

Office of Hearings and Appeals
3601 C Street, Suite 1322
P. O. Box 240249
Anchorage, AK 99524-0249
Telephone: (907) 334-2239
Fax: (907) 334-2285

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

In The Matter Of:)
)
) OHA Case No. 11-FH-188
)
Claimant.) DPA Case No. [REDACTED]
_____)

FAIR HEARING DECISION

STATEMENT OF THE CASE

Mr. [REDACTED] (Claimant) applied for Interim Assistance on or about April 14, 2011. (Ex. 1; Ex. 4.0) On May 10, 2011, the Alaska Department of Health and Social Services, Division of Public Assistance (Division) notified Claimant his application was denied. (Ex. 4) Claimant requested a hearing to contest the Division's denial of his application on May 10, 2011 (Ex. 4.2).

The Office of Hearings and Appeals (Office) has jurisdiction over this case pursuant to 7 AAC 49.010-020.

A Fair Hearing was held on June 17, 2011. Claimant attended the hearing telephonically, represented himself and testified on his behalf. Ms. [REDACTED], the Division's Public Assistance Analyst, attended the hearing in person, represented the Division, and testified on its behalf. Mr. [REDACTED], M.P.H., the Division's Interim Assistance Medical Reviewer, participated telephonically and testified on behalf of the Division.

All exhibits offered were admitted and the parties stipulated to the submission and admission of additional documents. The evidentiary record was held open until July 1, 2011 for the submission of additional medical documentation by the Claimant. The Division's response, if any, was due July 15, 2011. Both parties submitted additional documents.¹ (Exs. B, 18) On July 15, 2011, the evidentiary record closed.

¹ Claimant's supplementary information consisted of a psychiatric evaluation dated June 20, 2011, signed by the evaluating doctor on June 23, 2011. (Ex. B) Therefore, the Division's denial of Claimant's Application in April 21, 2011 and May 10, 2011 did not consider the psychiatric evaluation because it had not yet taken place. This fact was acknowledged by the Division in its response. (Ex. 18)

ISSUE

On May 10, 2011, was the Division correct when it denied Claimant's April 14, 2011 application for Interim Assistance benefits because Claimant's preliminary medical examination indicated he did not meet the Adult Public Assistance program's disability requirements?

SUMMARY OF DECISION

On April 14, 2011 at the time of his application for Interim Assistance benefits, Claimant was not engaged in substantial gainful activity. The Division conceded that Claimant's bipolar/ADD disorder and anxiety disorder are medically severe impairments that have lasted and can be expected to last for not less than 12 months. Therefore, Claimant satisfied the requirement to prove he had a medically severe impairment that met the durational requirement. Claimant did not prove he met the required disability criteria of the Social Security Administration's applicable Listing of Impairments for bipolar/ADD disorder and anxiety disorder. Claimant did not prove he cannot perform his prior work as a result of his impairments. Because Claimant can still perform his prior work, he is not permanently and totally disabled.

FINDINGS OF FACT

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

1. On April 14, 2011, Claimant applied for Adult Public Assistance (APA) and Medicaid. (Ex. 1; Ex. 4) Neither party supplied the application as evidence for this decision. However, the Division's Interim Assistance Medical Reviewer described that in his application, Claimant alleged he suffered "affective disorders," "anxiety disorders," degenerative disc disease with neck pain," and migraine headaches. (Ex. 2.0-2.2)
2. In addition, Claimant supplied the Preliminary Examination for Interim Assistance (AD 2) form completed by Dr. [REDACTED], D.O. on April 19, 2011, diagnosing Claimant with "bipolar disorder, anxiety depression, post-traumatic stress disorder, migraine headaches, attention deficit disorder, degenerative disc disease, cervical spine, 3 discs, neck pain." (Ex. 2.2) Dr. [REDACTED] wrote Claimant was not expected to recover from the diagnosed conditions. (Ex. 2.2) However, Dr. [REDACTED] also circled the 12th month in response to the question "what is the expected length of time required for recovery or remission?" (Ex. 2.2) Also, Dr. [REDACTED] reports supply no medical evidence concerning the conditions he reported as diagnoses on the April 19, 2011 Preliminary Examination for Interim Assistance report.
3. Claimant supplied medical evidence consisting of reports of visits to the [REDACTED] Clinic, Fairbanks, between April 2009 and May 27, 2010 (Exs. 2.18-2.57) and reports of visits to the [REDACTED], Kenai, between July 2010 and March 15, 2011. (Exs. 2.25-2.16) There is no record of diagnosis of or treatment for "degenerative disc disease, cervical spine, 3 discs" or "neck pain" or "migraine headaches" contained within these medical reports.
4. The medical reports referenced in paragraph 3 hereinabove pertain to Claimant's prescribed medications for the purpose of treating and/or controlling his bipolar/ADD/depression disorder(s) and

reported symptoms of anxiety.² (See Exs. 2.5-2.57) In addition, these medical reports include diagnosis and treatment for “essential hypertension/Anxiety” on January 12, 2011. (Exs. 2.10-2.12)

5. The primary prescribed medications which Claimant took in varying dosages and at varying times to control his bipolar/ADD and anxiety disorders are: adderall, ambien, clonazepam,³ lamictal, valium. (See Exs. 2.18-2.57)

6. The medical evidence of Claimant’s psychiatric/psychological condition consistently is reported as normal by Dr. [REDACTED] when Claimant was in Fairbanks (April 2009-May 2010). For example, on May 27, 2010, Dr. [REDACTED] writes Claimant is “oriented to time, place, person, and situation, ... affect is normal,... is anxious, does not have thoughts of grandiosity, does not have paranoia, has normal insight, does not have pressured speech, and does not have suicidal ideation.” (Ex. 2.20; *see also* Ex. 2.18-2.56)

7. The medical evidence of Claimant’s psychiatric/psychological condition consistently is reported as normal by Dr. [REDACTED] while Claimant was in Kenai (July 2010-March 2011). On March 15, 2011, one month before Claimant’s April 15, 2011 application, Dr. [REDACTED] writes Claimant appears “alert, no acute distress, well hydrated, well developed, well nourished, appropriate dress”; has no cardiovascular or respiratory problems, “psych: Oriented to all spheres, affect and mood appropriate, normal interaction, good eye contact.” (Ex. 2.5; *see also*, 2.8; 2.11; 2.15: 2.23)

8. Claimant’s reports of sleep problems are repeatedly found in the reports of his medical visits between April 2009 and March 2011. (for example, Exs. 2.8; 2.19; 2.22; 2.28; 2.31; 2.37; 2.43;2.46; 2.49; 2.52; 2.56) On February 11, 2011, Claimant was prescribed Amitriptyline at bedtime for sleep. (Ex. 2.8)

9. On April 21, 2011, the Division’s Interim Assistance Medical Reviewer evaluated Claimant’s application and medical information. (Ex. 2.0) The Medical Reviewer’s analysis found Claimant’s Application should be denied. (Ex. 2.0) The reasoning for the denial was:

a. Claimant did not meet or exceed a listed impairment of 20 C.F.R. § 404, Subpart P, Appendix 1, subsection 12.04 and 12.06 “Affective Disorders and Anxiety Disorders” because he failed to present medical evidence demonstrating at least two of the listed conditions, provided “no formal psychological testing”, “no indication of history of psychiatric hospitalizations or need for assisted living”, and “no indication of impairment to activities of daily living”; and because the physical examinations of Claimant by his doctors “consistently note: ‘psychological: oriented to all spheres, affect and mood appropriate, normal interaction, good eye contact.’”

b. Claimant did not meet or exceed 20 C.F.R. § 404, Subpart P, Appendix 1, subsection 1.04 in regard to degenerative disc disease with neck pain because the medical records Claimant made available in support of his application did not indicate the presence of any of the disability criteria for this condition.

