section B-2), or that the Claimant has repeated episodes of decompensation, each of extended duration (section B-4). The Claimant has *reported* some difficulties in maintaining concentration (section B-3). However, even were the Claimant's reports substantiated by psychological evaluation, (and currently they are not), the Claimant would still need to also satisfy section A, in addition to section B, to meet the listing. As discussed above, the Claimant does not satisfy the criteria of section A.

In summary, in order for the Claimant's personality disorder to meet the criteria of Listing 12.08, she must satisfy the requirements of *both* sections A and B. The Claimant has not demonstrated that she satisfies these requirements. Accordingly, the Claimant fails to satisfy the criteria of Listing 12.08.

C. Summary – The Claimant's Mental Impairments do not "Meet the Listings."

The Claimant failed to prove, by a preponderance of the evidence, that her medically severe mental impairments – (mood disorder, PTSD, and personality disorder) - meet the specific requirements of the Social Security Administration's applicable Listings (20 C.F.R. Part 404, Subpart P, Appendix 1, Sections 12.06 and 12.08). The next issue is whether the Claimant's impairments, *when considered in combination*, are *medically equivalent* to one or more Listings.

VIII. Do the Claimant's Impairments, in Combination, *Medically Equal* a Listing?

A finding of disability may be based on the combined effect of multiple impairments which, if considered individually, would not be of the requisite severity. *See* 20 C.F.R. § 416.906; 20 C.F.R. § 416.911; 20 C.F.R. § 416.923; and *Loza v. Apfel*, 219 F.3d 378, 393 (5th Cir. 2000). The combined

effect of a claimant's impairments must be considered throughout the five-step analytical process. 20 C.F.R. § 404.1523; *Fleming v. Barnhart*, 284 F.Supp.2d 256 (2003). In considering the combined effect of multiple impairments, those impairments found to be non-severe must be considered in addition to the impairments found to be severe. *Walterich v. Astrue*, 578 F.Supp.2d 482 (2008).

A claimant's combination of impairments need not satisfy the exact criteria of a specific listing; rather, a claimant may be found disabled if the combined effect of his or her impairments are found to be *medically equivalent* to a "Listings" impairment. 20 CFR § 416.926. The responsibility for determining medical equivalence in this case rests with the hearing officer. 20 CFR § 416.926(e).

In this case, the Claimant (a) was assessed on August 4, 2010 as having a GAF score of 50 (Exs. 4.012, 4.015, 4.016); (b) was assessed on August 25, 2010 as having a GAF score of 48 (Ex. 4.096); and (c) was assessed on September 23, 2010 as having a GAF score of 40, and a maximum GAF score of 45 within the preceding year (Ex. 4.094). A number of federal district court opinions hold that a GAF score of 50 or below is generally inconsistent with an ability to work. *See*, for example, *Colon v. Barnhart*, 424 F.Supp.2d 805, 812-813 (E.D. Pa. 2006).

However, a disability claimant cannot qualify for benefits under "medical equivalence" by showing that the overall *functional impact* of his or her combination of impairments is as severe as that of a listed impairment. *Washington v. Barnhart*, 424 F.Supp.2d 939 (S.D. Tex. 2006). Rather, findings concerning the combined effect of a disability claimant's impairments are *medical determinations* which must be grounded on the testimony of a medical expert. *Fenn v. Shalala*, 884 F.Supp. 267 (N.D. Ill. 1995); *Meraz v. Barnhart*, 300 F.Supp.2d 935 (C.D. Cal. 2004). There must be a comparison between the symptoms, signs, and laboratory findings pertaining to the claimant's impairment, with the corresponding criteria for a listed impairment. *Fleming v. Barnhart*, 284 F.Supp.2d 256 (2003). Stated otherwise, medical equivalence must be proven by medical evidence and supported by medically acceptable clinical laboratory diagnostic techniques. *Morris ex. rel. Feth v. Barnhart*, 326 F.Supp.2d 1203 (2004). In this case, the Claimant presented no medical evidence demonstrating that the combined effect of her impairments was medically equivalent to one or more listed impairments.

