

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

In the Matter of)
)
 N L)
_____)

OAH No. 13-1492-APA
Agency No.

DECISION

I. Introduction

N L has two potentially disabling conditions—back pain and schizophrenia. The Division of Public Assistance denied his application for interim assistance, however, because the evidence submitted to the Division did not show that either of Mr. L’s impairments met the requirements to be considered a disabling condition under the Social Security regulations. Because the evidence in the record, including the evidence offered at the hearing, does not indicate that Mr. L’s impairments meet or equal the requirements of Social Security’s detailed and stringent listings, the Division’s decision is affirmed.

II. Facts

N L is a 48-year-old man who lives in No Name. He has been incarcerated for about the last 22 years.¹ He was released from jail in August 2013.

Mr. L has paranoid schizophrenia.² He was first hospitalized for schizophrenia as a young adolescent. He hears voices, which sometimes instruct him to do bad things.³ The voices significantly increase in intensity when Mr. L is under stress.⁴ He has attempted suicide three times, first in 1984 by an overdose, and then in 1989 and 2007 by hanging.⁵ While he was in jail, he would be given work assignments like sweeping or other minor janitorial duties, but according to his testimony, only for about 30-60 minutes in duration.⁶ He currently lives in a transition/halfway house in No Name, called the No Name, which provides a supportive environment. He attempts to do chores around the house, but he moves very slowly and does not

¹ L testimony.
² Chastain testimony.
³ L testimony.
⁴ *Id.*
⁵ Division Exhibit 2.152.
⁶ *Id.*; see also Division Exhibit at 2.206.

adequately complete these tasks.⁷ He is under the care of No Name Health Center, and is taking several medications.⁸ Kathy Chastain, a nurse practitioner who has been involved in the treatment of Mr. L since September, testified that the clinic has not been able to stabilize Mr. L’s schizophrenia.

On August 27, 2013, Mr. L applied for interim assistance.⁹ Interim assistance is a benefit program that provides a temporary cash payment to disabled applicants who are awaiting a decision on their applications for Adult Public Assistance and Supplemental Security Income benefits.¹⁰ On his application for interim assistance, Mr. L identified “schizophrenia” in answer to the question that asked him to identify the problem that “interfere[s] with your work or routine daily activities.”¹¹ In answer to a question asking him to explain how his condition keeps him from working, Mr. L wrote “I see things that are not there and I hear very bad voices.”¹² An intake worker who conducted a face-to-face interview with Mr. L checked boxes on the form indicating that he had difficulty reading, writing, sitting, and understanding.¹³ The worker wrote on the application that “[c]lient had hard time sitting still. Had a hard time answering questions and writing.”¹⁴

As part of the application process, a form, called the “AD-2” was sent to his treating physician. The physician wrote on the form that Mr. L’s diagnoses were “schizophrenia, lower back pain and sciatica, [and] hyperlipidemia,” and checked the “No” box in answer to whether Mr. L was expected to recover from his illness.¹⁵

The Division of Public Assistance referred the application to its medical reviewer, Jamie Lang. Ms. Lang reviewed Mr. L’s medical records, and assessed whether Mr. L’s conditions were severe enough to qualify for interim assistance. Based on the medical evidence that she had available, Ms. Lang determined that Mr. L was not likely to be found disabled by the Social Security Administration, and therefore was not eligible for interim assistance.¹⁶ On October 18,

⁷ L testimony; J testimony. Z J is Mr. L’s landlady at No Name.

⁸ L Exhibit (Letter from Kathy Chastain (Oct. 31, 2013)). The pages in the L Exhibit are not numbered.

⁹ Division Exhibit 2.202-.203.

¹⁰ AS 47.25.455.

¹¹ Division Exhibit 2.204.

¹² *Id.*

¹³ *Id.* at 2.209.

¹⁴ *Id.*

¹⁵ *Id.* at 2.203.