² Section 12.04 of the 20 C.F.R. Part 404, Subpart P, Appendix 1 listings of impairments, discussed below, categorizes depression as well as bipolar disorder. Therefore, both are addressed together in this case.

³ Clonazepam is available generically as klonopin: for purposes of this decision, the two drugs are the same.

c. Claimant did not provide medical evidence of “etiology or resultant loss of everyday function” pertaining to migraine headaches, and the medical records Claimant made available in support of his application did not indicate the presence of any of the criteria for this condition.

d. The Division conceded “Steps one and two”; that is, Claimant was not employed at the time of his application and had a severe medically determinable impairment lasting 12 or more months, thereby conceding Claimant had proved the requirements of the first two steps of the SSI five step sequential evaluation of alleged disability.

(Ex. 2.0)

10. On May 9, 2011, the Division denied Claimant’s Application for Interim Assistance. (Ex. 3) On May 10, 2011, the Division informed Claimant it had denied his application because “review of your doctor’s preliminary medical examination indicates you do not meet the APA program’s disability requirements.” (Ex. 4.0)

11. On May 10, 2011, Claimant telephonically requested a Fair Hearing of the Division’s action. (Ex. 4.1-4.2)

12. On June 14, 2011, Claimant supplied the Office of Hearings and Appeals with a copy of a letter from [REDACTED], Olympia, WA, dated January 3, 2007, written by Dr. [REDACTED], M.D. [REDACTED] Psychiatry. The letter states Claimant was disabled for work between January 3, 2007 through June 2007 (“estimate”) due to “Bipolar Disorder-Depression” and Claimant needed to be reevaluated to “note progress.” (Ex. A) The Division’s Interim Assistance Medical Reviewer did not specifically reference this document in his review on April 21, 2011. (Ex. 2.0)

13. At the hearing on June 17, 2011, Claimant supplied credible testimonial evidence that:

a. He is seeking a finding of disability based on his bipolar disorder and ADD, which includes the post-traumatic stress, but not based on his degenerative disc disease, cervical, spine, neck issues and migraine headaches.

b. He has had mental/emotional problems all his life but did not know what they were due to until recently when bipolar disorder was identified; he has been trying to control his condition, to understand it, to find the right medication for it his whole life.

c. In 1998 he was diagnosed with depression and given anti-depressive medication.

d. In 2002 he was diagnosed as bipolar, and given anti-depressive medication and lithium because he had difficulty with confusion and concentration at work.

e. In 2005, 2006 and 2007 he attempted suicide, he has no understanding of why he wanted to commit suicide; Claimant did not supply documentation of these suicide attempts.

f. After these attempts he was hospitalized for about two weeks for diagnostic purposes and he was prescribed Adderall and other medications to try to find the right medication; however, the medications just took “the edge off” and he returned to work.

g. He has tried about 15 medications, counseling, exercise, and a number of other alternatives to get control of, and manage, his disorder without success, and suddenly it seems his condition is getting worse.

h. When he threw away his medications, he did so because he believed those medicines were not helping him and might be inhibiting his ability to deal with his condition. When he discovered he needed a medicine he immediately went to the doctor and had it replaced.

i. He is scared of bipolar disorder because he does not understand what his condition is and why he cannot control it. He is scared because the bipolar is causing major inability to concentrate, seems to be getting worse, and he has done substantially more difficult work than the level of work he now is unable to do.

j. He has problems where he goes out and spends a lot of money and then has to find a way to live without money.

k. His condition does not impact his dressing or bathing but it does affect his eating habits, "its very up and down," he can drive, buy groceries, he could cook if he wished and carry on other activities of daily living.

l. He has been fired from two jobs due to his mental conditions, for which he has taken medication for 12 to 15 years without finding medications which satisfactorily treat his conditions. After he lost one job, he tried consulting without success. He just got fired for symptoms of bipolar disorder after 5 weeks of work, when he was supposed to have 18 weeks of guaranteed work under the Alaska Family Leave Act but the State of Alaska let him go on or about January 25, 2011 because of his bipolar disorder.

m. Claimant read from a work performance evaluation from the State of Alaska (which was not submitted into the evidentiary record) that his behavior is a roller coaster ride because he has "on-day" and "off-day" moment by moment difficulties with concentration and thinking.

n. His employment includes work as a research and development analyst for pulp paper, in an analytical laboratory, for the City of Centralia, WA, for the State of Tennessee in testing and lab work, and for the State of Alaska; most or all of his work ended due to "weird situations."

o. He has a B.A. from [REDACTED], WA with a lot of environmental and art emphasis and additional continuing education credits; he worked for the city of [REDACTED], WA as a process analyst. He has 17 certifications within his specialty such as: wastewater treatment operator, spill prevention and response, effluent pollution control and EPA method 9 stack reading, effluent pollution control, enforcement of rules, field office inspector, 2 investigative certificates including Homeland Security for environmental crimes, and a number of others.

p. Claimant believes he is doing all that he can to control his bipolar disorder and believes he has been unsuccessful and is unable to hold a job because of it.

14. The Division's Interim Assistance Medical Reviewer testified in relevant part as follows:
 - a. There was insufficient medical evidence on which basis Claimant could be found to have met or equaled the criteria for impairments listed as affective disorders or anxiety disorders.
 - b. There was no evidence supporting the diagnosis of degenerative disc disease with neck pain.
 - c. There was no evidence supporting a diagnosis of migraine headaches which could be considered as a listed impairment.
15. The most current information (June 20, 2011) concerning Claimant's bipolar/ADD disorder is found in the psychiatric evaluation on June 20, 2011 by Dr. [REDACTED], M.D., signed June 28, 2011. (Ex. B) The evaluating doctor noted the history was obtained from Claimant. (Ex. B, p. 3)

The doctor wrote in the category "Mental Status Examination" that Claimant was "alert and oriented to person, place, time and situation." ... "Psychomotor activity was within normal limits. Memory was intact for immediate, recent and remote memory. Serial sevens were preformed [sic] as '93,86,71,62'. Proverbs and similarities were interpreted with adequate abstraction ability. Insight and judgment were deemed fair." (Ex. B, p. 4) Claimant was not at risk for self-harm. (Ex. B, p. 5)

This doctor noted Claimant also was "on long term Benzodiazepine treatment in the presence of prior alcohol abuse or dependence." (Ex. B, p. 5) A "diagnostic review" chart was established for bipolar disorder, attention deficit/hyperactive disorder, and post-traumatic stress disorder, but it is not completed and no testing results are indicated on it. (Ex. B, pp. 7-8)

Claimant elected not to continue the patient/physician relationship and therefore the psychiatric evaluation was viewed as a one-time consultation. (Ex. B, p. 5) There is no diagnosis and no testing results in the evaluation.

16. On June 22, 2011, Claimant returned to Dr. [REDACTED] to discuss concerns about his medications, in particular Lamictal, Adderall and Valium. (Ex. B, p. 6) No testing was done.

