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

In the Matter of:)
)
M. A. G.,) OHA Case No. 12-FH-79
)
Applicant for Interim Assistance.) DPA Case No.
_____)

FAIR HEARING DECISION

I. Introduction

M. G. applied for Interim Assistance in January of 2012. A disability adjudicator employed by the Division of Public Assistance (DPA or Division) concluded that his disabling conditions were not expected to meet the 12-month durational requirement to qualify for the program, and the Division therefore denied his application. Mr. G. timely requested a Fair Hearing, which was held before the undersigned on April 4, 2012.

At the hearing, the Division conceded that Mr. G. is not presently engaged in any substantial gainful activity, and that his depression constitutes a medically severe impairment. Contrary to the Division's assertion, the evidence received at the hearing establishes that Mr. G.' medically severe impairment *does* meet the twelve (12) month durational requirement, and that Mr. G. is otherwise qualified to receive Interim Assistance benefits.

II. Facts

M. G. applied for Interim Assistance on December 7, 2011.¹ His application was supported by a psychiatric examination diagnosing (1) "Major Depressive Disorder, recurrent type, severe without psychosis" and (2) anxiety disorder not otherwise specified,

¹ Exhibit 2.

both with an expected duration of 12 or more months.² The division’s medical reviewer, Laura Ladner, determined that the application should be denied because “applicant[’]s conditions are not expected to meet the 12 months durational requirement” for eligibility,³ and his application was denied on that basis on March 6, 2012.⁴

Mr. G., age 40, lives in a camper van behind a friend’s house in exchange for providing some limited driving and dog-walking services. Apart from this barter for living space, he has been unemployed for three years. Before that, he had intermittent employment as a cab driver and truck driver and, much earlier, as a bouncer. He was incarcerated from 2003 to 2006.⁵

Mr. G. has a number of physical health problems that medical providers have found “serious”.⁶ The most significant are:

- poorly controlled diabetes mellitus, which has led to numbness in the hands, feet, and left leg and an abnormal gait;
- chronic pain and sleep disturbance associated with an on-the-job back injury, three back surgeries, and continuing spinal issues including bone spurs in the cervical spine and an abnormality in the lumbar spine.

Additional current problems include gout, high blood pressure, bursitis, poor vision, obesity, and carpal tunnel syndrome.⁷

Mr. G.’ depression was noted in early 2011, and in the first part of that year it was treated very briefly (for about three weeks) with the antidepressant wellbutrin, which Mr. G. was not able to tolerate.⁸ Although his depression persisted, Mr. G. declined treatment in October of 2011.⁹ Mr. G. was diagnosed as suffering from severe depression on December 6, 2012, and he was started on the antidepressant venlafaxine in that date.¹⁰ This course of treatment appears to have been discontinued, for reasons not explained in the medical

² Exhibit 3.9. The second diagnosis appears as “Anxiety D/O NOS”.

³ Exhibit 3.1.

⁴ Exhibits 5, 6.

⁵ Testimony of Mr. G.

⁶ *E.g.*, Exhibit 3.27.

⁷ Exhibit 3.

⁸ Exhibits 3.42, 4.49, 3.52, 3.54.

⁹ Exhibit 3.42.

¹⁰ Exhibit 3.38.

records, at some time prior to January 5, 2012.¹¹ On January 19, 2012, the antidepressant paroxetine was prescribed.¹² There are no later records to indicate the results of this treatment, but the Division concedes that Mr. G. is “being treatment compliant currently” (as of April 4, 2012) and its medical reviewer felt that, notwithstanding treatment, “I do not think that [Mr. G.] can work currently.”¹³

The psychiatric evaluation supporting the application states that Mr. G. is expected to recover from his depression, “depending on response to medication,” but opines that the expected length of time required for recovery is “12 or more months.”¹⁴

III. Discussion

A. *Evaluation for Interim Assistance*

Interim Assistance is a benefit available to individuals while they are waiting for the Social Security Administration (SSA) to rule on their application for Supplemental Security Income (SSI).¹⁵ Among other requirements, to receive Interim Assistance an applicant must be “likely to be found disabled by the Social Security Administration.”¹⁶ The person seeking to obtain benefits has the burden of proving that he or she is likely to be found disabled by the SSA.¹⁷

The SSA uses a five-step evaluation process in making its disability determinations.¹⁸ Each step is considered in order, and if the SSA finds the applicant either disabled or not disabled at any step, it does not consider subsequent steps.¹⁹ The first step in this process looks at the applicant’s current work activity. If the applicant is performing “substantial gainful activity,” the SSA will find that the applicant is not disabled.²⁰

At step two, the SSA considers the severity of the applicant’s impairment. In order to be considered disabled, the impairment or combination of impairments must be severe,

¹¹ Mr. G. had been prescribed a 30-day supply of the medication. He was seen 30 days thereafter, and the prescription does not appear to have been renewed. However, medication is not mentioned in the chart note for the later appointment. Exhibit 3.32; *see also* Exhibit 3.24.

