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

In the Matter of	)	
	)	
H X	)	OAH No. 14-0707-APA
	)	Agency No.

DECISION

I. Introduction

H X was injured in a logging accident in 2000. His injuries have had lasting effect, and he now walks with a brace and crutch. In February 2014, 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

H X is a 53-year-old man who lives in No Name, Alaska.

Mr. X's work history shows that he worked in manual labor from 1972 until 2000. In the '80s and early '90s he worked in the construction and logging industries in Oregon. From 1992-2000, he was working in the logging industry in No Name. He described his various jobs as "hook tender"; "chaser"; and "chocker setter."[1]

In 2000, while working as a logger, Mr. X was involved in a severe accident. He was hit by a main line, which he recalls "came out of the air." He described the sensation of being hit like "being peeled." The line hit him on the left side of his head, wrenched his shoulder and elbow, and destroyed his kneecap.[2]

After surgery and recovery, doctors determined that Mr. X could never return to the logging industry.[3] In the aftermath of this determination, Mr. X recalled being embroiled in disputes regarding his worker's compensation. He stated that he agreed to be classified as medically stationary so that he could be retrained for other occupations. But the work that was

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1 Division Exhibit 3.53.
2 H. X testimony; *see also* Division Exhibit 3.56.
3 Division Exhibit 3.56.

slated for him included jobs that he described as "executive clerk" or "assembler." Because sitting or standing for extended periods was not an option, he did not consider this realistic. He refused to settle with the worker's compensation carrier, and eventually his case was dismissed because he missed certain filing deadlines.[4]

In the ensuing years, Mr. X tried to make a living as a commercial fisherman.[5] The venture failed, however and Mr. X "ended up going broke." In 2011, he reported that he still owed money on his credit cards from that era.[6] To support himself over the years, he has had to sell all of his possessions.[7]

Mr. X has not worked for several years and he now lives with his sister-in-law, D X, in a home that she owns. She works part-time, pays the bills, and does most of the cooking. In return, Mr. X tries to do household chores. He said he can push a vacuum for five minutes and he does the dishes and some laundry. But those chores are painful, and the only way he can lower himself down if he needs to pick something off the floor is to spread his feet. He cannot do yard work because it is too painful. He spends most of his time in bed reading.[8]

When he is up and about, in addition to a brace on his left knee, he has braces on his back and arm. Because his left knee is severely damaged, he needs a crutch to walk. Having a crutch in his armpit is too painful, so he has rigged up a series of straps to allow him to put his weight on the crutch.

The store is about a mile from his house, and if he wants to go shopping he will start out walking to the store. He reported, however, that he almost never has to go far before a car will stop and offer him a ride. On those rare occasions when he did not get a ride he has made it the full distance, but it was difficult and he had to recover from the pain. He does walk to the post office twice a week, but he described that distance as "a stone's throw—less than 1/8 of a mile."[9]

D X confirmed that Mr. X is in pain. She said she frequently hears him moaning and groaning because of the pain, and that his sleep is disturbed. Because of the pain, he gets up

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4 H. X testimony.

5 *Id*.

6 Division Exhibit 3.47. In his 2011 application for interim assistance, Mr. X stated "My crew did most of the work. I just ran the boat and that turned out badly because I had to drink just to handle the constant sitting and standing. Medication did not help." *Id.*

7 H. X testimony

8 *Id*.

9 *Id.*

every hour to two hours. In her view, his left knee is unstable and "he can't walk from here to there."[10]

On February 21, 2014, Mr. X applied for interim assistance, asserting that he qualified as disabled. He also applied to the Social Security Administration for Supplemental Security Income disability benefits. On March 27, 2014, he went to No Name to see Dr. K A, who completed a medical report and filled out the form, called the AD-2 form, that provides a brief diagnosis for purposes of determining whether a patient is disabled.[11] On the form, Dr. A described Mr. X's diagnosis as follows: "Advanced and progressive polyarticular joint disease, crippling, including disc and bone disease of the spine with lower extremity radiation, joint [unable to read] and chronic pain."[12] The record also contains a 2011 AD-2 and report from Dr. W F, whom Mr. X saw during a previous application for disability.[13]

Upon receiving Mr. X's application, the Division referred it to its medical reviewer, Jamie Lang. Ms. Lang concluded that, based on the medical documentation in the record, Mr. X was not likely to be found disabled by Social Security Administration. On April 23, 2014, the Division sent a notice to Mr. X denying his application for interim assistance.[14] On May 5, 2014, Mr. X requested a fair hearing.