17. Claimant's medical care for bipolar/ADD and anxiety disorders: Claimant provided medical reports of treatment since April 2009 documenting he has been treated for these disorders.⁴ All of the

⁴ The medical evidence pertaining to these conditions discloses that at least subsequent to April 10, 2009 Claimant was prescribed medications and treatment of bipolar/ADD and anxiety as follows:

1. On April 10, 2009, Claimant's doctor [REDACTED], D.O. of the [REDACTED] Clinic identified his "chronic problems" as "attention deficit" with hyperactivity and bipolar affective disorder. (Ex. 2.56) Dr. [REDACTED] treated Claimant at least from April 2009 until May 27, 2010. (Exs. 2.18-2.57) Dr. [REDACTED] prescribed Zyprexa and Clonazepam⁴ and continued his Lamictal, on July 21, 2009. (Ex. 2.55)
2. By September 15, 2009, Claimant was taking Clonazepam, Adderall, Ambien, Seroquel and Lamictal. (Ex. 2.53)
3. On October 23, 2009, Dr. [REDACTED] adjusted these medication dosages. (Ex. 2.47)
4. On November 11, 2009, Dr. [REDACTED] noted Claimant reported "problems with his routine psych meds and recently decided to stop all his medications on his own accord." (Ex. 2.42) Dr. [REDACTED] notes that after Claimant

reports of his medical visits contain only the doctor's impressions about Claimant and Claimant's statements about Claimant's conditions. There are no reports of laboratory analyses, tests, or objective results of any evaluative or diagnostic procedure, with one exception. That exception was a report of Claimant's urine analysis test for drugs, on October 11, 2011. (*See* Exs. 2.18-2.57)

18. Claimant's Physical Impairments: The medical records concerning Claimant's treatment by Dr. [REDACTED] do not contain any evidence of degenerative disc disease, cervical, spine, 3 discs, and neck pain. (Exs. 2.18-2.57)

19. Claimant's work history presented through his medical records:

a. In April 2009, Claimant was working as an "environmental coordinator" in or near Fairbanks, Alaska. (Ex. 2.56)

b. In September 2009, Claimant's employer was listed as a "refinery" where his occupation was "manager" and "environmental coordinator." (Ex. 2.48)

threw away his medications, Claimant experienced adverse symptoms and went of his own accord to obtain refills. (Ex. 2.42) Dr. [REDACTED] then terminated all medications except Clonazepam and Lamictal. (Ex. 2.42, 2.44)

5. On December 2, 2009, Claimant's medication review resulted in the re-introduction of Adderall, and continuation of Clonazepam and Lamictal. (Ex. 2.38)

6. On December 14, 2009, Dr. [REDACTED] continued the Clonazepam and Adderall in anticipation of Claimant's move to Montana; Dr. [REDACTED] notes Claimant's need for "formal psychiatric evaluation and management which unfortunately has been quite difficult to obtain here in Fairbanks." (Ex. 2.35) Dr. [REDACTED] noted Claimant was leaving Alaska on December 15, 2009.

7. On February 1, 2010, Dr. [REDACTED] again prescribed Klonopin, Adderall and Lamictal medications for Claimant. (Ex. 2.32)

8. On April 1, 2010, Dr. [REDACTED] continued the prescribed medications of Klonopin, Adderall and Lamictal. (Ex. 2.23)

9. On May 27, 2010, Dr. [REDACTED] noted Claimant was moving to Anchorage and continued his prescribed medications of Klonopin, Adderall, and Lamictal. (Ex. 2.20)

10. On July 17, 2010, Claimant had an office visit at the [REDACTED] in Kenai to obtain refills for his Adderall and Clonazepam for his reported ADD and "situational Manic Depressive / Bipolar Disorder. (Ex. 2.15) His use of Lamictal was recorded. (Ex. 2.15)

11. On January 12, 2011, Dr. [REDACTED], D.O., saw Claimant who wanted to discuss the stress he had at work with his boss. (Ex. 2.10) Dr. [REDACTED] identified four problems: bipolar disorder, "essential hypertension," for which he prescribed Lisinopril, and anxiety disorder and PTSD, for which he prescribed Valium. (Ex. 2.12)

12. On February 11, 2011, Dr [REDACTED] altered Claimant's prescribed medication by stopping the Ambien, adding amitrypyline, and refilling the Valium prescription. (Ex. 2.7-2.9)

13. On March 15, 2011, Dr. [REDACTED] prescribed refills of Claimant's Valium and Adderall for identified problems of anxiety, ADHD and depression. (Ex. 2.5)

14. On April 19, 2011, Dr. [REDACTED] notes that Claimant "has run out of Lamictal, which he has been using to control the bipolar disease." (Ex. 2.2)

- c. On December 2, 2009, Claimant reported he had been “let go” from his current job and was looking for work. (Ex. 2.36)
- d. On December 12, 2009, Claimant reported he was moving to Montana to research a work opportunity. (Ex. 2.33)
- e. On April 1, 2010, Claimant was unemployed, looking for work and reporting mental stress as a result. (Ex. 2.21)
- f. By May 27, 2010, Claimant had become employed in Anchorage (Ex. 2.21) but was based in Kenai. (Ex. 2.15)
- g. On January 12, 2011, Claimant reported difficulties at work during an office visit with his doctor. (Ex. 2.10)
- h. On February 11, 2011, Claimant reported he was unemployed and was looking at work opportunities in Washington, Houston, Barrow, or Montana. (Ex. 2.7)

PRINCIPLES OF LAW

I. Burden of Proof and Standard of Proof.

An individual who applies for public assistance benefits has the burden of proving he is eligible for them. *See, State of Alaska Alcohol Beverage Control Board v. Decker*, 700 P.2d 483, 485 (Alaska 1985). When an application is denied, the applicant continues to have the burden of proving he is eligible for the benefits he seeks. “Ordinarily the party seeking a change in the status quo has the burden of proof.” *See, State of Alaska Alcohol Beverage Control Board v. Decker*, 700 P.2d 483, 485 (Alaska 1985)(n. 5, citing 2 *K. Davis, Administrative Law Treatise*, § 14.14(1958).

The standard of proof in an administrative proceeding is a “preponderance of the evidence,” unless otherwise stated. *Amerada Hess Pipeline Corp. v. Alaska Public Utilities Comm’n*, 711 P.2d 1170, 1183 (Alaska 1986) *See, 2 R. Pierce, Administrative Law Treatise*, §10.7 at 973 (5th ed. 2010) (the preponderance of the evidence standard of proof applies to the vast majority of agency actions). The applicant must meet his burden of proving eligibility by a preponderance of the evidence.

“Where one has the burden of proving asserted facts by a preponderance of the evidence, he must induce a belief in the minds of the triers of fact that the asserted facts are probably true.” *Robinson v. Municipality of Anchorage*, 69 P.3d 489, 495 (Alaska 2003).

II. Interim Assistance Program: Alaska Laws

An applicant for Adult Public Assistance benefits in the form of Interim Assistance is required to apply for Supplemental Security Income (SSI) benefits from the Social Security Administration.⁵ 7 AAC

⁵ While there are some exceptions to this rule, they do not apply in this case. *See e.g.* 7 AAC 40.170(c).

40.060. To obtain Interim Assistance benefits, an applicant must be determined by the Division to be eligible for Adult Public Assistance. AS 47.25.455(a).

The State of Alaska, through the Division of Public Assistance (Division), Adult Public Assistance Program⁶, may pay a monthly cash benefit to an eligible applicant while the applicant awaits the Social Security Administration's final decision whether the applicant is eligible to receive Supplemental Security Income. AS 47.25.455; 7 AAC 40.170(b). Alaska's monthly payment is called Interim Assistance. AS 47.25.455.

An individual may apply for Interim Assistance by alleging permanent and total disability and must be determined disabled by the Division in order to get benefits. 7 AAC 40.170; 7 AAC 40.180.

A. Application Process

An applicant for Interim Assistance is required to complete a form provided by the Division. AS 47.25.440. Upon receiving an application, the Division must "investigate promptly and record the circumstances" concerning the applicant "to determine the facts supporting the application".... AS 47.25.450.

1. Applicant has the Burden of Proving Eligibility for Benefits.

The burden of proving eligibility for benefits is on the applicant. All applicants must "furnish adequate evidence to demonstrate ... eligibility for assistance." 7 AAC 40.050(a).

The applicant must be available for an interview.⁷ 7 AAC 40.050(a). Also, examination by "an appropriate medical professional" is required of an individual applying for Interim Assistance as a blind person or as a permanently and totally disabled person. 7 AAC 40.050(c). After examination, each examiner "shall furnish a written report of the examination on a form approved by the division."⁸ 7 AAC 40.050(c).

2. Applicant has Burden of Providing Information and Evidence.

In addition to the medical reports, the Division of Public Assistance (Division)

will, in its discretion, require each applicant for aid to the permanently and totally disabled 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.