In summary, for a disability claimant to prove that his or her combination of impairments is "equivalent" to a listed impairment, he or she must present medical findings equal in severity to all the criteria for the one most similar listed impairment. *Sullivan v. Zebley*, 493 U.S. 521, 110 S.Ct. 885, 107 L.Ed.2d 967 (1990). The Claimant did not do so. Accordingly, the Claimant failed to carry her burden and did not prove, by a preponderance of the evidence, that the combined effect of her severe and non-severe impairments was medically equivalent to one or more listed impairments. It is therefore necessary to proceed to the next step of the analysis and to determine whether the Claimant can perform her past work.

IX. Do the Claimant's Impairments Prevent Her from Performing Her Previous Work?

The next step is to determine whether the Claimant's impairments prevent her from performing her past relevant work. [22] "Past relevant work" is defined as "work that [the claimant has] done within

[22] As discussed above, the Division asserts that it is not required to consider whether an applicant for Interim Assistance can still perform his or her prior work. However, as demonstrated in preceding sections of this Analysis,

the past 15 years, that was substantial gainful activity, and that lasted long enough for you to learn to do it." 7 CFR § 416.960(b)(1). If the Claimant is not prevented from performing her previous relevant work, she is not disabled. 20 CFR § 416.920(a)(4)(iv); 20 CFR § 416.960(b)(2-3). In the hearing process, the responsibility for determining a claimant's residual functional capacity, (i.e. whether a claimant can perform prior work, or any other work), rests with the hearing officer. 20 CFR § 416.946(b).

A finding that the Claimant can no longer perform her past relevant work must consider both the Claimant's mental and physical impairments. A letter from [redacted], ANP-C dated May 31, 2011 (Ex. B) states in relevant part that, since May 28, 2010, the Claimant "has been unable to work due to her uncontrolled psychiatric illness." However, the record does not indicate that the Claimant was forced to quit any of her prior jobs solely as a result of her mental impairments. The Claimant testified that she had difficulty working as a housekeeper at a hotel from April 2009 until May 2009 due in part to her mental impairments (*see also* Exs. 2.005, 4.005). The Claimant's employment was ultimately terminated because of a disagreement she had with the housekeeping manager (Claimant testimony), but there is no evidence in the record that this argument resulted solely from the Claimant's mental impairments. A preponderance of the evidence thus indicates that the Claimant's mental impairments do not, by themselves, prevent the Claimant from performing her prior work.

The Claimant has, however, also been diagnosed with physical impairments (i.e. chronic neck pain and knee pain) (Exs. 4.001 – 4.002). An examining physician has opined that the Claimant is not expected to recover from these conditions (Ex. 4.002). Based on this diagnosis, the Claimant's testimony that she has fallen several times because her legs have given out, that she must now use a cane to walk because of her left knee pain and hip pain, and that she cannot stand for very long or move very fast, is credible.

The Claimant testified at hearing that, due in part to her physical impairments, she did not believe that she could still perform her prior work (a) at the front counter and the drive-through window of a fast food restaurant; (b) at a car rental agency; or (c) as a hotel maid / housekeeper. The only other work that the Claimant has performed in the last 15 years was (a) work as a retail store clerk (Ex. 2.005); (b) work as a grocery store clerk (Ex. 2.005); and (c) work performing food demonstrations (Ex. 2.005). These jobs have physical demands similar to those of the jobs which the Claimant testified she could no longer perform.

The Division's Interim Assistance Medical Reviewer did not assert that the Claimant could still perform her past work; rather, his analysis focused almost exclusively on "step 3" of the disability analysis, set forth above (see Ex. 4.0 and hearing testimony). Accordingly, the Claimant's evidence, though not overwhelming, is credible and stands un-rebutted.

