

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

In the Matter of)
)
 N J)
 _____)

OAH No. 13-1803-APA
Agency No.

DECISION

I. Introduction

Mr. J is no longer able to work as an electrician due to a tremor in his right hand. He applied to the Social Security Administration for Supplemental Security Income disability benefits and to the Division of Public Assistance for Interim Assistance. The Division denied his application for Interim Assistance, finding that he was not likely to be granted SSI disability benefits. Because the evidence in this record does not show that his impairments meet or equal the criteria in the Social Security Administration’s listings of impairments, the Division’s denial is affirmed.

II. Facts

N J is a 59-year-old former electrician who lives in No Name. He has not worked as an electrician for several years now, however, because he has a tremor in his right hand, and he is right-handed.¹

Mr. J describes his right hand as almost useless. Not only does it shake, but it is severely weakened. The most he can lift with his right hand, in his estimate, is fifteen pounds. He notes that his left hand is beginning to shake also, but he still has power in that hand, and estimates he could lift thirty to forty pounds with that hand.²

Mr. J also has pain in his left hip and right knee. He described his condition as a cracked pelvis and said the knee injury was from many years ago.³ The diagnosis filled out by Dr. H X for purposes of his disability application described his condition as “pain in joint – pelvic region and thigh; trochanteric bursitis of left hip.”⁴ Mr. J also has psychological problems, which he believes are due to his frustration with his debilitated condition. Dr. X described Mr. J’s

¹ J testimony.

² *Id.*

³ *Id.*

⁴ Division Exhibit 3-265. This form is called the “AD-2” form.

psychological issues as a “personality disorder.”⁵ Other medical records note that Mr. J has anger management issues.⁶ In addition, Mr. J described himself as an alcoholic, but stated that he is no longer drinking.⁷

In spite of his impairments, Mr. J has developed coping mechanisms. He is able to get around. He walks with a limp, and states that he uses a cane. He no longer drives, which he attributes to his poor eyesight and inability to afford glasses. He takes the bus. On a typical day, he will go to the grocery store and shop, and might go to the city library. He described himself as a fanatical reader. He is able to perform household and personal tasks like cooking, bathing, brushing his teeth, shopping, and combing his hair, by using his left hand or both hands together.⁸

In the summer of 2013, Mr. J laid a tile floor for friend. Mr. J described how the friend would bring the heavy tile boxes over and unpack them, and then he would lay the tiles. Given his condition, however, Mr. J stated that he could not do this kind of work commercially.⁹

Mr. J’s medical records do not give a very clear picture of the causes of his tremor. In 2011, the Division of Vocational Rehabilitation referred Mr. J to Dr. Pervier for a neurological examination. Dr. Pervier noted that “[m]uch of what he shows is an irregular, dysrhythmic, gross tremor of the right upper extremity that seems to go away with use and with being distracted.”¹⁰ Dr. Pervier was puzzled, and noted that “[t]his does not really fit what I would expect with a hemiparkinsonian process.”¹¹ In August 2013, Dr. X prescribed a medication, Sinemet, that Mr. J described as a medication to treat Parkinson’s disease. Nothing in this record indicates whether that drug has been effective. Mr. J testified that he has an appointment with a Parkinson’s specialist in January 2014.

With regard to Mr. J’s ability to work, Dr. Pervier noted the following:

Obviously, the patient cannot do his job as an electrician with his hand doing what it is doing at this time, but he does not seem to have any problems with sitting, standing, moving about, lifting, or carrying (as long

⁵ Division Exhibit 3-265.

⁶ *E.g.*, Division Exhibit 3-200.

⁷ J testimony.

⁸ *Id.*

⁹ *Id.*

¹⁰ Division Exhibit 3-27.

¹¹ *Id.* Dr. Pervier recommended a complete battery of tests. He noted that “[m]uch of his presentation looks affected and brought on by the patient himself, either subconsciously or in the form of symptom augmentation, conversion, or potentially frank malingering (which is not at the top of the list but is still part of the differential in this case).” *Id.*

as they are not delicate items). Handling objects would be a problem, if indeed this tremor is organic. The patient does not show any signs of difficulty with speaking, seeing, or travelling at this time.¹²

On November 1, 2013, Mr. J submitted an application for Interim Assistance to the Division of Public Assistance.¹³ He signed release forms, and the Division received copies of his medical records. The application and the records were reviewed by the Division's medical reviewer, Jamie Lang. In order to determine whether Mr. J was eligible for Interim Assistance, Ms. Lang applied steps 1-3 of the Social Security Administration's five-step sequential process for evaluating disability claims.¹⁴ She found that Mr. J met step one because he was not working. He met step two because he had severe, medically determinable impairments.¹⁵ Ms. Lang found that he did not meet step 3, however, because his impairments did not meet or equal Social Security's published criteria setting out when an impairment is considered disabling.¹⁶ Accordingly, Ms. Lang recommended that Mr. J's application for Interim Assistance be denied.