¹⁶ *Id.* at 2.0

2013, the Division denied Mr. L's application for interim assistance.¹⁷ On October 23, 2013, Mr. L appealed the denial to a fair hearing.¹⁸

A hearing scheduled for December 6, 2013, was postponed until December 18, 2013, because Malcom Nichols, a counselor at the jail where Mr. L had been incarcerated, was unable to participate. Shortly before the hearing on December 18, Mr. Nichols informed this office that he could not participate unless he was served with a subpoena. No subpoenas are available for these hearings, and Mr. Nichols did not testify. A telephonic hearing was held on December 18, 2013. Terri Gagne presented the case for the Division, and Mr. L presented the case for himself. Ms. Chastain and Z J, Mr. L's landlady at No Name, both testified for Mr. L. No witness appeared on behalf of the Division.

III. Discussion

A. The Department's regulatory requirements and the social security process

The State of Alaska's Adult Public Assistance program provides financial assistance to needy aged, blind, and disabled persons. The administration of the state Adult Public Assistance program is closely connected to the federal Supplemental Security Income program. Applicants for Adult Public Assistant must also apply for Supplemental Security Income and must meet Supplemental Security Income eligibility requirements.¹⁹ During the time that the application for Supplemental Security Income is pending, an applicant for Adult Public Assistance may receive interim assistance if the department determines that the applicant is disabled.²⁰

The test for disability under the Department's regulation 7 AAC 40.180 requires the division to conduct a medical review to determine "whether the applicant is likely to be found disabled by the Social Security Administration."²¹ For an applicant who does not have one of the presumptive disabling conditions, the division will consider "whether the applicant's impairment meets [the] Social Security Administration disability criteria for the listings of

¹⁷ *Id.* at 4

¹⁸ *Id.* at 6.1

¹⁹ *See* 7 AAC 40.030, 7 AAC 40.060.

²⁰ 7 AAC 40.170(b). This regulation instructs the Division to determine whether the applicant is disabled by applying the tests required in 7 AAC 40.180.

²¹ 7 AAC 40.180(b)(1).

impairments.”²² The listing of impairments is contained in an appendix to Social Security’s regulations, and will be referred to in this decision as “Appendix 1.”²³

The analysis of whether Mr. L’s impairments meet or equal one or more listing in Appendix 1 is done by taking into consideration the medical evidence, Mr. L’s ability to do activities of daily living, whether Mr. L can do work (including sedentary work) other than his former employment, and whether Mr. L’s impairment has lasted for more than 12 months.²⁴ If, after taking these issues into consideration, Mr. L’s impairment meets or equals a listing, Mr. L will qualify for interim assistance.

B. May the applicant introduce new evidence at the hearing?

At the outset, the Division has raised an evidentiary issue, arguing that Mr. L cannot present new evidence at hearing. The Division particularly objects to the testimony of Ms. J,

²² *Id.* The Department’s regulations specifically adopt 20 C.F.R. 404, subpart P, appendix 1, as revised as of April 1, 2005 (Appendix 1), by reference. *Id.*

²³ *Id.* The Department has interpreted its regulations to require application of the first three steps of the Social Security Administration’s five-step sequential evaluation process for determining whether an applicant is disabled. *In re M.H.*, OAH No. 12-0688-APA at Commissioner’s Decision (Commissioner Dep’t Health and Soc. Serv., Aug. 20, 2012). Those steps require that

(i) At the first step, we consider your work activity, if any. If you are doing substantial gainful activity, we will find that you are not disabled. (*See* paragraph (b) of this section.)

(ii) At the second step, we consider the medical severity of your impairment(s). If you do not have a severe medically determinable physical or mental impairment that meets the duration requirement in § 416.909, or a combination of impairments that is severe and meets the duration requirement, we will find that you are not disabled. (*See* paragraph (c) of this section.)

(iii) At the third step, we also consider the medical severity of your impairment(s). If you have an impairment(s) that meets or equals one of our listings in appendix 1 to subpart P of part 404 of this chapter and meets the duration requirement, we will find that you are disabled. (*See* paragraph (d) of this section.)

20 C.F.R. §416.920(a)(4). The parties agree that Mr. L’s mental health impairment meets steps one and two. Therefore, this decision will focus on whether Mr. L’s impairments meet or equal a listing in Appendix 1 as required in 7 AAC 40.180(b). As to steps four and five, although an Alaska superior court has held that the Department should apply steps four and five, that decision has been appealed. *See Gross v. State, Dep’t of Health and Social Services, Division of Public Assistance*, Alaska Superior Ct., Case No. 3 AN-12-09838CI (Sept. 26, 2013). Moreover, the superior court’s decision does not appear to be consistent with the Department’s regulations, which do not incorporate Social Security regulations other than Appendix 1. Regardless of whether it may or may not be appropriate to consider steps four and five at the administrative level while the appeal in *Gross* is pending, in this case, the record on steps four and five was not developed sufficiently to make a reasoned decision on those steps. This decision will not apply steps four and five.

