



Income benefits (SSI) on August 13, 2012; the application was initially denied and is presently on appeal status.<sup>4</sup>

Ms. Q is 38 years old and has a high school education.<sup>5</sup> She has worked as a retail assistant, front desk clerk, and receptionist, but in recent years has been unable to maintain regular employment.<sup>6</sup> Prior to 2012, Ms. Q was homeless for significant periods, including for about two years until October of 2012.<sup>7</sup> She was hospitalized for mental health reasons in the late 1990's, in 2004 or 2005, and, following a suicide attempt in 2008, most recently in 2009.<sup>8</sup> In 2012 she began receiving regular mental health care from the No Name Community Behavioral Health Center. She was prescribed medication that substantially alleviates her symptoms of depression.<sup>9</sup> However, the medication does not alleviate her PTSD.<sup>10</sup> She was seen at the emergency room in the spring of 2012 for treatment of a severe ankle sprain,<sup>11</sup> but due to her inability to pay for medical care, she has been seen only rarely for her asthma and osteoarthritis.<sup>12</sup>

Ms. Q lives alone, with the aid of housing assistance. She has a number of friends who visit. With the aid of her medication she functions in the community. She is generally able to do her own shopping (although she can carry only a single grocery bag) and to maintain her residence, although sometimes her depressive disorder keeps her in the home.<sup>13</sup> Ms. Q is physically capable of performing light or sedentary work.<sup>14</sup>

### III. Discussion

Alaska Public Assistance benefits are payable to eligible needy aged, blind and disabled persons pursuant to AS 47.25.430-.615. Applicants who are under age 65 are

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<sup>4</sup> Ex. 3.1, 3.79, 6.1.

<sup>5</sup> Ex. 3.90.

<sup>6</sup> Ex. 3.88; Testimony of L. Q.

<sup>7</sup> See Ex. 3.53(10/11/2012) (“homeless for 2 years now”; “The patient reports that she continues to be homeless but is happy to report that as of October 5<sup>th</sup> she has received her housing voucher.”).

<sup>8</sup> Testimony of L. Q.; Ex. 3.57.

<sup>9</sup> Testimony of L. Q. See, e.g., Ex. 3.48.

<sup>10</sup> Testimony of L. Q.

<sup>11</sup> Ex. 3.16-3.24.

<sup>12</sup> Testimony of L. Q. The record includes medical documentation for two visits to the No Name Community Health Center addressing asthma (Ex. 3.34-3.35, 3.43-3.44; 6/5/2012, 1/4/2013) and one addressing osteoarthritis (Ex. 3.40-3.41, 9/26/2012).

<sup>13</sup> The foregoing findings in this paragraph reflect the testimony of Ms. Q and her witnesses at the hearing.

<sup>14</sup> Testimony of J. Lang.

required to apply and qualify for federal Supplemental Security Income (SSI) benefits.<sup>15</sup> Interim Assistance benefits are paid monthly to eligible Adult Public Assistance applicants while they are waiting for the Social Security Administration to approve their SSI application.<sup>16</sup>

An applicant qualifies for Interim Assistance benefits if the Division determines the applicant to be disabled under 7 AAC 40.180.<sup>17</sup> The applicant must submit to an examination by a physician<sup>18</sup> and the Division's determination as to whether the applicant is disabled is based on:

- (1) a medical review by the department as to whether the applicant is likely to be found disabled by the Social Security Administration, including whether the applicant's impairment meets... (B) Social Security Administration disability criteria for the listings of impairments....;
- (2) medical evidence provided by the applicant or obtained by the department;
- (3) other evidence provided by the applicant...; and
- (4) a review of the written results of the... physician's examination...<sup>[19]</sup>

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

- (1) ...applicant's condition is listed as an impairment category...;
- (2) medical information...documents the applicant's impairment;
- (3) impairment affects the applicant's activities of daily living;
- (4) ...applicant can perform any other work, including sedentary work; and
- (5) ...applicant's impairment has lasted or is expected to last for a continuous period of not less than 12 months.<sup>[20]</sup>

A. The April 1, 2005 Listings Apply

In making its determination, the Division applied the most recent version of the listings, following a hyperlink in an editor's note to 7 AAC 40.180 that displays the most recent version of the listings, rather than applying the version of the listings specified in 7

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<sup>15</sup> 7 AAC 40.170(a). Adult Public Assistance applicants whose income exceeds the SSI standards are not required to apply for SSI benefits. *Id.*

<sup>16</sup> 7 AAC 40.170(a), (b); AS 47.25.455.