The Claimant has thus carried her burden and proven, by a preponderance of the evidence, that she can no longer perform her past relevant work. It is therefore necessary to proceed to the fifth and

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such an interpretation ignores both 7 AAC § 40.180(c)(4), and Adult Public Assistance Manual Section 426-2C (the latter of which interprets the Interim Assistance Program's substantive disability requirements as consistent with the SSI's program's substantive disability requirements). Accordingly, the Division must consider whether an applicant for Interim Assistance can still perform his or her prior work.

final step in the disability analysis and to determine whether the Claimant can perform any other work. 20 CFR § 416.920(a)(4)(v); 20 CFR § 416.960(c).

X. Do The Claimant's Impairments Prevent Her From Performing Any Work?

Pursuant to 20 CFR § 416.920(a)(4)(v) and 20 CFR § 416.960(c), if it is determined that a claimant cannot perform his or her past relevant work, it is then necessary to proceed to the final step in the disability analysis and decide whether the applicant is capable of performing any other work. [23] The hearing officer must determine whether the claimant retains a particular exertional capacity; decide whether the claimant has acquired transferable skills; identify specific jobs that the claimant can perform with the restrictions the claimant has been found to have; and verify that the jobs the claimant can do exist in significant numbers in the regional or national economies. *Haddock v. Apfel*, 196 F.3d 1084 (10th Cir. 1999). However, the hearing officer cannot himself provide affirmative vocational evidence; the evidence must be in the record. *Wilson v. Califano,* 617 F.2d 1050, 1053-1054 (4th Cir. 1980).

A. SSA Shifts the Burden of Proof to the Agency at Step Five of the Disability Analysis.

At this stage, *under the SSA's disability analysis,* the burden of proof shifts from the claimant to the agency. *See* 20 CFR § 416.960(c)(2); *see also Bowen v. Yuckert,* 482 U.S. 137, 144 (1987); *Embrey v. Bowen*, 849 F.2d 418, 422 (9th Cir. 1988); *Smolen v. Chater*, 80 F.3d 1273, 1289 (9th Cir.1996); *Tacket v. Apfel,* 180 F.3d 1094, 1099 (9th Cir. 1999); *Bustamante v. Massanari*, 262 F.3d 949, 953–954 (9th Cir.2001); *Valentine v. Commissioner of Social Security Administration*, 574 F.3d 685, 689 (9th Cir. 2009). Courts have stated that the rationale for this shifting of the burden at "Step 5" is to effectuate Congress' intent that doubts be resolved in favor of claimants in SSI cases. *Lopez v. Califano*, 481 F.Supp. 392 (D.C. Cal. 1979).

B. Does the Burden of Proof Shift to DPA at Step Five in Interim Assistance Cases?

It has been asserted that in Interim Assistance cases the burden of proof should not be shifted from the claimant to the agency at step five of the analysis. It is clear that the state's primary Interim Assistance regulation, 7 AAC § 40.180, does not *expressly* shift the burden of proof from the claimant to the agency at this stage. However, 7 AAC § 40.180(b)(1) specifically states that "[t]he department will make a determination of whether the applicant is disabled 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* . . . ." [Emphasis added].

Similarly, Adult Public Assistance Manual Section 426-2C provides in relevant part the "Division will obtain and use medical and other information to determine *whether an applicant is likely to meet the SSI disability/blindness criteria"* [emphasis added]. Thus, the Division's regulation and policy manual provisions adopt the Social Security Administration's disability analysis, and instruct

[23] As discussed at page 16, above, the Division asserts that it is not required to consider whether an applicant for Interim Assistance can still perform any work. However, as demonstrated in preceding sections of this Analysis, such an interpretation ignores both 7 AAC § 40.180(c)(4), and Adult Public Assistance Manual Section 426-2C (the latter of which interprets the Interim Assistance Program's substantive disability requirements as consistent with the SSI's program's substantive disability requirements). Accordingly, the Division is required to consider whether an applicant for Interim Assistance can still perform any work.

the Division to determine disability *like the Social Security Administration determines disability*. This necessarily includes *shifting the burden of proof to the Division at "step 5' of the disability analysis.*

