

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

In the Matter of:)
)
 V P) OAH No. 15-0070-APA
) DPA Case No.

DECISION

I. Introduction

The issue in this case is whether V P satisfies the Interim Assistance program's financial and disability criteria. The Division of Public Assistance (Division) denied Ms. P's application on three bases. First, the Division concluded that Ms. P's income, at the time of her application and the Division's determination, exceeded the maximum income limit for the Adult Public Assistance Program (APA), of which Interim Assistance is a part.¹ Second, the Division further concluded that, although (1) Ms. P is not working, (2) her impairments are medically severe, and (3) her impairments have lasted long enough to satisfy the 12 month durational requirement, they do not satisfy the specific criteria of the Social Security Administration's (SSA's) applicable impairment "Listings."² Finally, the Division concluded that Ms. P failed to appeal the SSA's denial of her application for Supplemental Security Income (SSI) within the time period required by the Division's regulations and policy manual.³ Accordingly, the Division denied Ms. P's application for Interim Assistance.

This decision concludes, with regard to Ms. P's financial eligibility for Interim Assistance, that Ms. P's monthly income does not exceed the applicable program requirements. Further, even if Ms. P was over-income at the time she applied for Interim Assistance in October 2014, the Division's initial denial notice of December 30, 2014 did not list excess income as a basis for denial.⁴ The Division subsequently issued revised denial notices⁵ listing excess income as a basis for denial. However, as a matter of law, the revised notices only operate prospectively; they do not relate back in time to the date of Ms. P's application. By the time the Division issued its revised notices in February and March 2015, Ms. P was no longer receiving the unemployment benefits based on which the Division premised its financial eligibility denial, and in fact had no income.⁶

¹ Exs. 32, 33.
² Exs. 4.2A - 4.4, 11, and 31; Jamie Lang hearing testimony.
³ Ex. 33.
⁴ Ex. 11.
⁵ Exs. 32, 33.
⁶ V P hearing testimony.

Accordingly, the Division was not correct to deny Ms. P's application for Interim Assistance based on excess income.

Next, this decision concludes, with regard to Ms. P's disability-based eligibility for Interim Assistance, that Ms. P can perform sedentary work. While this case was pending, the Alaska Supreme Court issued its decision in *State of Alaska, Department Of Health And Social Services, Division Of Public Assistance v. Gross*, 2015 WL 1874584 (Alaska, April 24, 2015).⁷ In that case, the court held that the Division's interpretation of 7 AAC 40.180, to include only steps one, two, and three of the SSA's SSI disability analysis when determining eligibility for Interim Assistance, improperly excluded from Interim Assistance eligibility the entire category of persons eligible for SSI at step five of the SSA's disability analysis. The *Gross* decision did not, however, specify a particular analysis to be used after step three of the disability analysis, stating that "[w]e leave it to the Department to decide in the first instance how it will satisfy the statutory mandate."

This decision concludes that Ms. P is not working, that she suffers from several severe impairments, and that these impairments satisfy the 12 month durational requirement. However, Ms. P's impairments do not currently satisfy the specific criteria of any of SSA's applicable impairment "Listings." Further, although the evidence indicates that Ms. P may no longer be able to perform her past relevant work, the preponderance of the evidence indicates that Ms. P can still perform sedentary work. As a result, Ms. P does not currently satisfy the Interim Assistance program's eligibility requirements.⁸ Accordingly, the Division was correct to deny Ms. P's application for Interim Assistance based on her level of impairment.

Finally, the Division correctly determined that Ms. P failed to appeal the SSA's denial of her application for SSI within the time required by the Division's regulations and policy manual.

In summary, although one of the Division's bases for denial was invalid, the Division's two other bases for denial were valid. The Division's decision denying Ms. P's application for Interim Assistance is therefore affirmed.

II. Facts

A. Ms. P's Medical Condition and Impairments per her Medical Records

Ms. P is 49 years old.⁹ Her current diagnoses include anxiety disorder, chronic lower back pain, constipation due to pain medications, gastro esophageal reflux disease (GERD), hepatitis C, hyperlipidemia, hypertension, migraine headaches, myofacial pain, sacroiliac pathology, sinusitis,

⁷ Because this decision was only recently issued, there is as yet no official Pacific Reporter citation available.

⁸ If Ms. P's condition worsens, she may re-apply for Interim Assistance at any time.

⁹ Ex. 1.

and tobacco dependence.¹⁰ Ms. P takes opioid medications for her lower back pain.¹¹ Her recent prescription medications include Ambien, Benadryl, Flector, Lactulose, Latuda, Prozac, Relpax, sumatriptan succinate, Topamax, Tramadol, Ultram, and Zegeride.¹²

In the past, Ms. P used alcohol and cocaine fairly heavily.¹³ Now, however, she no longer uses cocaine, and only drinks alcohol occasionally.