⁶ The Alaska statute authorizing Adult Public Assistance states, in relevant part: "[f]inancial assistance shall be given under AS 47.25.430-47.25.615 so far as practicable under appropriations made by law, to every aged, blind, or disabled needy resident who has not made a voluntary assignment or transfer of property to qualify for assistance." AS 47.25.430(a).

⁷ However, if the Division determines it would be unreasonable to require an applicant to make himself available for an interview, the applicant may provide written statements of persons who know the applicant's financial and other circumstances relating to his eligibility for Interim Assistance. 7 AAC 40.050(a); *see also* subsection (c).

⁸ The Department of Health and Social Services uses a form titled "Preliminary Examination for Interim Assistance," commonly called an "AD-2." *See* <http://dpaweb.hss.state.ak.us/manuals/apa/apa.htm>.

7 AAC 40.050(d). Regulation 7 AAC 40.050 authorizes the Division to seek information concerning the applicant's circumstances which is not medical information, according to the Division's sole discretion. The applicant has the responsibility to provide the information if the Division requests information.

3. The Division must Determine if an Applicant is Disabled.

This regulation, 7 AAC 40.050, is expressly incorporated by reference in regulation 7 AAC 40.180(b) that requires the Division to determine whether or not an applicant is disabled.

Regulation 7 AAC 40.180(b) incorporates regulation 7 AAC 40.050 by stating the Division's determination of disability must be based on "other evidence provided by the applicant under 7 AAC 40.050, if applicable...." 7 AAC 40.180(b)(3). Regulation 7 AAC 40.180(b)(3) and/or regulation 7 AAC 40.050 do not require the Division to consider non-medically related information when determining if an applicant is disabled unless the Division has sought and obtained information concerning an applicant's non-medical circumstances. If the Division obtains non-medical information, (pursuant to 7 AAC 40.050, for example), then regulations 7 AAC 40.180(c)(3) and (4) require the Division to consider the information supplied by the applicant.

The Division must make a determination of eligibility within 30 days of receiving an application.⁹ 7 AAC 40.070.

III. Eligibility Criteria for a Determination of Permanent and Total Disability: 7 AAC 40.180.¹⁰

For purposes of receiving Interim Assistance, the Alaska Legislature has defined the word "disabled" to mean "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."¹¹ AS 47.25.615(5).

Regulation 7 AAC 40.180 establishes what the Division must do when determining whether an applicant is totally and permanently disabled.

A. Regulation 7 AAC 40.180(a).

This subpart of regulation 7 AAC 40.180 requires that an individual applying for Interim Assistance must be examined by a psychiatrist or other physician who has entered into a current provider agreement with the Department and who provides written results of the examination to the Department on an approved form. 7 AAC 40.180(a). The Division must review the written results of a medical examination conducted by an approved provider who has examined an applicant for purposes of

⁹ An applicant for Interim Assistance first is screened for financial eligibility. 7 AAC 40.170; 7 AAC 40.230.

¹⁰ Blindness is addressed separately by regulation 7 AAC 40.160 and is not at issue in this case. Therefore, this decision does not include matters pertaining to blindness.

¹¹ The Alaska definition of "disability" is nearly identical to that of the Social Security Administration, Supplemental Security Income (SSI) definition. The definition of "disability" for SSI purposes is: "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." 10 C.F.R. §416.905(a).

determining if the applicant is disabled.¹² 7 AAC 40.180(a). This regulation focuses the base of the Division's disability determination on the medical evidence of an applicant's disability.

B. Regulation 7 AAC 40.180(b).

When an individual applies for Interim Assistance because of disability, regulation 7 AAC 40.180 requires the Division to determine whether the applicant is disabled based on four (4) factors. These are:

(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;¹³

(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 applicable¹⁴; and

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

C. Regulation 7 AAC 40.180(c).

Alaska regulation 7 AAC 40.180(c) requires the Division, when "determining whether an applicant's disability meets the criteria set out in (b)(1)(B) of this section," to "consider" five (5) additional factors. The five factors in subsection (c) are to be "considered" in making a determination whether the applicant's alleged disability meets the SSA's "disability criteria for the listings of impairments." These five factors are incorporated by reference in subsection (b), part (1)(B). In other words, the factors of 7 AAC 40.180(c) are to be considered solely in relation to the applicant's alleged medical impairment(s) and not in relation to the other factors of 7 AAC 40.180(b).

¹² The written results of the medical examination must be on a form approved by the Department of Health and Social Services (Department). 7 AAC 40.180(a). The form approved for this purpose is a two page form called "Preliminary Examination for Interim Assistance", also known as the "AD 2."

¹³ Federal SSI regulation 20 C.F.R. § 416.934 is found in Part 416 – "Supplemental Security Income for the Aged, Blind, and Disabled." Regulation § 416.920 provides for the "[e]valuation of disability of adults, in general" and establishes a five-step sequential evaluation process for determining if an applicant meets the disability criteria. The SSI regulation 20 C.F.R. § 416.911(a)(1) expressly incorporates the "Listing of Impairments in appendix 1 of subpart P of part 404..." in its definition of a disabling impairment if the applicant is an adult seeking SSI.

¹⁴ Regulation 7 AAC 40.050 is expressly incorporated by reference. Therefore, if the Division has exercised its discretion to request "other evidence" concerning an applicant's circumstances pursuant to that regulation, the Division is required to base its determination of applicant's disability on that evidence, at least in part and to the extent that the information is applicable.

Moreover, the Division is not to determine if an applicant is disabled by any or all of the factors of 7 AAC 40.180(c) but is to consider how the applicant's circumstances (in relation to the subsection (c) factors) contribute to the applicant's allegedly disabling medical conditions under 7 AAC 40.180(b)(1)(B).

Regulation 7 AAC 40.180(c) states:

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.

The requirements of 7 AAC 40.180(c) substantially incorporate considerations found in the federal SSI five-step sequential evaluative process.¹⁵ This is discussed further below.

IV. Interim Assistance Program: Federal Regulations Incorporated Expressly Into Alaska Regulations.

Alaska regulations 7 AAC 40.180(b)(1)(A) and (B) expressly require the Division to consider some certain federal regulations that the Social Security Administration (SSA) applies to determine if an applicant for Supplemental Security Income (SSI) is disabled and therefore eligible for SSI benefits.¹⁶

The Division requests the applicant's medical provider(s) to complete a "Preliminary Examination for Interim Assistance" form, commonly called an "AD 2." Unless an applicant is presumed disabled, the medical examiner is to write what is the applicant's diagnosis; whether the applicant is expected to recover from the illness or condition; if so, what is the expected length of time for recovery; and to provide any other information relevant to the applicant's illness or condition or recovery period. Finally, the medical examiner is requested to provide "any relevant medical records, laboratory or other test results used to confirm the applicant's diagnosis.

¹⁵ Alaska regulation 7 AAC 40.030(a) concerning potential conflicts between state Interim Assistance regulations and federal SSI program regulations provides: "[i]f the requirements of [Adult Public Assistance benefits] 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." Alaska has no regulation listing specific impairment categories applicable to disability determinations and incorporates federal regulations by reference in 7 AAC 40.180(b)(1).

¹⁶ Claimant does not assert his impairment falls within the listing of impairments resulting in a determination of presumptive disability under either the state or federal description. Therefore, presumptive disability is not addressed in this decision.

A. Alaska Regulation 7 AAC 40.180(b)(1)(B): Incorporation of Federal Regulation 20 C.F.R. Part 404, Subpart P, Appendix 1 Concerning Disability Criteria for Listings of Impairments.¹⁷

Alaska regulation 7 AAC 40.180(b)(1) requires the Division to determine whether the applicant's impairment meets the disability criteria for the listings of impairments found in appendix 1. Alaska Regulation 7 AAC 40.180(b)(1)(B) expressly incorporates the disability criteria of 20 C.F.R. Part 404, subpart P, appendix 1. Regulation (b)(1)(B) also mandates the Division only partly base its determination whether an applicant is likely to be found disabled by the SSA on the disability criteria in the listings of impairments described in appendix 1.

