

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

In the Matter of)
)
 N K)
_____)

OAH No. 14-0241-APA
Agency No.

DECISION

I. Introduction

N K has been out of work for most of the last year. Because of her severe back and shoulder pain, she 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 her application for Interim Assistance, finding that she was not likely to be granted Supplemental Security Income disability benefits. Because the evidence in this record does not show that her impairments meet or equal the criteria in the Social Security Administration's listings of impairments, the Division's denial is affirmed.

II. Facts

N K is a 61-year-old woman who lives with her son in an apartment in No Name. Dr. Q Smith diagnosed Ms. K as having the following three conditions: chronic back pain, chronic right shoulder pain (possible rotator cuff tear), and chronic mood disorder—depression/anxiety (possible bipolar).¹ Dr. Smith advised that "[t]hese conditions should be managed chronically and she may benefit from surgery, but it's unlikely she will ever be able to work/function fully with her conditions."² Ms. K testified that Dr. Smith told her she could work part-time, but not full-time.³

Ms. K testified that her back has been in bad shape for several years, and last winter she fell three times. During one of the falls, she aggravated her back condition, and it has not improved. She said that on some days bending over would cause unbearable pain, and on those bad days, she could barely walk. Even on a good day, any sudden movement would really hurt.⁴

¹ Division Exhibit 2.171c.

² *Id.*

³ K testimony.

⁴ *Id.*

In describing her shoulder injury, Ms. K said that she was told many years ago that she needed shoulder surgery. She has not had surgery, however, because she could not afford it. The doctors told her that without surgery, eventually her right arm would become unusable. She reports that her ability to use her right arm has decreased. Both of her arms will sometimes become numb, the right arm more frequently.⁵

Neither injury prevents Ms. K from doing her activities of daily living, but both affect her level of activity. She described activities like bathing, dressing, and shopping as being a big struggle and taking a long time. She does household chores like mopping, vacuuming, and doing the dishes, but she often will need to take a break and sit down. She does not drive because she does not have a car. She is able to take a bus, but walking to the bus stop is a challenge, especially given her concern about falling.⁶

Fine motor activities appear to be less of a problem at this time. In spite of the shoulder injury and intermittent numbness in her dominant hand, Ms. K testified that she did not have trouble holding a fork or feeding herself.⁷

Ms. K provided some testimony on her work history. She agreed that she has done sedentary work in the past, having worked as records clerk. She described her most recent job at the food bank as a bad fit because she sometimes had to lift heavy boxes. She explained that she was fired from this job because she had lashed out at another worker who was annoying to her. She attributed this event to her mood disorder.⁸

On October 31, 2013, Ms. K submitted an application for Interim Assistance to the Division of Public Assistance.⁹ She signed release forms, and the Division received copies of her medical records. Ms. K testified that because of her financial situation, she had not been to the doctor for several years. Other than Dr. Smith's medical report, which was created specifically for the purpose of the Interim Assistance evaluation, the medical records submitted in this case are at least eight years old. Ms. K explained that very recently she had an x-ray of her back and a psychological analysis for purposes of her social security disability application.¹⁰

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ Division Exhibit 2.

¹⁰ K testimony.

Ms. K's application and records were reviewed by the Division's medical reviewer, Jamie Lang. To determine whether Ms. K 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.¹¹ She found that Ms. K met step one because Ms. K was not working. Ms. K met step two because she had severe, medically determinable impairments.¹² Ms. Lang found that Ms. K did not meet step three, however, because her impairments did not meet or equal Social Security's published criteria setting out when an impairment is considered disabling.¹³ Accordingly, Ms. Lang recommended that Ms. K's application for Interim Assistance be denied.

On February 12, 2014, the Division notified Ms. K that her application for Interim Assistance was denied.¹⁴ Ms. K requested a fair hearing on February 14, 2014.¹⁵ A telephonic hearing was held on March 7, 2014. Ms. K represented herself. Terri Gagne represented the Division. The record was held open until March 10, 2014.¹⁶

III. Discussion

A. The Department's Interim Assistance regulations 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 apply for Supplemental Security Income and must meet Supplemental Security Income eligibility requirements.¹⁷ 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.¹⁸

¹¹ Division Exhibit 2.1a.