<sup>17</sup> 7 AAC 40.170(b). 7 AAC 40.180 in its current form was adopted in 2006, after an internal policy to similar effect was found to have been adopted in violation of the Administrative Procedures Act. *See State, Department of Health and Social Services v. Okuley*, 214 P.3d 247, 250 note 6 (Alaska 2009).

<sup>18</sup> 7 AAC 40.180(a).

<sup>19</sup> 7 AAC 40.180(b)(1)(B), (2), (3), (4).

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

AAC 40.180(b)(1)(B).<sup>21</sup> However, the April 1, 2005, version of the listings applies to Interim Assistance eligibility determinations made by the Division prior to December 7, 2013.<sup>22</sup>

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

As previously observed, the Division's disability determination for purposes of Interim Assistance is based, in part, on a medical review of whether the applicant is likely to be found disabled by the Social Security Administration, including whether the impairment meets the criteria stated in the disability listings.<sup>23</sup> The Social Security Administration follows a five evaluation process to determine whether a person is disabled.<sup>24</sup> The Division follows the first three steps of that process in determining whether a person is likely to be found disabled by the Social Security Administration.<sup>25</sup> At Step 1, the Social Security Administration considers whether the person is performing substantial gainful activity.<sup>26</sup> At Step 2, the Social Security Administration considers whether the impairment significantly limits the applicant from performing basic work activities and has lasted, or is expected to last, for at least 12 months.<sup>27</sup> At Step 3, the Social Security Administration considers whether the person meets or equals the disability listings.<sup>28</sup> If a person meets these first three steps of the Social Security Administration's process the Division will consider that person "likely" to be found disabled by the Social Security Administration, for purposes of eligibility for Interim Assistance benefits.<sup>29</sup> In this case, the Division concedes that Ms. Q meets the first two steps of the Social Security Administration's test, in that she is not performing substantial gainful activity, and that she suffers from severe medical determinable impairments that significantly limit her ability to perform basic work

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<sup>21</sup> See Ex. 3.3.

<sup>22</sup> See In Re W.W., at 3-4, OAH No. 13-0481-APA (Commissioner of Health and Social Services 2013). The Department of Health and Social Services has amended the regulation, effective December 7, 2013, to adopt by reference the 2013 version of the listings.

<sup>23</sup> 7 AAC 40.180(b)(1)(B).

<sup>24</sup> 20 C.F.R. §416.920 (SSI [Title XVI]); 20 C.F.R. §404.1520 (Federal Old Age, Survivors, and Disability Insurance [Title II]). These regulations are substantially the same.

<sup>25</sup> In Re M.H., OAH No. 12-0688-APA (Commissioner of Health and Social Services 2012), *reversed*, (Alaska Superior Court No. 12-09838 CI), *Petition for Review pending* (Alaska Supreme Court No. S-15339) (hereinafter, In Re M.H.). In that case, the commissioner overruled prior decisions adopting the full five part process. See OHA No. 11-FH-134 (2011); OHA No. 11-FH-188 (2011), at 18. See also In Re D.L.X., OAH No. 12-0591-APA (Commissioner of Health and Social Services 2012).

<sup>26</sup> 20 C.F.R. §416.920(a)(4)(i).

<sup>27</sup> 20 C.F.R. §416.920(a)(4)(ii). See 20 C.F.R. §416.909, -.921(a).

<sup>28</sup> 20 C.F.R. §416.920(a)(4)(iii).