²⁴ 7 AAC 40.180(c). The text of subsection (c) provides:

- (1) the applicant's condition is listed as an impairment category [in Appendix 1] ;
- (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 Division does not dispute that Mr. L’s impairments will last longer than 12 months.

arguing that new evidence that is not medical evidence, and which the Division has not had time to consider, is prohibited. In support of its motion to exclude, the Division cites to 7 AAC 40.180.

The Division is correct that the evidence that the Department can consider at the hearing is governed by 7 AAC 40.180(b). Under subsection (b)(2) of this regulation, the Department can consider medical evidence provided by the applicant at the hearing. The Division's argument for excluding evidence appears to be based on the requirement under subsection (b)(3). That subsection instructs the applicant to provide other evidence relating to the applicant's work history to the Division.²⁵ Therefore, the Division concludes that evidence other than medical evidence must be provided first to the Division before it can be considered by the Department on appeal.

The door to admission of additional evidence at the hearing is opened, however, by 7 AAC 40.180(c). This regulation instructs the Department that when applying Appendix 1 to the applicant, it must consider the applicant's activities of daily living and ability to perform other work. In addition, to the extent that the applicant's evidence relates to the specific criteria of a listing, the Department may consider that evidence because the Department must determine whether the applicant meets those criteria.²⁶ Because this case involves a listing for a mental impairment, and evidence relating to the applicant's socialization is considered in the listing, the Department must consider these issues at the hearing. It follows that the applicant is allowed to present evidence on these issues. For example, it would not make sense to require the Department to consider the applicant's activities of daily living—things like dressing or eating—and then not allow the applicant to put on evidence of how well he can perform these activities. Any evidence that does not relate to issues identified in 7 AAC 40.180(c), however, will not be considered in this Decision.

C. Does Mr. L's back pain meet or equal a listing in Appendix 1?

Although Mr. L has severe back pain, to meet or equal a listing in Appendix 1, an applicant must demonstrate significant functional debilitation in addition to the pain. The Department's medical reviewer, Ms. Lang, reviewed the medical documentation in the record, and determined that Mr. L's impairment did not meet or equal the listings in Appendix 1 for

²⁵ 7 AAC 40.180(b)(3). Under this regulation, "other evidence provided by the applicant" must be provided "under 7 AAC 40.050," and 7 AAC 40.050 requires that the evidence be provided to the Division.

²⁶ 7 AAC 40.180(c).

disorders of the spine.²⁷ An independent review of the medical records confirms Ms. Lang's decision—Mr. L has a serious back ailment, but at this time he is still able to function in spite of the pain. For example, Mr. L's back pain does not prevent him from being able to walk or to accomplish tasks such as activities of daily living. Mr. L did not present any additional evidence on the issue of back pain at the hearing. Therefore, the Division's decision that Mr. L's impairments related to his back pain do not meet or equal a listing in Appendix 1 is affirmed.

D. Does Mr. L's schizophrenia meet or equal a listing in Appendix 1?

Schizophrenia is a recognized mental health disorder that is included in Appendix 1 at section 12.03.²⁸ Section 12.03 lays out specific criteria for when a person's schizophrenia will be considered disabling. Although Mr. L does not need to meet all of these criteria to meet the listing, the issues that need to be addressed to are as follows:

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

1. *Delusions or hallucinations.* Mr. L testified that he hears voices, and the record shows that he has consistently reported hearing voices for many years. Therefore, he meets this criterion.
2. *Catatonic or other grossly disorganized behavior.* Ms. Chastain testified that Mr. L is not catatonic and the medical records all reflect that he generally presents as a pleasant and functional person. He does not meet this criterion
3. *Incoherence, loosening of associations, illogical thinking, or poverty of content of speech if associated with blunt/flat/or inappropriate affect.* Ms. Chastain described Mr. L's affect as flat. She described his thought process as linear and goal oriented.²⁹ This evidence shows that Mr. L is not incoherent or otherwise able to meet this criterion.
4. *Emotional withdrawal and/or isolation.* Ms. J testified that Mr. L is able to tolerate being in a communal setting during meal times. As soon as possible, however, he withdraws to his own room. Nothing in the medical records from the Department of