In addition, there is a rule of construction applicable to statutes and regulations which states that, absent express indications to the contrary, the wholesale adoption of statutes into other statutory schemes is presumed to perpetuate and incorporate the judicial baggage that has accumulated in relation to those provisions. *See*, e.g. *Sarracino v. Superior Court*, 529 P.2d 53 (Cal. 1974); *Alabama Association of Insurance Agents v. Board of Governors*, 533 F.2d 224, 245 (5th Cir. 1976), *cert. denied* 435 U.S. 904, 98 S.Ct. 1448, 55 L.Ed.2d 494 (1978); *Lorillard v. Pons*, 434 U.S. 575, 580-581, 98 S.Ct. 866, 869-870, 55 L.Ed.2d 40 (1978); *In re Harris*, 775 P.2d 1057 (Cal. 1989). The Alaska Supreme Court has stated that, where the legislature adopts a legislative expression which has previously received judicial interpretation, those judicial interpretations are prima facie evidence of the intent of the new legislation. *Kott v. State*, 678 P.2d 386 (Alaska 1984), *citing* 2A Sands, Sutherland Statutory Construction § 49.09 at 256 (4th Ed. 1973).

The federal courts have been interpreting the Social Security Administration's SSI regulations for many years. For at least forty years, (i.e. long prior to Alaska's adoption of its Interim Assistance Program), that interpretation has required that the burden of proving an SSI claimant's ability to perform other work be shifted to the agency at "step 5". [24] Alaska's Adult Public Assistance statutes (A.S. § 47.25.430 - .615) were enacted in 1982 (*see Moore v. Beirne*, 714 P.2d 1284 (Alaska 1986). Accordingly, the Alaska Legislature is deemed to have been aware of the federal SSI regulations and of the federal courts' interpretation of the SSI regulations – (i.e. that the burden of proof shifts to the agency at "step 5" of the disability analysis) - and to have intended to incorporate that interpretation into the Interim Assistance Program, at the time it created the Interim Assistance Program.

In summary, the DHSS Interim Assistance regulations must be interpreted in a manner consistent both with the SSI regulations which they have adopted by reference, and with the "judicial gloss" accumulated through years of decisions interpreting those SSI regulations. Accordingly, the burden of proof must be shifted from the claimant to the agency at this stage of the Interim Assistance analysis.

C. Has the Division Proven That the Claimant Can Still Perform Any Work?

To meet its burden at "step 5," the agency must show (1) that the claimant's impairment still permits certain types of activity necessary for other occupations; (2) that the claimant's experience is transferable to other work; and (3) that specific types of jobs exist in the national economy which are suitable for a claimant with these capabilities and skills. *Decker v. Harris,* 647 F.2d 291, 294 (2nd Cir. 1981). It is not the claimant's burden to develop vocational evidence at step five. *See Thompson v. Sullivan,* 987 F.2d 1482, 1491 (10th Cir. 1993).

[24] For examples of early SSI cases interpreting the SSI disability analysis as shifting the burden to the agency at "step 5," see *Meneses v. Secretary of Health, Education and Welfare*, 143 U.S. App. 81, 84, 442 F.2d 803, 806 (1971) and *Kerr v. Richardson*, 387 F. Supp. 361, 363 (E.D. Cal 1974).

The preferred method for an agency to carry its burden at step five is through the testimony of a vocational expert. *Lopez v. Califano*, 481 F.Supp. 392 (D.C. Cal. 1979). In this case, however, DPA presented no vocational evidence because it asserted that it was not required to do so.

In many circumstances, a decision on whether a claimant is disabled can be made, even in the absence of expert vocational testimony, by using the Social Security Administration's Medical-Vocational Guidelines (located at 20 CFR, Part 404, Subpart P, Appendix 2). These guidelines, known as "the Grids," are fact-based generalizations about the availability of jobs for people of varying ages, educational backgrounds, and previous work experience, with differing degrees of exertional impairment. *Holley v. Massanari*, 253 F.3d 1088, 1093 (8th Cir. 2001). The Grids "are used to evaluate the claimant's age, education, past work experience, and RFC [residual functional capacity] in order to determine whether that claimant is disabled." *Poole v. Astrue,* 2010 WL 2231873 (W. D. Ark. 2010).