¹² *Id.* at 3.

¹³ *Id.* 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.

¹⁴ Division Exhibit 3.

¹⁵ Division Exhibit 4.2.

¹⁶ The Division asked to keep the record open, and subsequently provided cites to 7 AAC 40.030; 7 AAC 40.060; and 7 AAC 40.040. These regulations do not relate to the issue of whether new medical records should be considered. Ms. K, however, has not requested the opportunity to supplement her application, and the record closed on March 10, 2014.

¹⁷ *See* 7 AAC 40.030, 7 AAC 40.060.

¹⁸ 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.

Under the department's regulations, the Division must conduct a medical review to determine "whether the applicant is likely to be found disabled by the Social Security Administration."¹⁹ 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."²⁰ 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."²¹ Under 7 AAC 40.180(c), the department must consider the following to determine whether Ms. K's impairment meets or equals a listing:

- the medical evidence;
- Ms. K's ability to do activities of daily living;
- whether Ms. K can do work (including sedentary work) other than her former employment; and
- whether Ms. K's impairment has lasted for more than 12 months.²²

¹⁹ 7 AAC 40.180(b)(1).

²⁰ *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.*

²¹ *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 Ms. K's impairments meet steps one and two. Therefore, this decision will focus on step three, whether Ms. K'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. 3AN-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. This decision will not apply steps four and five.

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

(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

Each of these requirements is discussed below.

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

With regard to Ms. K's back pain, Appendix 1 has a detailed description of what the medical evidence must show for disorders of the spine in order for a person to meet or equal a listing.²³ To meet the listing, an applicant must have:

Evidence of nerve root compression characterized by neuro-anatomic distribution of pain, limitation of motion of the spine, motor loss (atrophy with associated muscle weakness or muscle weakness) accompanied by sensory or reflex loss and, if there is involvement of the lower back, positive straight-leg raising test (sitting and supine);²⁴

Here, nothing in the medical record shows nerve root compression or motor loss, and Dr. Smith reports that the straight-leg raise test was negative.²⁵ Therefore, the medical evidence regarding Ms. K's back pain does not demonstrate that she meets the listing for a disorder of the spine.

With regard to Ms. K's shoulder injury, Ms. K's impairment is in only one shoulder. She does not demonstrate "involvement of one major peripheral joint in *each* upper extremity," which is required under Appendix 1 to demonstrate disability involving a major dysfunction of a joint.²⁶ Therefore, the medical evidence regarding Ms. K's shoulder injury does not demonstrate that she meets the listing for a major dysfunction of a joint.

With regard to Ms. K's mood disorder, although Dr. Smith noted a mood disorder, and she has been treated for psychological issues in the past, the record does not have any recent medical evidence of treatment or diagnosis.²⁷ To meet a listing for a psychological requires

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- (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 Ms. K's impairments will last longer than 12 months.

²³ Division Exhibit 2.1b at 12 of 14.

²⁴ 20 C.F.R. 404, subpart P, appendix 1 at § 1.04. The listing also provides for two alternative conditions, spinal arachnoiditis or lumbar spinal stenosis. *Id.* Nothing in this record implicates either of these conditions.

²⁵ Division Exhibit 2.189c.

²⁶ 20 C.F.R. 404, subpart P, appendix 1 at § 1.02 (emphasis added).

²⁷ The record indicates that in the past Ms. K has been treated for psychological disorders affecting her work. *See, e.g.*, Division Exhibit 2.113c-2.122c.

medical evidence of significant impairment.²⁸ Here, the medical evidence regarding Ms. K’s psychological condition does not demonstrate that she meets the listing for a psychological disorder.