²⁷ Division Exhibit 2.0c. Specifically, Ms. Lang found no evidence to support (i) nerve root compression; (ii) limitation of motion in the spine; (iii) motor loss including muscle atrophy; (iv) weakness; and (v) inability to walk effectively. *Id.* An independent review of the medical records confirmed Ms. Lang's finding.

²⁸ 20 C.F.R. § 404, subpart P, appendix 1 at 478 (2005).

²⁹ Chastain testimony.

Corrections indicates that he suffers from the extreme withdrawal and/or isolation that is contemplated by this criterion. Mr. L does not meet this criterion

AND

B. Resulting in at least two of the following:

1. *Marked restriction of activities of daily living.* Appendix 1 defines “marked” to mean “more than moderate but less than extreme.”³⁰ Here, Ms. J testified that Mr. L has difficulty with chores around the house. He is capable, however, of caring for his personal hygiene and seems to be able to attend to medical appointments. Ms. Chastain testified that Mr. L did not have significant deficits in activities of daily living. He does not meet this criterion.
2. *Marked difficulties in maintaining social functioning.* Mr. L clearly prefers to not have to deal with other people. Ms. J testified that he is not social with the other residents of No Name. His records from Department of Corrections reflect that when he was assigned a job as a painter, he expressed a preference for his previous job as a night buffer where he did not have to deal with people.³¹ Yet, when he has to deal with people, he can. He was able to function in his job as a painter, with no write-ups or discipline.³² His appearance at the parole board went well. His clinic records describe him as “very pleasant and cooperative.”³³ Mr. L does not meet this criterion.
3. *Marked difficulties in maintaining concentration, persistence, or pace.* Appendix 1 defines this criterion as “the ability to sustain focused attention and concentration sufficiently long to permit the timely and appropriate completion of tasks commonly found in the work setting.”³⁴ The intake interviewer noted Mr. L’s difficulties in filling out the application. Ms. J described Mr. L’s pace in completing tasks around the house as very slow. She opined that he would not be able to hold a job outside of the corrections system because, although he wants to do a good job, he loses concentration and works so slowly. The record shows that he held jobs while incarcerated, but it does not include any information on his pace or persistence in

³⁰ *Id.* at 473.

³¹ Division Exhibit 2.94.

³² *Id.*

³³ L Exhibit (No Name Health Center Patient Visit Note (August 30, 2013)).

³⁴ Appendix 1 at 473.

completing those jobs. The evidence on this issue is thin, but on balance, Mr. L meets this criterion.

4. *Repeated episodes of decompensation, each of extended duration.* Appendix 1 explains that this means three episodes within one year.³⁵ Decompensation can be inferred from records showing significant changes in medication or placement in a more structured psychological support system.³⁶ Here, Ms. Chastain raised the possibility that Mr. L may be in a sustained period of decompensation because he hears voices and the clinic has not been able to stabilize him. Mr. L testified about an incident in which he had been placed in isolation and “refused to come out of the hole” because the voices were telling him to stay.³⁷ He also testified that when he is placed in stressful situation, the voices increase significantly. Yet, going back through his records for the last year, although his medications changed after he was released from prison, nothing in the record indicates episodes of decompensation. Indeed, on July 31, 2013, his diagnosis was changed from schizophrenia to depressive disorder, possible psychotic disorder, polysubstance dependence, and antisocial personality disorder.³⁸ From this analysis, it appears that within the last year Mr. L did not experience repeated episodes of decompensation, and he does not meet this criterion.

OR

- C. *Medically documented history of a chronic schizophrenic, paranoid, or other psychotic disorder of at least two years duration that has caused more than a minimal limitation of ability to do basic work activities.* Notwithstanding the change in diagnosis, the record reflects that Mr. L has had significant mental health issues from the time he turned 13. His diagnosis of paranoid schizophrenia has been longstanding, and is the diagnosis of his current medical provider. The evidentiary record on his ability to work is not very extensive, but it indicates that his ability to work is impeded by the voices and his difficulty in concentration. He meets this criterion.