<sup>29</sup> See generally In Re M.H.

activities.<sup>30</sup> The Division argues, however, that her conditions do not meet the criteria for the disability listings applicable to mental disorders.<sup>31</sup>

C. Ms. Q Does Not Meet An Applicable Disability Criteria

Ms. Q's application identified osteoarthritis, osteopenia, a hearing impairment, asthma, PTSD, and depression as contributing to her disability.<sup>32</sup> These conditions, she asserted, made it difficult for her to focus and concentrate, function in a noisy environment or to "use many listening devices[,]” caused chronic pain, and made her unable to function in a substandard air quality environment.<sup>33</sup> The record includes diagnoses of osteoarthritis, asthma, major depressive disorder, and post-traumatic stress disorder (PTSD).<sup>34</sup>

These conditions are potentially within the scope of four different 2005 listings: Section 1.02 (major dysfunction of a joint), Section 2.08 (hearing impairment), Section 3.03 (asthma), Section 12.04 (affective disorders), and Section 12.06 (anxiety-related disorders).<sup>35</sup>

1. *Section 1.02 (major dysfunction of a joint)*

To meet the disability criteria for this listing, the applicant must be unable to ambulate effectively, or unable to perform fine and gross movements effectively.<sup>36</sup> To ambulate effectively is to be able to sustain a reasonable walking pace over a sufficient distance to be able to carry out the activities of daily living.<sup>37</sup> Ms. Q is able to do this. The inability to perform fine and gross movements effectively means “an extreme loss of function of both upper extremities.”<sup>38</sup> Ms. Q does not have an extreme loss of function in either upper extremity.<sup>39</sup> She does not meet the criteria for this listing.

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<sup>30</sup> See Ex. 3.3.

<sup>31</sup> *Id.*

<sup>32</sup> Ex. 3.85.

<sup>33</sup> *Id.* See also, Ex. 3.90 (lack of focus, concentration; memory loss).

<sup>34</sup> See Ex. 3.16-3.18 (5/8/12, Dr. Simon); Ex. 3.41 (9/27/2012, K. Bormann, PA-C); Ex. 3.48, 3.84 (8/2/2013, Dr. Kramer); 3.51, 3.82 (12/19/2012, Dr. Wong); 3.53 (10/11/2012, Dr. Barrett); 3.59-3.64 (5/30/2013, K. Graff, MA).

<sup>35</sup> 20 C.F.R. §404, Subpart P, Appendix 1 (2005).

<sup>36</sup> Section 1.04(A), (B).

<sup>37</sup> Section 1.00(b)(2).

<sup>38</sup> Section 1.00(c).

<sup>39</sup> See Ex. 3.21 (“The patient is moving all 4 extremities symmetrically with good tone.”) (4/30/2012; Dr. Tansky, No Name Memorial Hospital). Ms. Q testified that she has limited hand strength.

2. *Section 2.08 (hearing impairment)*

To meet the disability criteria for this listing, the hearing loss must be “not restorable by a hearing aid.”<sup>40</sup> Although Ms. Q’s hearing aid has significant limitations, she is able to hear. She does not meet the criteria for this listing.<sup>41</sup>

3. *Section 3.03 (asthma)*

To meet the disability criteria for asthma, the applicant must have asthma with either chronic asthmatic bronchitis meeting the criteria for chronic obstructive pulmonary disease or asthmatic attacks in spite of prescribed treatment and requiring physician intervention.<sup>42</sup> Spirometric testing is required in order to show that an individual meets the criteria for chronic obstructive pulmonary disease.<sup>43</sup> Because she has not been provided such a test, Ms. Q has not shown that she meets those criteria. As for asthmatic attacks, they must have occurred at least once every two months or six times a year.<sup>44</sup> Ms. Q did not testify that she had asthmatic attacks, and she does not meet the criteria for this listing.