A hearing was held on June 30, 2014. The Division was represented by Jeff Miller. Mr. X represented himself. Mr. X, Ms. X, and Ms. Lang testified. The record was held open for Mr. X to supplement the record with additional medical documentation. New documentation received included the 2011 report by Dr. F, and a series of radiological reports from the 2008 MRI and x-rays that had been taken of Mr. X's joints. The record closed on July 25, 2014.

III. Discussion

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.[15] During the time that the application

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10 D. X testimony.
11 Division Exhibit 3.8.
12 *Id*.
13 Division Exhibit 3.10.
14 Division Exhibit 3.
15 *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.[16]

The determination of whether a person is disabled is controlled by subsection (b) of section 7 AAC 40.180. Under this regulation, the department must conduct a medical review to determine "whether the applicant is likely to be found disabled by the Social Security Administration."[17] For an applicant who does not have one of the presumptive disabling conditions, the department will consider "whether the applicant's impairment meets [the] Social Security Administration disability criteria for the listings of impairments."[18] 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."[19]

In determining whether Mr. X's impairment meets or equals a listing in Appendix 1, the department must consider the five factors listed subsection (c) of section 180.[20] Therefore,

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[16] 7 AAC 40.170(b). This regulation instructs the department to determine whether the applicant is disabled by applying the tests required in 7 AAC 40.180.

[17] 7 AAC 40.180(b)(1).

[18] *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.*

[19] *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.
>
> (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.

20 C.F.R. §416.920(a)(4) (internal citations omitted). The parties agree that Mr. X's impairments meet steps one and two. Therefore, this decision will focus on step three, whether Mr. X's impairments meet or equal a listing in Appendix 1 as required in 7 AAC 40.180(b)(1)(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). The department's regulations do not require steps four and five, and they do not incorporate Social Security regulations other than Appendix 1. This decision will not apply steps four and five.

[20] 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

before turning to the question of whether Mr. X is disabled, this decision will first discuss the five factors of subsection (c). The discussion will then turn to subsection (b), which requires that the department determine whether Mr. X's impairments meet or equal the criteria in a listing in Appendix 1.

A. How do the five factors of 7 AAC 40.180(c) affect the analysis of whether Mr. X is disabled?

1. Are Mr. X's impairments listed in Appendix 1?

The first factor in subsection (c) is whether the applicant's impairments are listed in Appendix 1.[21] Dr. A described Mr. X's impairments as "[p]olyarticular joint pain" in the low back, knees, hands and feet.[22] Dr. F diagnosed his bilateral knee pain as arthritic, with a possible left meniscus tear. She diagnosed his low back pain as "degenerative disc disease." She described his right wrist pain and right ankle and foot pain as "posttraumatic arthritis."

These impairments are listed in Appendix 1. His most severe impairment is his left knee. Major dysfunction of a joint is a listed impairment.[23] Degenerative disc disease is included within a listed impairment.[24] Arthritis is a listed impairment.[25] As explained in other cases, however, the fact that the impairments are *listed*, while making the analysis somewhat easier, does not play a large role in determining whether he is disabled.[26]

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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.

21 7 AAC 40.180(c)(1).

22 Division Exhibit 3.17.

23 20 C.F.R. 404, subpart P, appendix 1 § 1.02.

24 20 C.F.R. 404, subpart P, appendix 1 § 1.04.

25 20 C.F.R. 404, subpart P, appendix 1 § 14.09.

26 *In re K.C.*, OAH No. 13-0631-APA at 11 (Department of Health and Social Services 2013) (noting that "[t]he fact that a person's condition is or is not listed has no readily discernible significance for purpose of determining whether the person's findings meet the disability criteria for a listing"). One reason that this factor is not determinative is that if an impairment is not listed it may still qualify as a disabling condition if it is found to be equivalent to a listing. *E.g.*, 20 C.F.R. 404, subpart P, appendix 1 § 1.00.H.4.