AND, one of the following:

³⁵ *Id.* at 474.

³⁶ *Id.*

³⁷ L testimony.

³⁸ Division Exhibit 2.73-2.74.

1. *Repeated episodes of decompensation, each of extended duration.* See No. 8, above. He does not meet this criterion.
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.* Here, Mr. L has been through many significant adjustments, including being moved to No Name and released from prison to a halfway house. Although some events might very well cause him to decompensate, nothing in this record indicates that “even a minimal increase in demands or change in the environment” would cause him to decompensate. He does not meet the criterion.
3. *Current history of one or more years’ inability to function outside a highly supportive living arrangement, with an indication of continued need for such an arrangement.* Mr. L has been in a highly supportive living arrangement for many years, and continues to live in a supportive environment after his release from prison. The difficult question posed by this record is whether the evidence indicates a continued need for such an arrangement. Ms. J testified that he is willing to tackle tasks around the house, but is essentially incompetent to complete them. Yet, there is no evidence that Mr. L is incapable of basic activities of daily living or that he could not function to some extent outside of a supportive environment. Mr. L does not meet this criterion.

This analysis demonstrates that Mr. L does not meet the listing for schizophrenia. Although he met one of the criterion under A (delusions), and one under B (concentration), he needed to meet two criteria under B to qualify. And although he met the criteria for the lead-in language of part C, he did not meet any of the three listed requirements for this section. Therefore, he does not meet the listing.

In comparison with other cases in which a schizophrenic applicant was found to meet the listing, the evidence for Mr. L comes up short. For example, in finding that an applicant with schizophrenia met the listing, one court relied on evidence that the applicant “demonstrated a habit of failing to follow through with medical appointments,” was “not cooperative” in medical appointments, had a history of working for only one day, being combative with co-workers, and

having a strained relationship with his mother.³⁹ The evidence showed that the applicant was a loner, with a flat affect, who “often is very angry and tries to intimidate [people], and that he heard voices.”⁴⁰ The court found this evidence established that the applicant had medically documented delusions, and had marked difficulties maintaining social functioning and marked difficulties in maintaining concentration, persistence, and/or pace.⁴¹ In contrast, Mr. L seems to not have any problem with making appointments, and generally is polite and cooperative. Although he has severe issues, it appears that he is generally able to find coping strategies.

In conducting this analysis, 7 AAC 40.180(c)(4) requires consideration of whether the Mr. L can perform other work, including sedentary work. Here, evidence is ambiguous on whether Mr. L could function in a work setting. His powers of concentration are limited, which might make it difficult for him to work at a job. The notes on the interview that he had great difficulty in filling out the application indicate that he is not a good candidate for desk work. On the other hand, he is a goal-oriented, linear thinker, which might make it possible for him to focus on completing a simple, routine task. The right task-oriented job might help him keep the voices at bay and provide the satisfaction of meeting goals. These regulations clearly reflect an intent that if a person can work, it is better for both the person and society to have the person employed than on disability. Here, where the evidentiary record is not conclusive as to the extent and nature of an applicant’s disability, the appropriate decision is that the applicant is not likely to be found to be disabled.

In sum, this is a close case, and, with access to additional evidence, the Social Security Administration may well determine that Mr. L is disabled. On this record, however, Mr. L’s mental and physical impairments do not appear to meet the tests for disabling conditions that are established in Appendix 1. Therefore, the Division’s determination that Social Security Administration is not likely to find that Mr. L is disabled is affirmed.

³⁹ *Johnson v. Astrue*, 493 F.Supp. 652, 658-59 (W.D.N.Y 2007).

⁴⁰ *Id* at 657.

⁴¹ *Id* at 657-59.

IV. Conclusion

The evidence in this record shows that neither Mr. L's back pain nor his schizophrenia meet the requirements for being disabling conditions under the Social Security listings. Therefore, the Division's decision denying Interim Assistance is affirmed.

DATED this 14th of January, 2013.

By: Signed
Stephen C. Slotnick
Administrative Law Judge

Adoption

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

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

DATED this 29th 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.]