¹² Exhibit 3.21.

¹³ Statement of Ms. Ladner, recording at 40:00.

¹⁴ Ex. 3.9.

¹⁵ 7 AAC 40.170(b); 7 AAC 40.375.

¹⁶ 7 AAC 40.180(b)(1).

¹⁷ *State v. Decker*, 700 P.2d 483, 485 (Alaska 1985) (burden of proof is on party seeking a change in the status quo).

¹⁸ 20 CFR §416.920.

¹⁹ 20 CFR §416.920(a)(4).

²⁰ 20 CFR §416.920(a)(4)(i).

and must also either (1) be expected to result in death, or (2) must have lasted or be expected to last for at least 12 months.²¹ If the impairment is not severe under this definition, then the applicant is not disabled.

At step three, the SSA looks at whether the impairment meets or equals one of the listings adopted by the SSA.²² If it does, the applicant is disabled, and the SSA does not look at steps four and five.²³

For applicants who are not determined to be disabled at step three, the SSA goes on to step four and looks at the applicant's ability to perform his or her past relevant work.²⁴ If the applicant is able to perform past relevant work, the applicant is not disabled. If the applicant is unable to perform past relevant work, the evaluation proceeds to the fifth step.

Finally, at step five, the SSA looks at the applicant's capacity for work, age, education, and work experience to determine whether the applicant can perform other work in the national economy.²⁵

B. Procedural Issues

1. Standard of Review

At this stage, the agency is still in the process of applying its expertise and reaching its final decision. During this internal appeal process, the Hearing Examiner may independently weigh the evidence and reach a different conclusion than the division staff even if the original decision is factually supported and has a reasonable basis in the law.

2. Notice

The notice denying an application for Interim Assistance must "detail the reasons for the proposed adverse action."²⁶ In this case, only one reason was given for denial: "APPLICANT[']S CONDITIONS ARE NOT EXPECTED TO MEET THE 12 MONTHS DURATIONAL REQUIREMENT."²⁷

²¹ 20 CFR § 416.920(a)(4)(ii); 20 CFR §416.909.

²² See 20 CFR § 404, Subpart P, Appendix 1 (hereafter "Appendix 1").

²³ 20 CFR § 416.920(a)(4)(iii) and (d).

²⁴ 20 CFR § 416.920(a)(4)(iv).

²⁵ 20 CFR § 416.920(a)(4)(v).

²⁶ 7 AAC 49.070.

²⁷ Ex. 6.

3. *Effect of Prior Determination by SSA*

In its Position Statement filed March 29, 2012, the Division asserted that at some time in the past Mr. G. “had a Social Security Administrative Law Judge Hearing and received an unfavorable decision.” The Division argues:

This shows the client has a history of being denied Social Security. It is **conclusive** and should have Res judicata effect.²⁸

The Division is mistaken about the effect which an Administrative Law Judge Hearing-level decision by SSA has on a pending application for Interim Assistance. First, the alleged res judicata effect of the SSA's determination was not listed in the Division's notice of adverse action as a basis for its denial of Mr. G.' Interim Assistance application. Second, the Division provided no records from the SSA proceeding, which makes it impossible to ascertain that the issues in the two cases were the same; this is a prerequisite for res judicata and similar issue preclusion doctrines. Moreover, the Division indicated at the hearing that the SSA decision occurred on May 17, 2011. The diagnosis which forms the basis for *this case* was made on December 6, 2011, almost seven (7) months later. Accordingly, the SSA's decision could not possibly have considered the December 2011 diagnosis.

C. *Disability*

1. *Steps One and Two of the Five Step Analysis*

The Division agrees that Mr. G. is not currently engaged in substantial gainful activity, hence meeting the precondition for disability at step one. As to step two, the Division likewise agrees that Mr. G.' medical impairment is severe.

The central question in this case, identified in the notice of denial, is whether Mr. G.' serious impairment is likely to meet the second aspect of step two, that is, the 12-month durational requirement. The durational requirement is satisfied by a “continuous period” of 12 months; this period can occur before the evaluation, after the evaluation, or it can “straddle” the evaluation date, falling partly before and partly after the evaluation.²⁹

Mr. G. has had severe depression at least since December 6, 2011. At the time of the hearing, he had had it for at least four months and it remained disabling, in that the Division

²⁸ Position Statement at 2 (boldface in original).

²⁹ 20 C.F.R. § 416.909; *see also, e.g., Vendetti v. Rhode Island Dep't of Human Services*, No. 03-1126 (R.I. Super. Ct. 2003) (<http://statecasefiles.justia.com/documents/rhode-island/superior-court/03-1126.pdf>) (durational requirement may be met by a combination of prior and future disability).

still did not think he could work at that time. Accordingly, if the condition remains disabling for another eight months after the hearing, it meets the durational requirement.