2. Are Mr. X's impairments documented by medical evidence?

The second factor in subsection (c) is whether Mr. X's physical impairments are documented by the medical evidence.[27] Mr. X's physical impairments are documented by the reports of Drs. A and F, the AD-2 forms, the x-ray reports, and the older medical documents that relate back to the treatment of his injury. Therefore, his physical impairments meet the requirements of paragraph (c)(2), and will be analyzed to determine whether they meet the requirements of Appendix 1. To the extent that Mr. X is alleging any psychological impairment, however, none of the medical evidence in the record documents that impairment. Therefore, psychological impairment will not be considered in the analysis.

3. Do Mr. X's impairments affect his activities of daily living?

The third factor in subsection (c) is whether Mr. X's impairments affect his activities of daily living.[28] Mr. X's joint pain clearly affects his activities of daily living.[29] Although he can generally take care of himself, he is impeded and slowed by his pain and joint dysfunction. The fact that he can still do his activities of daily living, however, will be significant in analyzing whether Mr. X meets or equals the criteria in Appendix 1.

4. Can Mr. X do work (including sedentary work) other than his former employment?

The fourth factor in subsection (c) is whether the applicant can perform any other work, including sedentary work.[30] In applying the requirement of paragraph (c)(4) to consider whether Mr. X can do other work, this decision will have to answer three questions. First, how detailed is the inquiry into the question of whether Mr. X is capable of doing work? Second, applying the appropriate level of inquiry, is he able to work? Third, how does the determination of whether an applicant is able to work affect the analysis of the criteria in Appendix 1? These three questions answered below.

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[27] 7 AAC 40.180(c)(2).

[28] 7 AAC 40.180(c)(3).

[29] For a discussion of what constitutes "activities of daily living" see *In re K.C.*, OAH No. 13-0631-APA at 12-13. In general these are activities required to take care of one's self.

[30] 7 AAC 40.180(c)(4).

a. How should the department address the question of whether Mr. X can work?

Although no previous cases have explicitly addressed how to make a determination of whether a person can perform other work for purposes of paragraph 180(c)(4), two concepts applied in other cases do provide guidance on that issue. First, in *In re M.H.*, the commissioner made clear that the department would *not* be applying steps four and five of the sequential Social Security analysis.[31] Those steps involve a detailed inquiry into an applicant's ability to do substantial gainful activity, which could include the need for vocational experts to evaluate the applicant and the jobs available in the relevant economy. That inquiry is fine for the Social Security Administration, which has the staff and could devote the time necessary for the issue. It is not, however, appropriate for determining interim assistance, which is meant to be a quick and temporary form of assistance while a person awaits the more complex disability determination made by Social Security. Therefore, in interim assistance cases, the inquiry will be a simple, common-sense evaluation of the evidence at hand to reach a determination of whether an applicant can perform any other work, including sedentary work.

Second, if the evidence about whether the applicant can work is inconclusive or ambiguous, the cases that have been decided since *In re M.H.* generally favor resolving any ambiguity by finding that the applicant likely can return to some form of work.[32] As one case noted, the disability regulations generally imply that people should work when work is a realistic option. Work is healthy and therapeutic, and both the applicant and society benefit if a person can return to work rather than be labeled disabled and unemployable.[33] Therefore, in conducting the simple, common-sense inquiry, doubts will be resolved in favor of the applicant being able to return to work.[34]

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[31] OAH No. 12-0688-APA at Commissioner's Decision 1-2 (Department of Health and Social Services 2012).

[32] *E.g.*, *In re E.G.*, OAH No. 13-0260 at 9 (Department of Health and Social Services 2013) (although applicant with seizure disorder could not work in former occupation, she could likely find other work); *In re N.K.*,OAH No. 14-0241-APA at 7 (Department of Health and Social Services 2014) (although applicant had not been able to find and keep job in city of residence, evidence indicated that she could perform work).

[33] *In re N.L.*, OAH No. 13-1492-APA at 10 (Department of Health and Social Services 2013).

[34] This decision is *not* holding that ambiguities about whether a person is *disabled* should be resolved in favor of a finding that a person is not disabled. How the paragraph (c)(4) factor affects the disability analysis is discussed in the next subsection of this decision, and, as will be seen, resolving the able-to-work question in paragraph (c)(4) without a detailed inquiry may increase or decrease the likelihood that an applicant may be found to be disabled. The important thing to understand here is that the inquiry under paragraph (c)(4) is *not* the same as the inquiry in SSA's steps four and five. Therefore, the inquiry under (c)(4) is not an inquiry into whether a person is disabled.

b. Applying a simple, common-sense inquiry, can Mr. X do other work?