4. *Sections 12.04 (affective disorders), 12.06 (anxiety disorders)*

Ms. Q’s primary disabling condition is her mental health. She has been diagnosed with depression and PTSD, and the testimony and evidence in the record makes it clear that in the past these conditions have substantially and materially impacted her ability to find and maintain employment. Ms. Q’s conditions are addressed in Sections 12.04 (depression) and 12.06 (PTSD).<sup>45</sup> To meet the criteria for PTSD, the applicant must present medically documented findings that are absent in this case.<sup>46</sup> Thus, the focus of the hearing, and the primary issue on appeal, is whether Ms. Q meets the listing for Section 12.04.

An applicant meets the listing for Section 12.04 if she meets the criteria for Sections 12.04(A) and (B), or if she meets the criteria for Section 12.04(C).<sup>47</sup> To meet the criteria for depression under Section 12.04(A), the applicant must have medically documented persistence at least four of nine specified symptoms: (1) anhedonia or pervasive loss of

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<sup>40</sup> Section 2.08.

<sup>41</sup> Ms. Q submitted a hearing test; Ms. Lang testified the results fall below the required level to meet the disability criteria for a hearing impairment, even absent a hearing aid.

<sup>42</sup> Section 3.03A, B.

<sup>43</sup> See Section 3.00E (documentation of pulmonary function testing); Section 3.02A (table of FEV<sub>1</sub> values).

<sup>44</sup> Section 3.03B.

<sup>45</sup> See Section 12.00(D)(11) (including posttraumatic stress syndrome as an anxiety disorder).

<sup>46</sup> See Section 12.06(A).

<sup>47</sup> See Section 12.04 (“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 C are satisfied.”).

interest in almost all activities; (2) appetite disturbance with loss of weight; (3) sleep disturbance; (4) psychomotor agitation or retardation; (5) decreased energy; (6) feelings of guilt or worthlessness; (7) difficulty concentrating or thinking; (8) thoughts of suicide; or (9) hallucinations, delusions, or paranoid thinking.<sup>48</sup> In this case, the medical records regarding Ms. Q's mental health: (1) do not document anhedonia or pervasive loss of interest in almost all activities;<sup>49</sup> (2) document weight gain and do not document appetite disturbance;<sup>50</sup> (3) document an absence of sleep disturbance;<sup>51</sup> (4) document "abnormal psychomotor movements, which is her baseline";<sup>52</sup> (5) do not document decreased energy;<sup>53</sup> (6) do not document feelings of guilt or worthlessness;<sup>54</sup> (7) with one exception,<sup>55</sup> document no difficulty in concentration or thinking;<sup>56</sup> (8) document denial of thoughts of suicide;<sup>57</sup> (9) document denial of hallucinations and an absence of delusions or paranoid thinking.<sup>58</sup>

The medical documentation, described above, does not show that Ms. Q has at least four of the symptoms required to meet the disability listing for depression under Section 12.04(A). Thus, she does not meet criteria for depression under Section 12.04(A). Because she does not meet those criteria, it is not necessary to determine whether she meets the criteria under Section 12.04(B)

To meet the listing under Section 12.04(C), the applicant must have:

Medically documented history of a chronic affective disorder of at least two years' duration that has cause more than a minimal limitation of ability to do

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<sup>48</sup> Section 12.04(A)(1).

<sup>49</sup> See Ex. 3.51 (12/19/2012).

<sup>50</sup> See Ex. 3.51 (12/19/2012) (weight 110); Ex. 3.53 (10/11/2012) (weight 98.5; applicant reports "adequate sleep and appetite, no changes in those areas"); Ex. 3.57 (7/30/2012) (weight 101).

<sup>51</sup> Ex. 3.49 (8/2/2013) ("She is sleeping well").

<sup>52</sup> Ex. 3.53 (10/11/2012).

<sup>53</sup> Ex. 3.48 (8/2/2013) (Dr. Kramer); Ex. 3.51 (12/19/2012) (Dr. Wong); Ex. 3.65-3.68 (10/11/12) (Mental Health Intake Assessment, K. Graff, MA); Ex. 3.53 (10/11/2012) (Dr. Barrett); Ex. 3.57 (7/30/2012) (Dr. Barrett).