Ms. P describes her lower back pain as constant, achy, dull, and sharp.¹⁴ On a scale of one to ten, she rates her pain level as ranging from a low of three to a high of ten.¹⁵ Her lower back pain increases with stress, lifting, bending, and twisting; it decreases with hot baths, stretching, and relaxation.¹⁶ It runs from her lower left back down her left hip and all the way down to her left knee.¹⁷ Ms. P has had sacroiliac joint injections in an effort to alleviate her pain; the injections provide relief, but the relief is only temporary.¹⁸ Ms. P has suffered from her back pain since 2007 or before.¹⁹ X-rays taken in October 2007 indicate that, as of that time, Ms. P's lumbar spine was straight, had no fractures or dislocations, had a minimal convex left curvature, and had no degenerative changes.²⁰ The x-rays also indicated that Ms. P's hips were normal; that her sacroiliac joints were normal, and that her intervertebral disc spaces were well-maintained.²¹ More recent x-rays taken in September 2013 showed mild degenerative changes of the thoracic spine, including anterior osteophytic lipping.²²

In January 2008, a chiropractor cleared Ms. P to perform light-duty work, which the chiropractor defined as lifting no more than 20 pounds, with limited lifting, bending, and sitting.²³ In February 2014, Ms. P reported to her doctor that she had pain in all of her joints, was having a hard time grasping items with her hands, and was having trouble standing up while at work.²⁴

¹⁰ Exs. 3.014, 3.174.

¹¹ Ex. 3.014.

¹² Ex. 3.014.

¹³ All factual findings in this paragraph are based on Ex. 3.158 unless otherwise stated.

¹⁴ Ex. 3.017.

¹⁵ Ex. 3.147.

¹⁶ Ex. 3.014.

¹⁷ Ex. 3.133.

¹⁸ Exs. 3.018, 3.136.

¹⁹ Ex. 3.035.

²⁰ Ex. 3.039.

²¹ Ex. 3.039.

²² Ex. 3.168.

²³ Ex. 3.040.

²⁴ Ex. 3.172.

Ms. P began taking Topamax for her migraine headaches at some time prior to July 2014.²⁵ On July 11, 2014 she reported to her doctor that, since starting Topamax, her headaches are fewer and less intense.

Ms. P has received Carbocaine trigger-point injections in her trapezius muscles to relieve her myofascial pain syndrome.²⁶ She has reported to her doctor that these injections are effective and that she has no pain for a period of time after the injections.

On June 6, 2014 Ms. P called a local crisis line complaining of depression, suicidal thoughts, and anger management problems.²⁷ At that time she reported having a hard time going to sleep and staying asleep; poor appetite; lack of interest; feelings of detachment, disappointment, and hopelessness; isolation from friends and family, having a lack of energy; lack of focus, being depressed short-tempered, and easily agitated; being claustrophobic, having panic attacks; and being easily overwhelmed. Ms. P underwent a psychological evaluation on June 23, 2014.²⁸ Her evaluation states in relevant part as follows:

[Ms. P] states that she has a great deal of difficulty sleeping. She is very tearful much of the time. She is also irritable . . . [and] very anxious. She states that her self-esteem is very low. She experiences racing thoughts. She states that she has suicidal thoughts frequently, but promises that she will not harm herself

Past Psychiatric History: She has never been hospitalized in a psychiatric hospital. She has never seen a therapist or a psychiatrist or a psychiatric nurse-practitioner in the past. About ten years ago, she was also quite depressed. Her medical practitioner . . . gave her [three different medications, the last of which] worked very well. After a year or so . . . she felt that she was back to normal so she stopped taking medication.

. . . .

Mental Status Examination: She . . . is very tangential and difficult to redirect. She had difficulty concentrating on telling me how she felt . . . I see no evidence of psychosis. She denies any episodes of mania or hypomania lasting more than a day or two. She has never attempted suicide. She currently has difficulty concentrating and problems with her memory. She is tearful most of the time. Her self-worth is very low. She experiences anxiety and panic. She has difficulty sleeping. She . . . is disinterested in things that used to give her pleasure. She denies suicidal intent She denies homicidal ideation. Judgment and insight are adequate.

Assessment summary: I . . . give her a diagnosis of Major Depressive Disorder, Recurrent. It would be very important for her to continue in therapy.

²⁵ All factual findings in this paragraph are based on Ex. 3.133 unless otherwise stated.

²⁶ All factual findings in this paragraph are based on Exs. 3.134 - 3.142 unless otherwise stated.

²⁷ All factual findings in this paragraph are based on Exs. 3.083 - 3.090 unless otherwise stated.

²⁸ All factual findings in this paragraph are based on Ex. 3.127.

On July 18, 2014 Dr. N, M.D. performed Ms. P's preliminary examination for Interim Assistance and completed the Division's Form AD-2.²⁹ Dr. N reported Ms. P's primary diagnoses as chronic back pain, COPD, depression, hepatitis C, hypertension, and migraine headaches. Dr. N also wrote that these were all chronic conditions and that Ms. P was not expected to recover from them.

On or about July 29, 2014 Ms. P completed the Division's *Disability and Vocational Report* form.³⁰ Ms. P wrote that, due to her back pain, migraines, and hepatitis C, she could not lift much weight, could not sit or stand for very long, and was in need of retraining.