Mr. X's past work has been as an unskilled laborer. The evidence shows that Mr. X cannot return to work in a position that requires heavy or moderate labor. In addition, work in the fishing industry is not realistic—he could not work a slime line, and his experience with attempting to run a boat was a marked failure. With regard to office work or work in a service industry such as food service, because of his back pain, standing or sitting for extended periods does not appear to be an option. His age, his lack of education, his tendency to moan and groan because of his pain, his pain in his right wrist, and the pain he professes to experience when writing, taken as whole, appear to make him a poor candidate for retraining into a sedentary or service industry occupation.

Other evidence in the record indicates that Mr. X is unlikely to be able to work. After one visit, Dr. A concluded that "he is effectively disabled."[35] How Dr. A was interpreting the term "disabled" is unclear—he noted that he was not a disability specialist—but his use of the term "effectively disabled" makes it appear that he was offering a medical opinion on Mr. X's ability to work. In addition, unlike some other long-time workers in the construction industry, Mr. X does not have training or knowledge that he could apply outside of field work, such as in consulting, estimating, or sales. Finally, the long period of time that he has not been employed makes it less likely that he could successfully reintegrate into the workforce. Therefore, under a common-sense inquiry based on the record, and resolving ambiguities in favor of a finding that he could return to work, Mr. X likely cannot do other work, including sedentary work.

The reader is reminded again that this conclusion is *not* a conclusion under AS 47.25.615(5) that Mr. X cannot "engage in substantial gainful activity by reason of a medically determinable physical or mental impairment." To reach a solid conclusion regarding ability to engage in substantial gainful activity as that term is used in AS 47.25.615 would likely require expert analysis from a person knowledgeable in vocational rehabilitation. Paragraph (c)(4) uses different terminology than AS 47.25.615(5). Paragraph (c)(4) appears to be asking for a preliminary estimate of whether a person can do other work, including sedentary work, for the purpose of taking the estimate into consideration when determining whether an impairment meets or equals the criteria in Appendix 1. The result of the "substantial gainful activity" inquiry by the Social Security Administration may well be different.

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[35] Division Exhibit 3.17.

c. How should the determination that Mr. X cannot work be considered in the analysis of the criteria in Appendix 1?

We now turn to the question of how the determination under paragraph (c)(4) applies to the disability analysis. The answer to this question is determined by close examination of the text of 7 AAC 40.180(c).

The lead-in language of subsection (c) tells us that the five factors listed in subsection (c) are to be "considered" in making the determination of whether an applicant's disability fits the criteria in Appendix 1. For the four factors other than ability to work in paragraph (c)(4), considering the factors of subsection (c) is not difficult—these factors are either elements already contained in Appendix 1 (such as whether the impairment prevents activities of daily living, paragraph (c)(3)), or provide a framework for the analysis (such as the requirement that the department consider medical evidence, paragraph (c)(2)).

Ability to work, however, is different. Under Social Security's framework, ability to work is considered *after* the determination of disability has been made under Appendix 1 (which is step three in SSA's process). Ability to work would be considered then only to determine whether an applicant who does not meet the criteria for disability under Appendix 1 may yet be found disabled if the applicant cannot work (steps four and five in SSA's process). Here, in contrast, the regulations instruct that ability to work is to be considered *when* the criteria in Appendix 1 is being evaluated (that is, during step three).

To "*consider"* means "[T]o examine, to inspect. To deliberate about and ponder over. To entertain or give heed to."[36] The regulation sheds no light, however, on *how* ability to work is to be taken into account or given heed to.

In taking ability to work into account, the first consideration is that, even for an applicant who cannot work, paragraph (c)(4) does not waive the requirement that an applicant must have medical evidence that the applicant's impairments meet or equal the criteria in a listing.[37] Nor does this consideration negate or waive the other requirements of statute or regulation—the determination still must be based on medical evidence.

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[36] *Black's Law Dictionary* 306 (6th ed. 1990).

[37] This result may seem incomprehensible to a person used to applying steps four and five of the Social Security process. Under that process, a person who cannot work is disabled, even if the person's impairments do not meet a listing. Here, however, the analysis is different. The determination of whether a person can work is a low-level determination, and it is only a consideration, not conclusive evidence, on the question of whether a person is disabled.