In this case, the Claimant is 48 years old, is literate and able to communicate in English, but has less than a full high school education, and has performed only unskilled work. *See* Findings of Fact at Paragraphs 1, 25, 26, and 27, above. Accordingly, *if the Grids were applied*, and if the Claimant were found to be able to perform any work, it would be under Rule 201 of "the Grids" ("Maximum sustained work capability limited to sedentary work as a result of severe medically determinable impairment(s)"). The specific sub-rule that would apply is Rule 201.18. According to that rule, where (as here) a person's age is between 45 – 49 years; the person has a limited education (has not graduated from high school), and was previously engaged in unskilled employment, the person is deemed *not* to be disabled.

It is well established, however, that "the Grids" do not apply if the claimant has a significant non-exertional impairment. See, for example, *Cole v. Secretary of Health and Human Services*, 820 F.2d 768, 771 (6th Cir. 1987), *Payan v. Chater*, 959 F.Supp. 1197 (C.D. Cal. 1996). Non-exertional impairments include mental impairments, sensory impairments, and impairments involving environmental limitations. *See Cole, supra*, 820 F.2d at 772; *see also Johnson v. Secretary*, 872 F.2d 810, 814 (8th Cir. 1989) (headaches are a non-exertional impairment); *Gray v. Apfel*, 192 F.3d 799, 802 (8th Cir. 1999) (pain, mental incapacity are non-exertional impairments); *Van Winkle v. Barnhart*, 55 Fed. Appendix 784 (8th Cir. 2003) (anxiety and depression are non-exertional impairments); *Case v. Barnhart*, 165 Fed. Appendix 492 (8th Cir. 2006) (depression is a non-exertional impairment).

In this case, the impairments on which the Claimant's allegations of disability are primarily based - (i.e. her mood disorder, PTSD, and personality disorder) – are all mental impairments. As discussed above, mental impairments are non-exertional impairments, and the Grids cannot properly be applied where (as here) a significant portion of a claimant's disability is based on non-exertional impairments.

The Claimant *may* be able to perform *some types* of sedentary work *in spite of her mental impairments.* However, the Division chose not to present evidence on this point based on its interpretation of the governing law. On the other hand, the Claimant presented credible testimony indicating that her mental impairments significantly impinge on her ability to work (*see* Findings of Fact at Paragraph 31(f)).

Where a claimant cannot perform the full range of work in a particular category due to non-exertional impairments such as a mental disorder, an agency cannot carry the step-five burden by relying on the Guidelines, but must introduce testimony from a vocational expert as to the availability of jobs that a person with the claimant's profile could perform. *See*, for example, *Trent v. Secretary of Health and Human Services*, 788 F.Supp. 939 (E.D. Ky. 1992); *Gathright v. Shalala*, 872 F.Supp. 893 (1993); *Banks v. Apfel*, 144 F.Supp. 2d 752 (2001); *Johnson v. Barnhart*, 378 F.Supp.2d. 274 (2005); *Baker v. Barnhart*, 457 F.3d 882, 888, 894-895 (8th Cir. 2006). The Division did not do so.

In summary, the Claimant proved that she can no longer perform her prior work; the burden of proof shifted to the Division, and the Division then failed to prove that the Claimant is capable of performing other work. The Claimant is therefore deemed disabled based on the SSA's regulations and case law which are incorporated into Alaska's Interim Assistance Program.

CONCLUSIONS OF LAW

1. The criteria which must be satisfied in order to qualify for Interim Assistance are equivalent to the criteria which must be satisfied in order to qualify for federal Supplemental Security Income.