The "listings of impairments" consists of a system of "body system listings." 20 C.F.R. Part 404, subpart P, appendix 1. For example, "Mental Disorders" includes a lengthy "Introduction" and other discussion concerning the evaluation of disability on the basis of mental disorders, discusses the need for medical evidence of the required duration consisting of symptoms, signs, and laboratory findings, assessment of severity including impact on the activities of daily living and social functioning, assessment of the impact on concentration, persistence or pace in relation to appropriate completion of tasks commonly found in a work setting, and episodes of decompensation.

The preliminary text also discusses the documentation needed, sources of evidence, need for longitudinal evidence, work attempts, mental status examination and psychological testing, intelligence, personality and screening tests, neurological assessments, traumatic brain injury, anxiety disorders, eating disorders, chronic mental impairments and references a "technique for reviewing evidence in mental disorders claims to determine the level of impairment severity." 20 C.F.R. Part 404, subpart P, appendix 1, 12.00 Mental Disorders, I.¹⁸

Regulation 20 C.F.R. Part 404, subpart P, appendix 1, 12.00 Mental Disorders, 12.04 Affective Disorders, applies to the bipolar/ADD issue in this case, and establishes a set of requirements that an applicant must meet in order to be considered disabled. Likewise, 20 C.F.R. Part 404, subpart P, appendix 1, 12.00 Mental Disorders, 12.06 Anxiety Related Disorders, applies to anxiety related disorders. *See* Analysis section hereinbelow.

The Division is to determine if the applicant is likely to be found disabled by the Social Security Administration (SSA), in part by reviewing the applicant's medical information in context of the pertinent body system(s) listings. Alaska regulation 7 AAC 40.180(b)(1)(B) expressly adopts the body system listing of impairments by reference. As discussed above, the Division is required to determine if an applicant is disabled, and base that determination on several factors, including whether the SSA would likely find the applicant disabled because the medical evidence he provides proves he

¹⁷ Part 404 pertains to Federal Old-Age, Survivors and Disability Insurance. Subpart P is titled "Determining Disability and Blindness." Appendix 1 is a "Listing of Impairments."

¹⁸ The Mental Disorders listing continues by identifying nine (9) categories of impairments identified by sub-number (e.g., 12.01; 12.02 etc) including, for example, "organic mental disorders," "affective disorders," "mental retardation disorders," "anxiety related disorders," "personality disorders," "substance addiction disorders," etc. Each category of disorder is described and has established on what basis the required level of severity for the disorder has been met to be considered a disability.

experiences the disabling criteria in the required severity and number described for each listed impairment.

V. Alaska Regulation 7 AAC 40.180 Requires The Division To Consider Factors In Addition to the SSA Listings of Impairments When Determining if an Applicant is Permanently and Totally Disabled.

The Division must base its disability determination on the factors identified in 7 AAC 40.180(b)(1) through (4). In addition, the Division must consider other evidence as described in 7 AAC 40.180(c).

One important distinction between regulation 180(b) and 180(c) is that 7 AAC 40.180(b)(1) requires an applicant's alleged impairment to be determined to meet a condition in the SSA's listing of impairments. However, 7 AAC 40.180(c)(1) requires the Division only to consider "whether the applicant's condition is listed as an impairment category...." Thus, even if the applicant's impairment does not meet the criteria of a listed impairment, if it is among the listed impairments, that factor must be considered by the Division in deciding if the applicant is impaired.

Also, regulation 7 AAC 40.180(b) requires the Division to make a disability determination based on "medical evidence" (b)(2); "other evidence" if requested by the Division (b)(3); and a review of the Preliminary Examination for Interim Assistance report (b)(4), as well as the listings of impairments (b)(1). In contrast, subsection 180(c) requires the Division only to consider the factors of (c)(1)-(5) but does not require a determination of the applicant's condition as to those factors.

A. The Division's Determination under 7 AAC 40.180(b)(1)(B).

The Alaska regulation 7 AAC 40.180 appears to incorporate most, if not all, of the considerations that the SSA uses in its five step process found at 20 C.F.R. § 416.920 and that the SSA applies to determine if an applicant is eligible for Supplemental Security Income (SSI).¹⁹

In addition, Alaska regulation 7 AAC 40.180(b)(1)(B) expressly requires the Division to determine if an applicant is disabled based on "a medical review... as to whether the applicant is likely to be found disabled by the Social Security Administration" (SSA), including whether the applicant "meets ...Social Security Administration disability criteria for the listings of impairments described in 20 C.F.R. 404, subpart P, appendix 1...." (hereinafter, appendix 1).

Also, the Division must apply the factors of 7 AAC 40.180(c) when it evaluates the applicant under 7 AAC 40.180(b)(1)(B). The factors of 180(c) and the requirements of 180(b)(2), (3), and (4), that the Division must consider, when determining if an applicant meets the listing of impairments of appendix 1 substantially, mimic the factors applied by the SSA when determining if an applicant for SSI is disabled under the SSA's five step sequential evaluation process. *Compare* 7 AAC 40.180(c) to 20 C.F.R. § 416.920(a)(4).

B. Alaska Regulation Incorporates Social Security Administration SSI Determination Process.

It can be confusing to compare the federal SSI and state Interim Assistance regulations, especially because some of the comparable Alaska regulations apply only to the Division's determination of whether the applicant's impairment meets the listing of impairments [under 180(b)(1)(B)], and not as separate evaluative steps applied by SSA. This confusion is allayed a bit if it is noted that 7 AAC

¹⁹ Interim Assistance provided from Alaska funds are intended to provide a financial bridge for applicants for SSI.

40.180(c) applies only to 7 AAC 40.180(b)(1)(B). Regulation 7 AAC 40.180(b)(1)(B) incorporates by reference only one step of the Social Security Administration's SSI disability analysis; that is "Step three." However, the Social Security Administration's five step SSI disability analysis includes all the factors that the Division is required to include in Alaska's 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, 351-52 (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.

The Social Security Administration's Supplemental Security Income (SSI) regulation 20 C.F.R. § 416.920(a)(4) identifies a five step sequential evaluation whereby, at each step, an applicant is determined disabled or not disabled and the disability determination either stops or continues as required. At step three of this sequence an applicant is determined to meet or not meet the disability criteria for the impairment the applicant alleges. This step incorporates "disability criteria for the listings of impairments" referenced in 7 AAC 40.180(b)(1)(B).

Step one: 20 C.F.R. § 416.920(a)(4)(i) - consider if the applicant is doing "substantial gainful activity." The approximate equivalent Alaska provision is the initial screening done to determine financial need of an applicant and what if any "efforts to engage in gainful employment" have been made by an applicant, if such information is submitted pursuant to 7 AAC 40.050(d), upon discretionary request by the Division as provided by 7 AAC 40.180(b)(3).

Step two: 20 C.F.R. § 416.920(a)(4)(ii) - consider if the applicant has one, or a combination of, severe medically determinable physical or mental impairment(s). A "severe" impairment is one that "significantly limits" an applicant's ability to do "basic work activities" that are "necessary to do most jobs," such as walking, standing, sitting, lifting, seeing, hearing, and speaking. *Dickson v. Astrue*, 2009 WL 1657538 (W.D.Ky.) Alaska regulation 7 AAC 40.180(c)(3) requires the Division to consider if the applicant's alleged impairment "affects the applicant's activities of daily living." Although the activities of daily living are not the same as "basic work activities", they are so fundamental that an applicant whose impairment affects activities of daily living must also be impaired as to basic work activities.