Yet, where the determination under (c)(4) *can* be given heed in determining whether an applicant's impairment meets the criteria in Appendix 1 is to give an applicant who likely cannot work the benefit of the doubt. If a finding is made under (c)(4) that a person cannot work, then the department may be more willing to infer from the medical evidence that an impairment meets a listing. The inference still must be reasonable, and it must be supported by the evidence. But if an applicant who cannot work comes forward with medical evidence that reasonably supports an inference that the applicant's impairment meets or equals a criterion for being disabled in Appendix 1, the department can draw the inference. This will be true even if in other cases the same quantity of evidence would not be sufficient to prove that the applicant is disabled.

This discussion is not merely legalistic. The department must apply and follow its own regulations, and this decision should explain how ability to work is taken into consideration.[38] The Alaska Supreme Court has strongly cautioned that an "administrative agency is generally required to follow its own regulations; an agency's compliance with its own regulations is a strong indicator that it proceeded in the manner required by law."[39] This means that the department must find a meaningful way to *consider* the determination of an applicant's ability to work when making the determination of whether the applicant's impairments meet or equal a disability criterion. For those cases where an applicant cannot work, by giving the benefit of the doubt to the applicant's evidence on the criteria in Appendix 1, the department complies with 7 AAC 40.180(c)(4).[40]

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[38] In at least one previous case, the department appeared to be stymied in how to apply the requirement of 7 AAC 40.180(c)(4). *See In re K.C.*, OAH No. 13-0631-APA at 14. In that case, the department found that the applicant probably could not perform sedentary work on a sustained basis. The department was unable, however, to find a way to take that finding into consideration when determining whether the applicant met the disability criteria of Appendix 1.

[39] *Stosh's I/M v. Fairbanks North Star Bor.*, 12 P.3d 1180, 1185 -1186 (Alaska 2000) (citations omitted; citing *U.S. v. RCA Alaska Communications, Inc.*, 597 P.2d 489, 498 (Alaska 1978); *Jager v. State*, 537 P.2d 1100, 1108 (Alaska 1975).

[40] The department may be able to comply with the requirement to "consider" an applicant's ability to work by pondering the issue without necessarily *applying* the outcome of the inquiry to the analysis under Appendix 1. At a minimum, however, paragraph (c)(4) would require an explanation of how ability to work was taken into consideration.

5. Has Mr. X's impairment lasted for a continuous period of 12 months?

The fifth and final factor in subsection (c) is whether the applicant's impairment has lasted or is expected to last for at least 12 continuous months.[41] The medical evidence demonstrates conclusively that Mr. X's impairments have lasted for more than 12 months.[42] This means that Mr. X's impairments meet the durational requirements of Appendix 1, and the analysis of the criterion for disability can next be undertaken.

B. Is Mr. X disabled based on the disability criteria of the listings of impairments described in Appendix 1?

Under 7 AAC 40.180(b)(1)(B), the department will determine if Mr. X is disabled by determining whether Mr. X's impairments meet the criteria established in Appendix 1. Mr. X's impairments will be analyzed under disorders of the musculoskeletal system (§ 1.00 of Appendix 1).[43] Appendix 1 applies both a documentary and a functional test to determine whether a musculoskeletal impairment meets the criteria of being disabled. The documentary test requires that the impairment be medically identifiable. The functional test requires that the applicant have lost either the ability to ambulate effectively or the ability to effectively perform fine or gross motor movements. Under the functional test, pain may be taken into account as an important factor contributing to functional loss if it is ascribed to a medically determinable impairment that could reasonably be expected to produce the pain.[44]

1. Does Mr. X's back pain meet or equal the criteria in a listing?

The source of a considerable degree of Mr. X's pain appears to be his back. His x-rays and doctors relate his back pain to degenerative disc disease.[45] Appendix 1 instructs that degenerative disc disease should be analyzed under §1.04.[46] Section 1.04 has three subsections, but the only one that could apply to Mr. X is subsection 1.04A. For Mr. X to meet the level of impairment criteria under that listing, he must document:

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41 7 AAC 40.180(c)(5).

42 *E.g.*, Division Exhibits 3.8; 3.10.