On December 16, 2013, the Division notified Mr. J that his application for Interim Assistance was denied.¹⁷ Mr. J requested a fair hearing on that same day.¹⁸ A telephonic hearing was held on January 7, 2014. Mr. J represented himself. Jeff Miller represented 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

¹² Division Exhibit 3-28.

¹³ Division Exhibit 2.

¹⁴ Division Exhibit 3.3.

¹⁵ *Id.* at 3.5.

¹⁶ Division Exhibit 3.5-3.6. Ms. Lang and Social Security's website refer to Social Security's Publication as the "Blue Book." This publication is available at <http://www.ssa.gov/disability/professionals/bluebook/AdultListings.htm>. This decision will refer to the relevant criteria as "Appendix 1" because it is adopted into regulation at 20 C.F.R. 404, subpart P, appendix 1.

¹⁷ Division Exhibit 4. A minor correction was made and the denial renoticed on December 17. *Id.* at 4.1.

¹⁸ *Id.* at 6.1.

¹⁹ *See* 7 AAC 40.030, 7 AAC 40.060.

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 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 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. J’s impairments meet or equal one or more listing in Appendix 1 is done by taking into consideration the medical evidence, Mr. J’s ability to do activities of daily living, whether Mr. J can do work (including sedentary work) other than his former employment, and whether Mr. J’s impairment has lasted for more than 12 months.²⁴ If,

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).

²² *Id.* The Department’s regulations specifically adopt 20 C.F.R. 404, subpart P, appendix 1, as revised as of September 1, 2013 (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. J’s mental health impairment meets steps one and two. Therefore, this decision will focus on whether Mr. J’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. 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:

after taking these issues into consideration, Mr. J's impairment meets or equals a listing, Mr. J will qualify for interim assistance.

B. Does the medical evidence show that Mr. J meets or equals a listing (7 AAC 40.180(c)(1) and (2))?

With regard to Mr. J's tremor, Appendix 1 contains the following listing:

11.06 Parkinsonian syndrome with the following signs: Significant rigidity, bradykinesia, or tremor in two extremities, which, singly or in combination, result in sustained disturbance of gross and dexterous movements, or gait and station.²⁵

At this time, the medical evidence in the record does not support a diagnosis of Parkinsonian syndrome. In 2011, Dr. Pervier was unable to identify the cause of the tremor. In 2013, Dr. X noted "[t]remor of unknown etiology."²⁶ Further, even if Mr. J had a diagnosis, nothing in the medical evidence or his testimonial evidence indicates that at this time his impairments would meet or equal a listing. He does not have significant tremor in two extremities. The outcome is the same when his tremor is analyzed under the listings for musculoskeletal system impairments, which, for upper extremity impairments, would require "the inability to perform fine and gross movements effectively on a sustained basis." This means:

an extreme loss of function of both upper extremities; i.e., an impairment(s) that interferes very seriously with the individual's ability to independently initiate, sustain, or complete activities. To use their upper extremities effectively, individuals must be capable of sustaining such functions as reaching, pushing, pulling, grasping, and fingering to be able to carry out activities of daily living. Therefore, examples of inability to perform fine and gross movements effectively include, but are not limited to, the inability to prepare a simple meal and feed oneself, the inability to

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

- (1) 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.

At this time, the Division does not appear to dispute that Mr. J's impairments will last longer than 12 months.

²⁵ 20 C.F.R. 404, subpart P, appendix 1 at § 11.06.

²⁶ Division Exhibit 3.30.

take care of personal hygiene, the inability to sort and handle papers or files, and the inability to place files in a file cabinet at or above waist level.²⁷

Mr. J, although seriously impaired by his tremor, retains the ability to accomplish fine motor skills, either with his left hand or at times with his right hand or both hands. Therefore, his tremor in his right hand does not meet or equal a listing.

With regard to Mr. J's hip pain, Appendix 1 contains the following listing:

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

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

OR

B. Involvement of one major peripheral joint in each upper extremity (i.e., shoulder, elbow, or wrist-hand), resulting in inability to perform fine and gross movements effectively, as defined in 1.00B2c.²⁸

Here, the medical evidence shows that Mr. J is ambulatory, and remained ambulatory after a fall that injured his hip.²⁹ That is consistent with his testimonial evidence. Based on the medical evidence, and the record as a whole, Mr. J's hip pain does not meet or equal a listing in Appendix 1.

With regard to Mr. J's psychological impairment, Appendix 1 contains the following listing:

12.08 Personality disorders: A personality disorder exists when personality traits are inflexible and maladaptive and cause either significant impairment in social or occupational functioning or subjective distress. Characteristic features are typical of the individual's long-term functioning and are not limited to discrete episodes of illness.

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

A. Deeply ingrained, maladaptive patterns of behavior associated with one of the following:

²⁷ 20 C.F.R. 404, subpart P, appendix 1 at § 1.00c.