The severe medically determinable physical or mental impairment must meet the duration requirement incorporated from regulation 20 C.F.R. § 416.909, that is, it must have lasted or must be expected to last for a continuous period of at least 12 months or result in death. Similarly, Alaska regulation 7 AAC 40.180(c)(5) requires the Division to consider if the applicant's impairment "has lasted or is expected to last for a continuous period of not less than 12 months."

Step three: 20 C.F.R. § 416.920(a)(4)(iii) – consider if the applicant's impairment "meets or equals" the disability criteria for at least one listed impairment found in 20 C.F.R. Part 404, Subpart P,

Appendix 1.²⁰ Alaska regulation 7 AAC 40.180(b)(1)(B) expressly incorporates the listings of impairments and requires the Division to determine if the applicant is disabled. The Division's disability determination, in part, is based on if the applicant is "likely to be found disabled by SSA." To be found disabled by the SSA, an applicant's impairment must meet the SSA disability criteria for a listed impairment. If an applicant meets the duration requirement, it applies to both steps.

Step four: 20 C.F.R. § 416.920(a)(4)(iv) – consider the SSA's assessment of the applicant's "residual functional capacity" (also called the "RFC") and ability to do past relevant work. The comparable Alaska regulation is 7 AAC 40.180(b)(3). That regulation requires the Division to determine if the applicant is disabled based on "other evidence provided by the applicant under 7 AAC 40.050, if applicable," which includes evidence concerning education and training, work experience, activities before and after onset of the claimed disability, etc.

Step five: 20 C.F.R. § 416.920(a)(4)(v) – consider whether the applicant can make an adjustment to other work; the SSA regulation terms this "residual functional capacity." The comparable Alaska regulation is 7 AAC 40.180(c)(4) which requires the Division to consider if "the applicant can perform any other work, including sedentary work;..." as part of the Division's determination whether the applicant meets the disability criteria of at least one impairment listed in appendix 1.²¹

Alaska regulation 7 AAC 40.050(a) clearly requires the applicant to provide the evidence of his eligibility for assistance, thereby placing on the applicant the burden of providing evidence the applicant cannot do any work.²² Also, regulation 7 AAC 40.180(c)(4) requires the Division only to consider if the applicant can or cannot "perform any other work, including sedentary work" as part of its determination whether the applicant has met the disability criteria of a listed impairment. In contrast, the SSA must show that the applicant has no ability to adjust to any kind of work.

ANALYSIS

I. Burden of Proof and Standard of Proof.

Alaska Regulation 7 AAC 40.050(a) expressly provides "[a]ll applicants must "furnish adequate evidence to demonstrate ... eligibility for assistance." More generally, as an applicant for Interim Assistance benefits, the Claimant has the burden of proving that he is eligible for the benefits he seeks. *See, State of Alaska Alcohol Beverage Control Board v. Decker*, 700 P.2d 483, 485 (Alaska 1985).

²⁰ SSA regulation 20 C.F.R. § 416.920(a)(4)(iii), 'Step three' also requires the that the impairment which meets or equals one of the listed impairments must meet the same duration requirement of 20 C.F.R. § 416.909 as is required for 'Step two'.

²¹ These two regulations clearly consider the same factor; that is, if the applicant can adjust to do any work at all, but there is a big difference between the two requirements. Importantly, under the SSA five step sequential disability evaluation, the burden of proving an applicant can do appropriate work shifts to the SSA. This shifting of the burden of proof does not apply to the Division under Alaska law. Alaska regulation expressly states the burden of proof is on the applicant to "furnish adequate evidence to demonstrate his eligibility for assistance." 7 AAC 40.050(a). Also, Alaska regulation 7 AAC 40.030(a), concerning potential conflicts between state Interim Assistance regulations and federal SSI program regulations, provides the requirements of Alaska Adult Public Assistance (and hence Interim Assistance) will apply unless the federal SSI regulation specifically supercedes a state provision. *See* footnote 16.

²² In contrast, the federal law requires the SSA to prove the applicant can do some kind of work. *Bowen v. Yuckert*, 482 U.S. 137, 144 (1987); *Dickson v. Astrue*, 2008 WL 4287389 (N.D. N.Y.)

The standard of proof in an administrative proceeding is a “preponderance of the evidence,” unless otherwise stated. *Amerada Hess Pipeline Corp. v. Alaska Public Utilities Comm’n*, 711 P.2d 1170, 1183 (Alaska 1986) Therefore, Claimant must prove he is eligible for Interim Assistance by a preponderance of the evidence at each step of the determination of whether he is disabled or not.

II. Issue

On May 10, 2011, was the Division correct when it denied Claimant’s April 14, 2011 application for Interim Assistance benefits because Claimant did not meet the Adult Public Assistance program’s Interim Assistance disability requirements?

III. The Division’s Determination That Claimant Is Not Eligible for Interim Assistance.

The Division must apply Alaska regulation 7AAC 40.180 to determine whether an applicant for Interim Assistance is disabled and therefore eligible for benefits. This regulation has specific requirements.

First, Claimant was required to be examined by a physician or psychiatrist who reported the results of the examination on a Preliminary Examination for Interim Assistance form (AD 2). 7 AAC 40.180(a). Claimant was examined by Dr. [REDACTED], D.O. on April 19, 2011. (Ex. 2.1-2.2) Dr. Shurig stated Claimant was diagnosed with: with “bi-polar disorder, anxiety, depression, post-traumatic stress disorder, migraine headaches, attention deficit disorder, degenerative disc disease, cervical, spine, and neck pain.” (Ex. 2.2)

However, Claimant testified at the June 17, 2011 hearing that he sought Interim Assistance solely on the basis of bipolar disorder, ADD, and post traumatic stress disorder.²³ (Claimant’s testimony) The Division determined that Claimant could be evaluated for a disability determination for his mental health problems but he had not supplied medical evidence sufficient to support consideration of degenerative disc disease, cervical, spine and neck pain, and migraine headaches for purposes of a disability determination. A review of the evidentiary record makes clear there is insufficient evidence to consider any physical ailment or condition for purposes of a disability determination, and this fact was recognized by both parties. Therefore, this decision addresses solely Claimant’s mental disorder(s).

Second, regulation 7 AAC 40.180(b) requires the Division to determine whether Claimant is disabled. This determination must be based on four factors. These are:

(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

²³ Dr. [REDACTED]’s Preliminary Examination for Interim Assistance listed post traumatic stress disorder among Claimant’s diagnoses. However, Claimant provided no evidence in support of this diagnosis, aside from mentioning it in his testimony and Dr. [REDACTED]’s form. Therefore, there is no basis on which to evaluate whether this disorder can serve as a disabling impairment.

(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;²⁴

- (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 applicable²⁵; and
- (4) a review of the written results of the psychiatrist's or other physician's examination under (a) of this section.

The first factor is a review of Claimant's medical evidence for the purpose of determining if Claimant "is likely to be found disabled by the Social Security Administration..." (7 AAC 40.180(b)(1)). The Division's determination of this factor can, and does, incorporate the medical evidence of the second factor, the "other evidence" of the third factor, and the review of the "written results of the physical examination" by Dr. [REDACTED] as required by the fourth factor of 7 AAC 40.180(b). In short, determining the likelihood that the Social Security Administration will find Claimant disabled necessarily includes considering all of the factors of 7AAC 40.180(b)(2-4).

Moreover, regulation 7 AAC 40.180(c) expressly requires the Division to consider several criteria which the SSA applies when making a disability determination. All of the factors identified in 7 AAC 40.180(c) are included in the evaluative process identified as the five step sequential evaluation of an applicant's eligibility for Supplemental Security Income (SSI) by which an alleged impairment is evaluated. The requirement of 7 AAC 40.180(b)(1)(B) that the Division must determine if Claimant's impairment meets the SSI listings of impairments is the same as step three of the SSI evaluation process. Accordingly, the five step evaluation process applicable to determination by the SSA of an applicant's eligibility for SSI based on disability is employed as an aid to considering whether the Division was correct in making its determination that Claimant was not disabled for purposes of Interim Assistance eligibility.