43 Because Dr. F cites to the degenerative arthritis that has developed in Mr. X's joints since his accident as the likely cause of his pain, an argument could be made that his impairments should be analyzed under §14.09, inflammatory arthritis. It does not appear, however, that Mr. X would meet the listing for this section because the evidence does not document the level of persistent inflammation or deformity described in §14.09. *See* 20 C.F.R. 404, subpart P, appendix 1 §§ 14.09A and B. Moreover, the criteria in §14.09A requires that the applicant meet the same functional test required under the relevant musculoskeletal test: inability to ambulate or inability to perform fine and gross motor skills.

44 20 C.F.R. 404, subpart P, appendix 1 § 1.00B2d.

45 Division Exhibit 3.22; X Exhibit at F, O.

46 20 C.F.R. 404, subpart P, appendix 1 § 1.00K4.

> A. 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). [47]

Although the medical evidence shows some of these conditions, in general, it does not meet these criteria. His MRI report from 2008 identifies disc bulges that abut the nerves and a possible slight nerve impingement at L3-4 and L4-5.[48] In March 2014, Dr. A noted "significant [range-of-motion] limitation at his C-spine" and at his "lumbar spine."[49] He also described his "gait and stance" as "markedly affected by obvious polyarticular arthralglas."[50] Yet, he did not find muscle weakness or atrophy: "5/5 strength [in] all major upper extremity muscle groups" and "~4/5 legs & low back."[51] In February 2011, Dr. F performed the straight-leg raise test, and found that it was negative on both sides.[52] She concluded that the evidence of nerve abutment and impingement did not correlate with her physical examination. She recommended that no neurosurgical evaluation was needed and that continuing exercise and activity modification would be encouraged.[53]

This analysis illustrates how the benefit-of-the-doubt analysis applies to determine if an impairment meets or equals the criteria of a listing. Drawing inferences in Mr. X's favor, the possible slight nerve impingement and Dr. A's statement about range of motion could support inferences that he meets the requirements of § 1.04A for nerve compression and range of motion limitation. Although the evidence is not strong, in this case, it would be enough. No amount of giving Mr. X the benefit-of-the-doubt, however, can change a negative leg raise into a positive one or 4/5 muscle strength into muscle weakness.[54] Therefore, Mr. X does not meet the criteria of Appendix 1 for disorders of the spine.

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47 20 C.F.R. 404, subpart P, appendix 1 § 1.04A.

48 X Exhibit at F.

49 Division Exhibit 3.22.

50 *Id*.

51 *Id.*

52 X Exhibit at O.

53 *Id*.

54 Dr. F's 2011 examination found 5/5 muscle strength in all lower extremities except the great toes, which were 4/5. X Exhibit at O. *See also* X Exhibit R (2008 medical report concluding that his x-rays show "only very mild degenerative disc disease changes").

2. Does Mr. X's lower extremity dysfunction meet or equal a listing?

Mr. X's knee, ankle, and foot pain can all be analyzed under § 1.02, major dysfunction of a joint. Although the medical evidence is not strong that Mr. X's joints would meet the criteria in § 1.02 of "gross anatomical deformity," his left knee x-rays document that the "joint space compartment is narrowed," that "spur formation" is present and that "there is subchondral irregularity across the knee joint medially."[55] Drawing inferences in favor of Mr. X, this medical evidence meets the requirements of § 1.02 for "joint space narrowing" and possibly also for "bony destruction." The requisite "chronic joint pain and stiffness" is documented in Drs. A's and Edward's reports, and in the testimony of Mr. X and Ms. X. In addition to this requirement for medical documentation, however, § 1.02 also requires that as a result of the pain and dysfunction in the joint, Mr. X is no longer able to effectively ambulate.[56]

Appendix 1 defines effective ambulation as "having insufficient lower extremity functioning to permit independent ambulation without the use of a hand-held assistive device(s) that limits the functioning of both upper extremities."[57] Appendix 1 further explains the term as follows:

> To ambulate effectively, individuals must be capable of sustaining a reasonable walking pace over a sufficient distance to be able to carry out activities of daily living. They must have the ability to travel without companion assistance to and from a place of employment or school. Therefore, examples of ineffective ambulation include, but are not limited to, the inability to walk without the use of a walker, two crutches or two canes, the inability to walk a block at a reasonable pace on rough or uneven surfaces, the inability to use standard public transportation, the inability to carry out routine ambulatory activities, such as shopping and banking, and the inability to climb a few steps at a reasonable pace with the use of a single hand rail. The ability to walk independently about one's home without the use of assistive devices does not, in and of itself, constitute effective ambulation.[58]

Applying this standard to the facts in this case, in his testimony, Mr. X described that he would sometimes have to walk the entire mile to the grocery store. He could make it, but it

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55 X Exhibit at O.