<sup>54</sup> Ex. 3.48 (8/2/2013) (Dr. Kramer); Ex. 3.51 (12/19/2012) (Dr. Wong); Ex. 3.65-3.68 (10/11/12) (Mental Health Intake Assessment, K. Graff, MA); Ex. 3.53 (10/11/2012) (Dr. Barrett); Ex. 3.57 (7/30/2012) (Dr. Barrett).

<sup>55</sup> See Ex. 3.82 (12/19/2012) (Dr. Wong, psychiatrist) ("Patient is with a mental condition which seriously impairs her ability to focus, concentrate/attend properly to task").

<sup>56</sup> Ex. 3.49 (8/2/2013) ("Memory, attention, and concentration are good."); Ex. 3.51 (12/19/2012) ("Memory, attention, and concentration was clear."); Ex. 3.57 ("Thoughts were lineal, logical and goal directed.": "Memory is intact.").

<sup>57</sup> Ex. 3.48 (8/2/2013) ("There is no suicidal or homicidal ideation."); Ex. 3.51 (12/19/2012) ("The patient denied suicidal or homicidal ideation."); Ex. 3.53 (10/11/2012) ("She denies suicidal ideation"); Ex. 3.57 (7/30/2012) ("There was no suicidal ideation", although ""she reports intermittent passive suicidal thoughts").

<sup>58</sup> Ex. 3.49 (8/2/2013) ("There is no evidence of paranoid. There is no delusional thinking."); Ex. 3.51 ("Thought process/content was clear. There was no evidence of paranoia, voices or delusions." (12/19/2012); Ex. 3.53 (10/11/2012) ("She denies...auditory/visual hallucinations"; "Thoughts are lineal, logical and goal-directed"); Ex. 3.57 (7/30/2012) ("no...auditory/visual hallucinations").

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.

Ms. Q meets the threshold requirement of Section 12.04(C), in that she has a medically documented history of a longstanding affective disorder that has caused more than a minimal limitation of ability to do basic work activities, with symptoms that are currently attenuated by medication. Thus, she meets the criteria of Section 12.04(C) if she satisfies any one of the three additional criteria.

The first additional criterion is repeated episodes of decompensation, each of extended duration. An episode of decompensation is an exacerbation or temporary increase in symptoms or signs, accompanied by a loss of adaptive functioning, "as manifested by difficulties in performing activities of daily living, maintaining social relationships, or maintaining concentration, persistence or pace."<sup>59</sup> Repeated episodes of decompensation means that the applicant had three episodes within a year or an average of once every four months, each lasting at least two weeks, but can include "less frequent episodes of longer duration."<sup>60</sup>

An episode of decompensation may be inferred from hospitalization for mental health treatment,<sup>61</sup> and Ms. Q was hospitalized for mental health treatment in the late 1990's, in 2004 or 2005, and in 2009. However, this is a frequency of less than three times per year on average, and the length of her hospitalization was not established. An episode of decompensation may also be inferred from other information in the record.<sup>62</sup> In this case, the testimony and evidence in the record indicate that Ms. Q had a period of about two years, ending in 2012, in which she experienced substantial difficulty in maintaining concentration, persistence and pace,<sup>63</sup> resulting in the loss of employment and, ultimately,

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<sup>59</sup> Section 12.00(C)(4).

<sup>60</sup> Section 12.00(C)(4)

<sup>61</sup> *See* Section 12.00(C)(4).

<sup>62</sup> *Id.*

<sup>63</sup> *See supra*, notes 34, 57.



homelessness. However, the evidence in the record also indicates that during this time, notwithstanding difficulty in maintaining focus, persistence and pace,<sup>64</sup> she maintained the substantial ability to carry out the activities of daily living and to interact independently, appropriately and effectively, on a sustained basis, with other individuals.<sup>65</sup> Ms. Q did not establish that that this two-year period was an extended period of decompensation. Absent characterization of that period as one of decompensation, Ms. Q does not meet the first of the three additional criteria to meet the listing for an affective disorder under Section 12.04(C). Moreover, her mental health condition, with medication, is at present not so marginal that even a minimal increase in mental demands would be predicted to cause an episode of decompensation, and thus she does not meet the second additional criterion. Finally, she is currently able to function outside of a highly supportive living environment, and therefore she does not meet the third additional criterion. For these reasons, Ms. Q does not meet the criteria of Section 12.04(C).