2. The interpretation of state Interim Assistance regulation 7 AAC § 40.180 urged by the Division in this case, as not requiring Step 4 or Step 5 of the Social Security SSI disability analysis, is contrary to the Division's own official interpretation of the Interim Assistance Program's eligibility requirements as set forth in Section 426-2C of the Adult Public Assistance Manual. Accordingly, the interpretation of 7 AAC § 40.180 asserted by the Division in this case fails the deferential "reasonable basis" standard of review.

3. The Division must determine disability like the Social Security Administration determines disability and must consider educational and vocational factors as required by Steps 4 and 5 of the Social Security SSI disability analysis.

4. If an applicant for Interim Assistance proves that she can no longer perform her prior work, then the burden of proof shifts to the Division, and the Division must present evidence demonstrating that the applicant can perform some other type of work.

5. The Claimant carried her burden and proved, by a preponderance of the evidence, that:

   a. She is not currently engaged in substantial gainful activity as defined by 20 CFR § 416.920(a)(4)(i) and 20 CFR §§ 416.971 - .974.

   b. Her mood disorder and PTSD, (both categorized under SSA Impairment Listing No. 12.06), and her personality disorder, (categorized under SSA Impairment Listing No. 12.08), constitute medically severe impairments as defined by 20 CFR § 416.920(c) and 20 CFR § 416.921(b).

   c. Her mood disorder and PTSD, (both categorized under SSA Impairment Listing No. 12.06), and her personality disorder, (categorized under SSA Impairment Listing No. 12.08), have lasted or can be expected to last for 12 months or longer, and the Claimant therefore

satisfies the twelve-month durational requirement of 20 CFR § 416.909 and 20 CFR § 416.920(a)(4)(ii).

6. The Claimant did not carry her burden and failed to prove, by a preponderance of the evidence:

a. That her mood disorder and PTSD, (both categorized under SSA Impairment Listing No. 12.06), and her personality disorder, (categorized under SSA Impairment Listing No. 12.08), meet the specific requirements of the Social Security Administration's applicable Listing of Impairments.

b. That all of her impairments, severe and non-severe, considered alone or in combination, are medically equivalent to any of the Social Security Administration's applicable Listings of Impairments.

7. The Claimant carried her burden and proved, by a preponderance of the evidence, that she can no longer perform her prior work as a result of her severe and non-severe impairments.

8. The burden of proof then shifted to the Division. The Division failed to carry its burden and did not prove, by a preponderance of the evidence, that the Claimant can still perform any type of work.

DECISION

The Division was not correct to deny the Claimant's application for Interim Assistance benefits, most recently on May 4, 2011, based on the assertion that the Claimant did not satisfy the Interim Assistance Program's disability requirements.

APPEAL RIGHTS

If for any reason the Claimant is not satisfied with this decision, the Claimant has the right to appeal by requesting a review by the Director. *If the Claimant appeals, the request must be sent within 15 days from the date of receipt of this Decision*. Filing an appeal with the Director could result in the reversal of this Decision. To appeal, send a written request directly to:

Director of the Division of Public Assistance
Department of Health and Social Services
PO Box 110640
Juneau, AK 99811-0640

DATED this 5th day of October, 2011.

(signed)

_____

Jay Durych
Hearing Authority

CERTIFICATE OF SERVICE

On October 5, 2011 true and correct copies of this document were sent to the Claimant via USPS mail, and to the remainder of the service list by secure / encrypted e-mail, as follows:

Claimant – Certified Mail, Return Receipt Requested
care of [redacted], Esq., Disability Law Center of Alaska

[redacted], Esq., Disability Law Center of Alaska
Counsel for Claimant - [redacted]

[redacted], Esq., Attorney General's Office, D.O.L.
Counsel for DPA - [redacted]@alaska.gov

[redacted], DPA Hearing Representative
[redacted], DPA Hearing Representative
[redacted], Policy & Program Development
[redacted], Staff Development & Training
[redacted], Administrative Assistant II

(signed)
By:_____
J. Albert Levitre, Jr.
Law Office Assistant I