IV. The Five Step Sequential Evaluation

The impairments asserted by Claimant or reflected by the medical records are:

1. Bi-polar disorder, depression, ADD (Ex. 2.2) listing number 12.04 in the Social Security Administration regulation 20 C.F.R. Part 404, subpart P, Appendix 1 "Listing of Impairments" (hereinafter "Listing of Impairments" or "Listing")

²⁴ Federal SSI regulation 20 C.F.R. § 416.934 is found in Part 416 – "Supplemental Security Income for the Aged, Blind, and Disabled." Regulation § 416.920 provides for the "[e]valuation of disability of adults, in general" and establishes a five-step sequential evaluation process for determining if an applicant meets the disability criteria. The SSI regulation 20 C.F.R. § 416.911(a)(1) expressly incorporates the "Listing of Impairments in appendix 1 of subpart P of part 404..." in its definition of a disabling impairment if the applicant is an adult seeking SSI.

²⁵ Regulation 7 AAC 40.050 is expressly incorporated by reference. Therefore, if the Division has exercised its discretion to request "other evidence" concerning an applicant's circumstances pursuant to that regulation, the Division is required to base its determination of applicant's disability on that evidence, at least in part and to the extent that the information is applicable.

2. Anxiety (Ex. 2.2) listing number 12.06 in the Social Security Administration regulation 20 C.F.R. Part 404, subpart P, Appendix 1 “Listing of Impairments” (hereinafter “Listing of Impairments” or “Listing”)

A. Is Claimant Performing Substantial Gainful Activity?

The first element of the disability analysis is whether the Claimant is performing “any substantial gainful activity”. Regulation 20 C.F.R. § 416.971-.976 addresses what is meant by “substantial gainful activity.” In general, “substantial gainful activity” is “work activity that involves doing significant physical or mental activities” [20 C.F.R. § 416.972(a)] and “activity” that “is the kind of work usually done for pay or profit.” [20 C.F.R. § 416.972(b)].

Claimant’s doctor’s report of February 11, 2011 documents Claimant’s report to his doctor that he was unemployed and looking for work within Alaska and in other states. (Finding of Fact 20) The Division conceded Claimant was unemployed at the time of application on April 14, 2011. Therefore, Claimant has proven by a preponderance of the evidence that he was not performing substantial gainful activity at the time of application.

B. Does The Claimant Have a Severe Impairment?

Alaska regulation requires the Division to determine if Claimant is disabled based, in part, on a review of the medical evidence the Claimant provided to prove his alleged impairment “meets” the “disability criteria for” at least one of the impairments in the “listings of impairments” of 20 C.F.R. Part 404, Subpart P, Appendix 1 (Appendix 1). 7 AAC 40.180(b)(1)(B). The SSA five step sequential evaluation at “Step two”, 20 C.F.R. § 416.920(a)(4)(ii), considers if a Claimant has a severe impairment. The Division conceded ‘Step two’ in this case. (*See* Finding of Fact 9 d.) Therefore, the Division deemed Claimant to have a severe impairment.

C. Does the Claimant’s Severe Impairment Satisfy the Durational Requirement?

Alaska regulation 7 AAC 40.180(c) requires the Division to consider whether Claimant’s impairment(s) has lasted or is expected to last for a continuous period of not less than twelve (12) months, when determining if Claimant has met the disability criteria of a listed impairment. 7 AAC 40.180(b)(1)(B). The Division’s ‘consideration’ is less demanding than the SSI evaluation ‘Step two’ requirement. Nonetheless, Claimant must prove his severe impairment meets the same twelve month duration requirement because, as discussed above, the Alaska regulation and the SSA regulation require the same duration period. 20 C.F.R. § 416.920(a)(ii) and (iii). Therefore, Claimant must prove his severe impairment meets the duration requirement or he cannot be deemed permanently and totally disabled, and hence eligible for Interim Assistance benefits.

The Division conceded the duration requirement because it conceded ‘Step two’. Therefore, Claimant has met his burden of proving his impairment has lasted or is expected to last for a continuous period of not less than 12 months. 7 AAC 40.180(c)(5).

D. Does Claimant’s Severe Impairment(s) Meet or Medically Equal “the Listings?”

Alaska Interim Assistance regulation 7 AAC 40.180(b)(1)(B) expressly requires the Division to consider whether Claimant is likely to be found disabled by the SSA based, in part, on whether Claimant’s impairment(s) meet the disability criteria for the listings of impairment found at 20 C.F.R.

Part 404, Subpart P, Appendix 1. Claimant's impairments categories are addressed at 20 C.F.R. Part 404, subpart P, appendix 1, 12.00 Mental Disorders, 12.04 Affective Disorders (for the bipolar/ADD impairment), and at 12.06 Anxiety Related Disorders (for the anxiety disorder).

For Claimant to meet his burden of proving he meets the disability criteria pertaining to bipolar disorder, he must provide evidence proving that he has met the requirements of A and B below, or the requirements of C as described below. 20 C.F.R. Part 404, subpart P, appendix 1, 12.04 Affective Disorders.

1. Affective Disorders (bipolar, ADD)

A. Medically documented persistence, either continuous or intermittent, of one of the following:

1. Depressive syndrome characterized by at least four of the following:
 - a. Anhedonia or pervasive loss of interest in almost all activities; or
 - b. Appetite disturbance with change in weight; or
 - c. Sleep disturbance; or
 - d. Psychomotor agitation or retardation; or
 - e. Decreased energy; or
 - f. Feelings of guilt or worthlessness; or
 - g. Difficulty concentrating or thinking; or
 - h. Thoughts of suicide; or
 - i. Hallucinations, delusions, or paranoid thinking; or
2. Manic syndrome characterized by at least three of the following:
 - a. Hyperactivity; or
 - b. Pressure of speech; or
 - c. Flight of ideas; or
 - d. Inflated self-esteem; or
 - e. Decreased need for sleep; or
 - f. Easy distractability; or
 - g. Involvement in activities that have a high probability of painful consequences which are not recognized; or
 - h. Hallucinations, delusions or paranoid thinking; or
3. Bipolar syndrome with a history of episodic periods manifested by the full symptomatic picture of both manic and depressive syndromes (and currently characterized by either or both syndromes);

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

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

The Division determined that Claimant did not meet these criteria because he provided no psychological testing results, no proof of psychiatric hospitalizations, and no need for assisted living. Additionally, his medical records consistently noted his physical examinations showed he was "oriented to all spheres, affect and mood appropriate, normal interaction, good eye contact." (Ex. 2) A psychiatric evaluation on June 20, 2011, supplied by Claimant after the hearing, disclosed that the most current assessment of Claimant's mental state is that he was "alert and oriented to person, place, time and situation" and that his memory and psychomotor activity were normal. *See* Findings of fact 6, 7, 15.

Claimant testified at the June 17, 2011 hearing he was hospitalized for a two week period for diagnostic purposes and medication evaluation. In addition, Claimant provided undisputed testimony that he experienced sleep disturbance, difficulty with concentration and thinking, that he believes cost him his job with the State of Alaska. Claimant's undisputed testimony was that he had made three suicide attempts, one in each year of 2005, 2006 and 2007.

Claimant's statements, by themselves, are insufficient evidence to meet the disability criteria. 20 C.F.R. § 416.908. The Division is required to make its determination whether Claimant is permanently and totally disabled based on medical evidence. 7 AAC 40.180(a), (b)(1), (2), (4). Claimant provided no evidence that he suffers "[b]ipolar syndrome with a history of episodic periods manifested by the full symptomatic picture of both manic and depressive syndromes (and currently characterized by either or both syndromes)."