#### D. Other Considerations

As the commissioner noted In Re M.H.,<sup>66</sup> in determining whether a person meets the criteria set out in 7 AAC 40.180(b)(1)(B) the Division is required by 7 AAC 40.180(c) to consider whether: (1) the condition is listed;<sup>67</sup> (2) the impairment is medically documented;<sup>68</sup> (3) the impairment affects the person's activities of daily living;<sup>69</sup> (4) the person can perform any other work (including sedentary work);<sup>70</sup> and (5) whether the impairment will last twelve months.<sup>71</sup>

##### 1. *Listing (7 AAC 40.180(c)(1))*

7 AAC 40.180(c)(1) provides that the Division will consider whether an impairment is listed. Whether an impairment is listed or not is significant for purposes of determining whether an applicant's condition is medically equivalent to a listed impairment, an issue which the Social

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<sup>64</sup> See Ex. 3.82 (12/19/2012, Dr. Wong); Ex. 3.90 (8/5/2013) (Ms. Q self-report).

<sup>65</sup> Ms. Q's friends' testimony establishes that notwithstanding her struggles, she maintains an intact social network. Their testimony is in marked contrast to the reported "lack of close friends and stormy relationships" noted in one medical record, and "lacking social supports and stable friendships" in another. See Ex. 3.59 (6/13/2012); Ex. 3.66 (10/11/2012).

<sup>66</sup> See In Re M.H., at 2, note 5.

<sup>67</sup> 7 AAC 40.180(c)(1).

<sup>68</sup> 7 AAC 40.180(c)(2).

<sup>69</sup> 7 AAC 40.180(c)(3).

<sup>70</sup> 7 AAC 40.180(c)(4).

<sup>71</sup> 7 AAC 40.180(c)(5).

Security Administration considers in Step 3.<sup>72</sup> The Division makes substantially the same inquiry, even though 7 AAC 40.180(b)(1)(B) requires it to consider only whether the applicant meets a listing.<sup>73</sup>

A determination of medical equivalence may be made in three distinct circumstances: (1) the applicant's impairment is listed, but the applicant does not exhibit all specified findings in required severity;<sup>74</sup> (2) the applicant's impairment is not listed;<sup>75</sup> or (3) the applicant has a combination of impairments, no one of which meets a listing.<sup>76</sup>

Ms. Q falls into the third category: she has a combination of impairments, no one of which meets a listing. In that situation, the Social Security Administration will consider whether an applicant has "findings relating to [her] impairments [that] are at least of equal medical significance to those of a listed impairment."<sup>77</sup> Ms. Q findings, in their totality, are not of equal medical significance to those of a listed impairment. Consideration of this factor does not increase the likelihood that the Social Security Administration will find that she is disabled.

## 2. *Medical Documentation (7 AAC 40.180(c)(2))*

In this case, medical documentation is not altogether absent, but apart from her affective disorder the medical documentation is limited. Ms. Q's affective disorder is addressed in medical documentation over a period of a year, essentially through the date of her application. Ms. Q's asthma, joint impairment and hearing loss are only minimally documented, and the documentation does not show that the criteria for any of those impairments is met. The medical documentation does not address PTSD, other than to note the diagnosis.

Consideration of this factor adds no weight to the likelihood that the Social Security Administration will find Ms. Q disabled, because there is no indication in the record that the absent medical records would include diagnostic tests or other findings establishing that she meets the disability criteria for a listed impairment.

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<sup>72</sup> 20 C.F.R. §920(a)(4)(iii).

<sup>73</sup> 7 AAC 40.180(b)(1)(B) calls for the Division to make a determination based, in part, on "a medical review...as to whether the applicant is likely to be found disabled by the Social Security Administration, including whether the applicant's impairment meets [the disability criteria]" (emphasis added). That the determination must include whether the impairment meets the disability criteria does not mean the determination may not include any other issues, such as whether the impairment equals the disability criteria. The Division's position statement in this case specifically includes that issue, and the Division has routinely considered it in prior cases. *See* Ex. 3.3 ("IA must determine if the claimant meets or equals any listing...").