56 20 C.F.R. 404, subpart P, appendix 1 § 1.02A. Although only his left knee has medically-documented findings that would meet the criteria of a listing, under § 1.00H4, all sources of pain in combination can be considered to determine whether Mr. X's impairments meet the criteria for disability. In Mr. X's case, this comes down to whether he can effectively ambulate, as that term is used in Appendix 1.

57 20 C.F.R. 404, subpart P, appendix 1 § 1.00B2b(1) (internal citation omitted).

58 20 C.F.R. 404, subpart P, appendix 1 § 1.00B2b(2).

would take considerable time, and left him in a debilitated condition from which he would have to recover.

On the other hand, he found walking to the Post Office to be not a significant chore. The distance to the Post Office was less than 1/8 of a mile.

In setting a distance requirement for effective ambulation, Appendix 1 is informal: "a block." City blocks can be short or long—although a short city bock would be in the 200 foot range, they can sometimes be as long as 1/8 mile (660 feet), and sometimes longer. The long blocks in Manhattan, for example, are 900 feet. The message that Appendix 1 is communicating here is: do not apply a precise standard; just use commonsense to determine whether the applicant can effectively ambulate.

Another message that comes through from Appendix 1 is that the test for effective ambulation is a functional test. Can Mr. X ambulate well enough to shop or bank? Applying this test, Mr. X can effectively ambulate. Although he usually gets a ride to cover the one-mile distance, he ambulates well enough to do his grocery shopping once he gets to the store. Going to the Post Office and checking the mail is no problem. This is noteworthy not only because it shows that Mr. X can complete a task but because the Post Office is about a block away. This evidence establishes that although Mr. X does have significant pain, he is resourceful and has developed coping mechanisms that allow him to effectively ambulate. Therefore, his lower extremities do not meet the criteria for major dysfunction of a joint that are established in § 1.02.

3. Does Mr. X's wrist dysfunction meet or equal a listing?

Mr. X described his wrist pain as quite debilitating. He found it agonizing to write and he would not spend more than five minutes on chores like vacuuming.

Yet, Mr. X's upper extremity dysfunction does not meet the criteria of § 1.02 for several reasons. First, the medical documentation does not meet the requirements. Although his right wrist has a bony deformity, Dr. F found good grip strength with extension and flexion. She concluded that "it is simply a bony deformity."[59] Second, § 1.02 requires that both upper extremities be dysfunctional. Here, at most, Mr. X can only make a case for his right side. Third, § 1.02 also requires that the level of dysfunction include "inability to perform fine and gross movements effectively."[60] The functional test for this standard includes an inability to

[59] X Exhibit at O.

[60] 20 C.F.R. 404, subpart P, appendix 1 § 1.02B.

perform certain activities of daily living like feeding oneself or taking care of personal hygiene.[61] Here, Mr. X can complete all of his activities of daily living. He has no difficulty feeding himself and the only difficulty he has in personal hygiene is that he cannot wash his feet.[62] In sum, his upper extremities do not meet the criteria in § 1.02 for major dysfunction of a joint.

IV. Conclusion

Mr. X is seriously injured and impaired. For the very limited purpose of taking ability to work into consideration when applying Social Security's criteria for what constitutes a disabling impairment, this decision determined that Mr. X likely cannot do his past work or other work, including sedentary work.

On this record, however, Mr. X is not disabled. His spine and wrist impairments meet neither the documentary nor the functional requirements of Social Security's criteria for musculoskeletal disabilities. Given a favorable standard of review, his knee impairment can meet the documentary requirements. But because he can walk well enough to go at least 1/8 of mile and to shop and do other errands, even looking at the combined effect of all of his impairments, he does not meet the functional criteria for musculoskeletal disability. Therefore, the Division's decision denying interim assistance is affirmed.

DATED this 1st of August, 2014.

By *Signed*
Stephen C. Slotnick
Administrative Law Judge

[61] 20 C.F.R. 404, subpart P, appendix 1 § 1.00B2c.
[62] H. X testimony.

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 19th day of August, 2014.

By: *Signed*
Name: Bride Seifert
Title/Division: ALJ/OAH

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