Claimant provided the medical reports of visits to his doctors who provided him with medication to control his bipolar/ADD and anxiety symptoms but did not provide tests or results of tests confirming his diagnosis of bipolar/ADD disorder. However, Claimant's medical evidence supports his assertion that he has suffered impairment from bipolar/ADD and related anxiety and other symptoms for most of his life. Claimant's evidence is that he has been able to able to work for periods of time while having bipolar/ADD disorder and related anxiety.

However, Claimant did not provide sufficient medical evidence that not based on Claimant's statements and reports to his doctors. Claimant did not provide medical evidence based on acceptable clinical and laboratory diagnostic techniques, or evidencing signs, symptoms and laboratory findings supporting his testimony or proving he meets the disability criteria of the listing of impairments for bipolar/ADD disorders and anxiety.

Alternatively, Claimant did not provide “medically documented persistence, either continuous or intermittent” of any of the other disability criteria in subsections 1 or 2, as required by 12:04 Affective Disorders (1)(A). At best, Claimant provided a record of his statements to his doctors that he was suffering sleep problems. *See* Finding of fact 8. However, to meet the disability criteria of this listing, Claimant also would have to prove that his sleep problems resulted in “at least two” of: “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.” Claimant’s medical evidence did not show any restriction or difficulties or episodes of decompensation. In addition, only Claimant’s testimonial reading from a performance evaluation suggested he had difficulty maintaining concentration due to his mental disorder.

Finally, Claimant did not meet the alternate disability criteria of proving he has a

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

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

Therefore, Claimant did not meet the disability criteria of A and B. For the same reason, Claimant did not meet his burden of proving he met the disability criteria of C.

The Division did not err in determining that Claimant is not “likely to be found disabled by the Social Security Administration” because he does not meet the “disability criteria of 20 C.F.R. Part 404, Subpart P, Appendix 1, 12.04 Affective Disorders, as required by 7 AAC 40.180(b)(1)(B).

2. Anxiety Disorders (anxiety)

Claimant also was diagnosed with anxiety by Dr. [REDACTED] and provided testimony that he was scared about the effects of his bipolar disorder/ADD and the problems it causes him when it is uncontrolled. Regulations at 20 C.F.R. Part 404, subpart P, appendix 1, 12.00 Mental Disorders, at 12.06 Anxiety Related Disorders (for the anxiety disorder) provide:

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.

As discussed above, Claimant provided only medical records proving he had been prescribed medications to control bipolar/ADD and anxiety disorders. Claimant did not provide "medically documented findings" of any of the criteria necessary to prove he meets the listing of impairment for an anxiety related disorder. Claimant's reports to his doctors and in his testimony was that he was scared of the apparent worsening of his bipolar disorder and the apparent inability of his medication to control it. This anxiousness does not amount to the "generalized persistent anxiety" or a "persistent, irrational fear" or "severe recurrent panic attacks" or "recurrent obsessions or compulsions." Alternatively, there is no evidence Claimant has a "complete inability to function outside" of his home. Therefore, Claimant does not meet the disability criteria of impairment 12.06 Anxiety Related Disorders, parts A and B or C.

The Division did not err in determining that Claimant is not "likely to be found disabled by the Social Security Administration" because he does not meet the "disability criteria" of 20 C.F.R. Part 404, Subpart P, Appendix 1, 12.06 Anxiety Related Disorders, as required by 7 AAC 40.180(b)(1)(B).

E. Do Claimant's Impairments Prevent Him from Performing His Previous Work?

Alaska regulation 7 AAC 40.180(b) does not expressly require determining whether an applicant can work when the Division determines if an applicant is disabled. However, regulation 7 AAC 40.180(c)

requires the Division to consider if the applicant can perform any other work as part of the Division's review of whether an applicant's impairment meets the disability criteria for the listings of impairments. Therefore, Claimant has the burden of providing evidence on which basis the Division can consider if Claimant can perform any other work.

In this case, Claimant provided testimonial evidence and evidence of statements he made to his doctors, as recorded in the medical reports of visits to his doctors, concerning his employment circumstances.

Claimant testified he has a college degree and has 17 certifications appropriate to working in the fields of environmental management, coordination, inspection, and wastewater treatment. Claimant has worked in testing laboratories. Claimant was working approximately three months before he filed his April 14, 2011 application seeking Interim Assistance. Claimant testified that his bipolar/ADD disorder(s) affected his ability to do his work, in particular affecting his concentration and ability to perform consistently his work tasks.

Claimant's medical evidence memorializes Claimant's ability to work for at least eight months in Fairbanks; and between May 2010 and about February 2011, when he worked in Anchorage/Kenai. Claimant's evidence is that he can perform his past relevant work but that he can do so only for a limited period of time. Claimant's frustration with finding medications that he finds satisfactory in controlling his bipolar disorder is evident. *See* Finding of Fact 13. There was no evidence proving Claimant is permanently and totally disabled to the point he can do no work or cannot "perform any other work, including sedentary work." 7 AAC 40.180(c)(5).

If Claimant is not prevented from performing his previous relevant work, the SSA will not find him disabled. 20 C.F.R. § 416.920(a)(4)(iv). If the SSA will not find Claimant disabled, then the Division correctly determined that Claimant is not likely be found disabled by the SSA.

Therefore, the Division was correct to determine that Claimant is not permanently and totally disabled for purposes of eligibility for Interim Assistance benefits. 7 AAC 40.170; 7 AAC 40.180.

CONCLUSIONS OF LAW

1. Claimant proved by a preponderance of the evidence that:
 - a. On April 14, 2011, when he applied for Interim Assistance benefits, he was not engaged in substantial gainful activity as defined by 20 C.F.R. § 416.920(a)(4)(i).
 - b. His bipolar/ADD and anxiety (SSA Impairment Listing Nos. 12.04 and 12.06) constitute medically severe impairments as defined by 20 C.F.R. § 416.920(c) and 20 C.F.R. § 416.921(b).
 - c. His bipolar/ADD and anxiety 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 C.F.R. § 416.909 and 20 C.F.R. § 416.920(a)(4)(ii).
2. Claimant did not prove by a preponderance of the evidence that his bipolar/ADD and anxiety disorder meet the specific required disability criteria of the Social Security Administration's 20 C.F.R. Part 404, subpart P, appendix 1, 12.00 Mental Disorders, 12.04 Affective Disorders (for the

bipolar/ADD impairment) and at 12.06 Anxiety Related Disorders (for the anxiety disorder). Therefore, the Division correctly based its determination that Claimant is not disabled on Claimant's failure to meet the disability criteria for at least one of the impairments in the listings of impairments of Appendix 1. 7 AAC 40.180(b)(1)(B).

3. Claimant did not prove by a preponderance of the evidence that he can no longer perform his prior work as a result of the impairments listed in Paragraph 1, hereinabove. Therefore, the Division correctly based its determination that Claimant is not disabled on the fact that Claimant can do his past relevant work, and can perform work, including sedentary work. 7 AAC 40.180(c)(5).

4. On May 10, 2011, the Division was correct when it found Claimant was not disabled based on the medical evidence Claimant provided and that Claimant did not provide the requisite medical evidence on which basis it could determine Claimant was permanently and totally disabled because of the impairments of bipolar/ADD disorder and anxiety disorder. 7 AAC 40.170(a) and 7 AAC 40.180(b).

DECISION

On May 10, 2011, the Division was correct when it denied Claimant's April 14, 2011 Application for Interim Assistance benefits because Claimant did not meet the eligibility criteria to receive Interim Assistance benefits.

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 September 6, 2011.

Claire Steffens
Hearing Authority

CERTIFICATE OF SERVICE

I certify that on September 6, 2011 a copy of this document was sent to Claimant via USPS Certified Mail, Return Receipt Requested

By: _____/signed/_____

I certify that on September 7, 2011 copies of this document were sent to the following by secure, encrypted e-mail, as follows:

_____, DPA Hearing Representative
_____, DPA Hearing Representative
_____, Policy & Program Development
_____, Staff Development & Training
_____, Administrative Assistant II
_____, Eligibility Technician I

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