<sup>74</sup> 20 C.F.R. §416.926(b)(1).

<sup>75</sup> 20 C.F.R. §416.926(b)(2).

<sup>76</sup> 20 C.F.R. §416.926(b)(3).

<sup>77</sup> 20 C.F.R. §416.926(b)(3).

3. *Activities of Daily Living (7 AAC 40.180(c)(3))*

The phrase “activities of daily living” is not defined for purposes of 7 AAC 40.180(c)(3). However, for purposes of Section 12.04, the listing for depression, “activities of daily living” are defined as including:

adaptive activities such as cleaning, shopping, cooking, taking public transportation, paying bills, maintaining a residence, caring appropriately for your grooming and hygiene, using telephones and directories, and using a post office....<sup>[78]</sup>

Ms. Q and her witnesses testified that her physical functional ability has been significantly reduced by her osteoarthritis and chronic pain. However, Ms. Q also testified that although her physical functional ability has been reduced, she is able to maintain her residence and to ambulate without assistance. Moreover, the testimony that her physical functioning has been significantly adversely affected by her physical impairments is not supported by the medical documentation,<sup>79</sup> and the preponderance of the evidence is that with medication her depression is not debilitating. On balance, the evidence in this case supports the conclusion that Ms. Q’s ability to engage in these types of activities has been adversely affected by her combination of impairments, to a limited extent. Consideration of this factor adds somewhat to the likelihood that the Social Security Administration will find that she is disabled.

4. *Ability to Perform Work (including sedentary work) (7 AAC 40.180(c)(4))*

7 AAC 40.180(c)(4) calls for consideration of whether “the applicant can perform any other work, including sedentary work.” An applicant’s ability to work is the subject of inquiry under the Social Security Administration’s Step 4 and Step 5: under Step 4, the Social Security Administration considers whether the applicant “can still do [her] past relevant work”;<sup>80</sup> under Step 5 it considers whether she “can make an adjustment to other work.”<sup>81</sup> “[O]ther” work, as used in 7 AAC 40.180(c)(4), presumably means work other than the work the applicant performed prior to her impairment. (Such a presumption is consistent with the fact that the applicant who has been found to meet Step 2 has, by definition, a significant limitation on her ability to perform basic work activities.) Thus, the reference to “other” work in 7 AAC 40.180(c)(4) in effect presumes an inability to perform the applicant’s “past relevant work” as

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<sup>78</sup> Section 12.00(C)(1).

<sup>79</sup> See, e.g., Ex. 3.40 (“[S]he has been more active, walking and biking more, her mobility has increased and she does not currently require the assistance of a mobility device to get around.”) (9/26/2012, K. Bormann, PA-C).

<sup>80</sup> 20 C.F.R. §920(a)(4)(iv).

<sup>81</sup> 20 C.F.R. §920(a)(4)(v).

referenced in Step 4 , and echoes the reference to “other” work in Step 5. Accordingly, this factor may be viewed as substantially incorporating the ultimate factual issues considered by the Social Security Administration in Steps 4 and 5. However, the burden of proof is on the applicant under 7 AAC 40.180(c), rather than on the agency. Moreover, because Interim Assistance is intended as a short-term, easily administered program, and the Division’s task is to predict what the Social Security Administration is likely to do, in order to determine eligibility for state benefits under Alaska’s Interim Assistance Program, rather than to make a factual finding that she is, or is not, disabled for purposes of federal Supplemental Security Income benefits, it is neither necessary nor appropriate to incorporate into an Interim Assistance eligibility determination all of the procedural and substantive rules applicable to Steps 4 and Step 5 of the Social Security Administration’s ultimate disability determination.<sup>82</sup>

Consistent with these premises, in considering whether Ms. Q is capable of performing other work, including sedentary work (7 AAC 40.180(c)(4)), this decision is limited to consideration of evidence pertaining to the criteria stated in Section 12.04(B). Those criteria, if met, are considered “incompatible with the ability to do any gainful activity”<sup>83</sup> and are thus a reasonable basis upon which to predict that the Social Security Administration is likely to find the applicant disabled. While it was unnecessary to consider them in connection with Step 3, they are an appropriate subject of inquiry in connection with 7 AAC 40.180(c)(4).<sup>84</sup>

An applicant meets the criteria stated in Section 12.04(B) if she has, as a result of her affective disorder, 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.