Ms. K indicated at the hearing that she has seen additional doctors and that more medical evidence, including an x-ray of her back and a psychological report, is being prepared for purposes of her social security disability application. She explained that she filed for Interim Assistance because it was made available to her, and she appealed the denial because she was concerned that the denial could affect her social security disability application. She did not request that the hearing be continued or held open for her to file additional medical evidence. The medical evidence in this record does not support a conclusion that Ms. K meets or equals a listing in Appendix 1.

C. Does the effect of Ms. K’s impairments on her activities of daily living show that she meets or equals a listing (7 AAC 40.180(c)(3))?

Ms. K’s testimony established that her activities of daily living are affected by her conditions. She has serious impairments that make her activities more difficult. She is, however, able to employ coping skills and mechanisms to continue to take care of herself and do daily household chores. Under Appendix 1, the loss of function necessary to qualify for a listing must be so severe that the applicant cannot “carry out activities of daily living.”²⁹ Therefore, taking the effect on Ms. K’s activities of daily living into account does not result in her meeting or equaling a listing.

²⁸ See, e.g., 20 C.F.R. 404, subpart P, appendix 1 at § 12.08, which lists the following evidentiary requirements for a personality disorder:

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

The medical evidence does not show that Ms. K has this level of psychological impairment.

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

D. Does the effect of Ms. K's impairments on her ability to perform any other work, including sedentary work, indicate that she meets or equals a listing (7 AAC 40.180(c)(4))?

Ms. K is not currently working and she testified that she has applied for many jobs but has not been able to find one. The evidence in the record, however, indicates that she likely could perform sedentary work. Ms. K testified that Dr. Smith advised that she could do part-time work, and the fact that she has been applying for jobs indicates that she herself believes she is *capable* of working. The fact that she has been unable to find work in the No Name area is not sufficient evidence to conclude that she is not able to perform sedentary work. Therefore, taking her ability to work into consideration does not affect the determination that Ms. K's impairments do not meet or equal a listing in Appendix 1.

IV. Conclusion

Ms. K has serious impairments. Her back and her shoulder injury cause her pain and impede her movements. Her psychological conditions have caused her anxiety and led to physical disorders. Her 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 that govern eligibility for Interim Assistance. Therefore, Ms. K is ineligible for Interim Assistance, and the Division's decision denying her Interim Assistance is affirmed.

DATED this 11th of March, 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 26th day of March, 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.]

Non-Adoption Options

A. Under a delegation from the Commissioner of Health and Social Services and in accordance with AS 44.64.060(e)(2), I decline to adopt this Decision, and instead order under AS 44.64.060(e)(2) that the case be returned to the administrative law judge to

take additional evidence about _____;

make additional findings about _____;

conduct the following specific proceedings: _____.

DATED this _____ day of _____, 2014.

By: _____

Ree Sailors, Deputy Commissioner
Department of Health and Social Services

B. Under a delegation from the Commissioner of Health and Social Services and in accordance with AS 44.64.060(e)(3), I revise the enforcement action, determination of best interest, order, award, remedy, sanction, penalty, or other disposition of the case as set forth below, and adopt the proposed decision as revised:

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 _____ day of _____, 2014.

By: _____

Ree Sailors, Deputy Commissioner
Department of Health and Social Services

C. Under a delegation from the Commissioner of Health and Social Services and in accordance with AS 44.64.060(e)(4), I reject, modify, or amend one or more factual findings as follows, based on the specific evidence in the record described below:

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 _____ day of _____, 2014.

By: _____
Ree Sailors, Deputy Commissioner
Department of Health and Social Services

D. Under a delegation from the Commissioner of Health and Social Services and in accordance with AS 44.64.060(e)(5), I reject, modify, or amend the interpretation or application of a statute or regulation in the decision as follows and for these reasons:

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 _____ day of _____, 2014.

By: _____
Ree Sailors, Deputy Commissioner
Department of Health and Social Services

DATED: June 30, 2014.

By: _____
Stephen C. Slotnick
Administrative Law Judge