Mr. G. has been compliant with treatment since December. Over the history of the depression, two medications were discontinued, one because he could not tolerate it (early in 2011, before the depression was diagnosed as severe), and the other for unexplained reasons³⁰ (in January 2012). A third medication was initiated two-and-a-half months before the hearing.

The treating medical provider assessed the expected length of time for recovery at 12 or more months, but indicated that eventual recovery is expected “depending on response to medication.”³¹ She noted that there was a “long history” of prior depression and that “the patient experiences chronic pain that exacerbates the depression.”³² Notably, the record does not suggest that the chronic pain has been brought under control,³³ and his current insurance status seems to preclude surgery to address its causes.³⁴

In contesting the medical opinion that the course of the condition is likely to be 12 or more months, the division presented the opinion of a disability adjudicator, Laura Ladner. Ms. Ladner’s training in mental health consists of a bachelor’s degree in psychology.³⁵ She testified that she expects Mr. G.’ condition to improve significantly with medication by November of 2012. In explaining her opinion, she seemed to minimize the chronic pain component in Mr. G.’ depression. She faulted Mr. G. as noncompliant for discontinuing wellbutrin during a prior depressive episode, overlooking the records that indicate he did not tolerate that medication well. She did not discuss the medication he is currently taking or the outcomes it has been shown to achieve in patients similar to Mr. G. In general, her view that the treating provider’s assessment is too pessimistic was not persuasively explained.

On balance, the opinion of Mr. G.’ treating provider (that the disabling condition is likely to persist for 12 or more months) is the better assessment of Mr. G.’ prognosis. Based

³⁰ There are hints in the testimony that this may have been an issue of unaffordability. A claimant “cannot be denied benefits for failing to obtain medical treatment that would ameliorate his condition if he cannot afford that treatment.” *Gamble v. Chater*, 68 F.3d 319, 321 (9th Cir. 1995).

³¹ Ex. 3.9.

³² *Id.*

³³ *See, e.g.*, Ex. 3.30.

³⁴ *See* Ex. 3.43.

³⁵ Testimony of Ms. Ladner.

on the evidence in the record, it is more likely than not that Mr. G.' medically severe condition will have a total duration, (including the time already elapsed), of 12 or more months.

2. *Steps Three, Four, and Five of the Five Step Analysis*

The Division's disability adjudicator determined that Mr. G. "can [not] work currently," but when the Division gave Mr. G. its notice, (which is required to "detail the reasons for the proposed adverse action"), the Division did not assert that Mr. G. failed to satisfy the disability criteria at steps three, four, or five.³⁶ Accordingly, the Division has conceded that Mr. G. either meets the categorical disability listings in step three or, alternatively, that he lacks the capacity to work under steps four and five.

In any event, there is uncontroverted evidence in the record that Mr. G. has a qualifying disability under step three of the analysis. The SSA recognizes (in appendix 1 to subpart P of 20 C.F.R. Part 404) a list of specific impairments that, if met or equaled, are considered disabling.³⁷ Listing 12.04 is for Affective Disorders, including depression. For these disorders,

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

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

³⁶ 7 AAC 49.070.

³⁷ 20 CFR § 416.920(a)(4)(iii).

2. Manic syndrome characterized by at least three of the following:
[omitted]

or

3. Bipolar syndrome [criteria omitted];

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.

Under A-1, Mr. G.' diagnosis shows anhedonia, insomnia, psychomotor retardation, decreased energy, and difficulty thinking or concentrating.³⁸ Under B, there is marked interference with daily functioning and marked difficulties in social functioning and in maintaining concentration, persistence, or pace.³⁹ This combination of symptoms meets the Listing's required level of severity.

IV. Decision

Mr. G. has met his burden of proving that he is likely to meet the Social Security Administration's criteria for disability. Accordingly, Mr. G. is entitled to receive Interim Assistance.

³⁸ *E.g.*, Ex. 3.20. These conditions are amply documented elsewhere in the file, as well.

³⁹ *E.g.*, Ex. 3.16.

APPEAL RIGHTS

If for any reason Mr. G. is not satisfied with this decision, he has the right to appeal by requesting a review by the Director of Public Assistance. If Mr. G. 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
P.O. Box 110640
Juneau, AK 99811-0640

Dated this 29th day of June, 2012.

/Signed/
Jay Durych
Hearing Authority

CERTIFICATE OF SERVICE

I certify that on June 29, 2012, true and correct copies of the foregoing decision were distributed as follows:

To the following via U.S.P.S. Certified Mail, Return Receipt Requested:

M A. G.

and to the following via secure / encrypted e-mail:

Terri Gagne, Public Assistance Analyst
Jeff Miller, Public Assistance Analyst
Erin Walker-Tolles, Policy & Program Development
Joy Dunkin, Staff Development & Training
Kari Lindsey, Administrative Assistant II
Courtney Wendel, Policy & Program Development

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