²⁸ 20 C.F.R. 404, subpart P, appendix 1 at § 1.02.

²⁹ Division Exhibit 3.35.

1. Seclusiveness or autistic thinking; or
2. Pathologically inappropriate suspiciousness or hostility; or
3. Oddities of thought, perception, speech and behavior; or
4. Persistent disturbances of mood or affect; or
5. Pathological dependence, passivity, or aggressivity; or
6. Intense and unstable interpersonal relationships and impulsive and damaging behavior;

AND

B. Resulting in at least two of the following:

1. Ned restriction of activities of daily living; or
2. Ned difficulties in maintaining social functioning; or
3. Ned difficulties in maintaining concentration, persistence, or pace; or
4. Repeated episodes of decompensation, each of extended duration.³⁰

The medical evidence documents that Mr. J is “pleasant and cooperative,” with a provisional diagnosis of PTSD.³¹ Although he does have issues with anger and frustration, neither the medical evidence nor his testimony demonstrate the maladaptivity required by Appendix 1 to meet or equal a listing for psychological impairments.

C. Does the effect of Mr. J’s impairments on his activities of daily living indicate that he meets or equals a listing (7 AAC 40.180(c)(3))?

7 AAC 40.180(c)(3) requires that the department consider whether the applicant’s “impairment affects the applicant’s activities of daily living.” Without question, Mr. J’s impairments have affected his activities of daily living. In order to do ordinary tasks, Mr. J has to compensate for the tremor and weakness of his dominant hand. Yet, based on his testimony, he is able to function and to complete his activities of daily living in spite of his impairment. Therefore, taking the effect on his activities of daily living into consideration does not change the conclusion that he does not meet or equal a listing.

D. Does the effect of Mr. J’s impairments on his ability to perform any other work, including sedentary work, indicate that he meets or equals a listing (7 AAC 40.180(c)(4))?

7 AAC 40.180(c)(3) requires that the department consider whether the applicant “can perform any other work, including sedentary work.” Here, that is a difficult question. Mr. J reports that he has been to the Division of Vocational Rehabilitation, and apparently that division was suggesting that some retraining might be possible for him, but it was not sure what it could

³⁰ 20 C.F.R. 404, subpart P, appendix 1 at § 12.08.

³¹ Division Exhibit 3.14-15.

do.³² If medication is not able to help his tremor, his inability to use his dominant hand will certainly limit his ability to do work. On the other hand, he is bright, articulate, and capable, and his work experience does provide him with knowledge of the construction industry that might be useful in certain sedentary occupations. Dr. Pervier’s analysis implies that Mr. J could return to the workforce. Therefore, on this record, he more likely than not is able to do work other than his former occupation as an electrician in the construction industry.³³ Thus, taking his ability to do other work into consideration does not change the conclusion that he does not meet or equal a listing in Appendix 1.

E. Does 7 AAC 40.180(b)(1) apply an illegal test by preempting federal law?

At hearing, Mr. J argued that the Division acted illegally when it made the determination that he was not likely to be found disabled by the Social Security Administration. In his view, the Division was preempting federal law by presuming to tell the federal government how its test would come out before the federal government had an opportunity to make the final administrative decision on his disability.

Mr. J is correct that under 7 AAC 40.180(b)(1), the test for whether an applicant is eligible for Interim Assistance requires the department to conduct “a medical review by the department as to whether the applicant is likely to be found disabled by the Social Security Administration.” This review, however, does not bind or even influence the Social Security Administration’s own application of its test for disability. The department’s test for Interim Assistance is laid out in regulation, and the department is free to rely on and make use of federal standards in its regulations. As explained in *In re M.H.*, the two-tests are not identical. The test for Interim Assistance is meant to be much simpler and quicker than the five-step Social Security process.³⁴ Therefore, Department’s determination that Mr. J is not likely to be found disabled by the Social Security Administration does not preempt federal law.

IV. Conclusion

Mr. J has serious impairments, particularly the tremor in his right, dominant hand. His impairments, however, do not meet or equal a listing in the Social Security Administration disability criteria for the listings of impairments, as required under the Alaska regulations.

³² J testimony.

³³ Ms. Lang testified that she took his ability to work into consideration in reaching the conclusion that Social Security is likely to deny his application for Interim Assistance. She suggested that there may be jobs in security monitoring that he could perform.

³⁴ OAH No. 12-0688-APA at Commissioner’s Decision.

Therefore, Mr. J is ineligible for Interim Assistance, and the Division's decision denying him Interim Assistance is affirmed.

DATED this 16th of January, 2014.

By: Signed
Stephen C. Slotnick
Administrative Law Judge

Adoption

Under a delegation from the Commissioner of Health and Social Services, I adopt this Decision as the final administrative determination in this matter, 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 Alaska R. App. P. 602(a)(2) within 30 days after the date of this decision.

DATED this 3rd day of February, 2014.

By: Signed
Name: Stephen C. Slotnick
Title: Administrative Law Judge/DOA

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