As may be seen, these are substantially the same as the factors considered above in connection with Section 12.04(C).<sup>85</sup> In that connection, Ms. Q did not establish that she has a

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<sup>82</sup> See generally, In Re M.H. The administrative law judge declines to adopt the reasoning of the superior court decision, which, because it currently on appeal, is not a final decision entitled to recognition under the doctrine of collateral estoppel. See generally, State v. United Cook Inlet Drift Association, Inc., 895 P.2d 947 (Alaska 1995).

<sup>83</sup> Section 12.00(A) (“The criteria in paragraphs B and C describe impairment-related functional limitations that are incompatible with the ability to do any gainful work.”).

<sup>84</sup> See In Re M.H., at 2-3, footnote 5; Ex. 3.3 (Position Statement, p. 3, note 7). This decision is limited to application of 7 AAC 40.180(c)(4) in the context of a claim of disability primarily characterized by an affective disorder. It does not address whether it would be necessary or appropriate to consider additional factors, such as residual work capacity, age, education, and work experience, in connection with a primarily physical disability.

<sup>85</sup> *Supra*, pp. 7-9.

marked restriction in performing the activities of daily living or in maintaining social functioning, or that she had repeated episodes of decompensation of extended duration. Accordingly, she does not meet the criteria of Section 12.04(B).

Because Ms. Q has not shown that she meets the criteria of Section 12.04(B), consideration of this factor does not add to the likelihood that the Social Security Administration will find that she is disabled, under Steps 4 and 5 of the Social Security test.

5. *Duration (7 AAC 40.180(c)(5))*

Whether an impairment will last for twelve months or more is considered in connection with Step 2 of the Social Security Administration's test for disability.<sup>86</sup> In this case, the Division concedes that Ms. Q meets Step 2, and thus it concedes that her impairment will last longer than twelve months.

**IV. Conclusion**

The Division determines whether 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. In making that determination, the Division makes a predictive judgment about what the Social Security Administration is likely to do, rather than a factual determination that the applicant is, or is not, disabled. In making its determination, the Division considers whether the applicant is likely to be found disabled under Steps 1-3 of the Social Security Administration's process for determining disability, and also considers the factors listed in 7 AAC 40.180(c), which include issues considered by the Social Security Administration in Steps 4-5. The Interim Assistance regulatory framework does not bind the Division to the entire federal regulatory framework established for purposes of the Social Security Administration's programs. In this case, Ms. Q's condition does not meet or equal the disability criteria for a listed impairment. She has not shown by a preponderance of the evidence, considering the factors listed in 7 AAC 40.180(c), that she is likely to be found disabled by the Social Security Administration. She is therefore ineligible for Interim Assistance. The Division's decision is sustained.

DATED December 20, 2013

*Signed*  
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Andrew M. Hemenway  
Administrative Law Judge

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<sup>86</sup> 20 C.F.R. §416.920(a)(4)((ii) ("If you do not have a[n impairment] that meets the duration requirement in §416.909,...we will find that you are not disabled."); §416.909 ("Unless your impairment is expected to result in death, it must have lasted or must be expected to last for a continuous period of at least 12 months."). See, e.g., In Re C.B.G., OAH No. 13-0098-APA (Commissioner of Health and Social Services 2013).

## Adoption

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

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

DATED this 9<sup>th</sup> day of January, 2014.

By: Signed \_\_\_\_\_  
Name: Ree Sailors  
Title: Deputy Commissioner, DHSS

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