On October 22, 2014, Ms. P's behavioral health practitioner reported that Ms. P had made only "minimal progress" with the treatment of her depression as of that date.³¹

B. Ms. P's Education and Work History

Ms. P can speak and write in English.³² She has a twelfth grade education.³³ Over the past 15 years she has worked as a taxi cab driver, and as a delivery driver and counter person for an auto parts store.³⁴ Ms. P's last job was working as a delivery driver. She worked delivering auto parts for an auto parts store from 2007 to 2014.³⁵ She was forced to quit that job in April 2014 because she was depressed, was often forgetting things, was becoming confused, and was getting lost, even though she was familiar with the area.

C. Relevant Procedural History

Ms. P applied to the Social Security Administration (SSA) for Supplemental Security Income (SSI) on June 13, 2014.³⁶ SSA denied her application for SSI on August 15, 2014.³⁷

Ms. P applied for Adult Public Assistance (including Interim Assistance) on October 30, 2014.³⁸ On December 30, 2014 the Division denied Ms. P's application based on its finding that her medical condition did not appear to satisfy the Interim Assistance program's disability criteria.³⁹ Ms. P requested a hearing on January 22, 2015.⁴⁰

²⁹ All factual findings in this paragraph are based on Exs. 3.197 and 3.198 unless otherwise stated.

³⁰ All factual findings in this paragraph are based on Exs. 3.199 - 3.203 unless otherwise stated.

³¹ All factual findings in this paragraph are based on Ex. 3.060 unless otherwise stated.

³² Ex. 3.203.

³³ Exs. 3.085, 3.203.

³⁴ All factual findings in this paragraph are based on Exs. 3.054, 3.055, and 3.201 unless otherwise stated.

³⁵ Ex. 3.085.

³⁶ Exs. 3.008, 10.

³⁷ Exs. 3.008, 10. As of 2009, the latest year for which statistics appear to be available, about 75% of all applications for SSI and SSDI disability benefits were denied by SSA at the initial application level. See the SSA's website at http://www.ssa.gov/policy/docs/statcomps/di_asr/2010/sect04.html#table60 (accessed on May 5, 2015).

³⁸ Exs. 2.0 - 2.6.

³⁹ Ex. 11.

⁴⁰ Exs. 12, 12.1.

Ms. P's hearing was held on April 2, 2015. Ms. P participated in the hearing by phone, represented herself, and testified on her own behalf. Public Assistance Analyst Michelle Cranford participated by phone and represented the Division. Jamie Lang, the Division's Interim Assistance medical reviewer, participated by phone and testified on behalf of the Division. The record closed at the end of the hearing.

III. Discussion

A. Does Ms. P Satisfy the Applicable Financial Eligibility Criteria?

The Division denied Ms. P's application for Interim Assistance on two bases. The Division's first basis for denial asserts that Ms. P's monthly countable income exceeds the applicable income limit for Adult Public Assistance, of which Interim Assistance is a part. Under the APA, countable income is determined by adding together the applicant's / recipient's total (gross) income, and then subtracting any applicable deductions.⁴¹

In October 2014, Ms. P's countable monthly income was \$928.80.⁴² For 2014, the APA maximum countable income limit for an individual living in another person's household was \$1,106.00.⁴³ Accordingly, at the time she applied for Interim Assistance, Ms. P's monthly income was \$177.20 less than the applicable APA maximum income limit.⁴⁴ Ms. P was therefore financially eligible for Interim Assistance at that time.

During February - March 2015, Ms. P's countable monthly income was zero.⁴⁵ For 2015, the APA maximum countable income limit for an individual living in another person's household is \$1,125.00.⁴⁶ Ms. P was therefore financially eligible for Interim Assistance at that time also.

In summary, regardless of whether the relevant period was the month Ms. P applied for benefits (October 2014), or the months the Division issued denial notices based on excess income (February and March 2015), the Division was not correct to deny Ms. P's application for Interim Assistance due to financial ineligibility. It is therefore necessary to determine whether Ms. P satisfies the Interim Assistance program's disability criteria.

⁴¹ See 7 AAC 40.230, 7 AAC 40.310(a), 7 AAC 40.320(a), and 7 AAC 40.350.

⁴² Ex. 30 (\$216.00 per week, multiplied by 4.3 weeks per month, equals \$928.80 per month).

⁴³ See Alaska Adult Public Assistance Manual, Addendum 1, accessed online at <http://dpaweb.hss.state.ak.us/manuals/apa/apa.htm> (date accessed May 5, 2015).

⁴⁴ The APA program also provides a deduction for the applicant's first \$20.00 of monthly income (see 7 AAC 40.320(a)(23)). However, Ms. P's income was within applicable program income limits even without applying this deduction.

⁴⁵ V P's undisputed hearing testimony.

⁴⁶ See Alaska Adult Public Assistance Manual, Addendum 1, accessed online at <http://dpaweb.hss.state.ak.us/manuals/apa/apa.htm> (date accessed May 5, 2015).

B. The Interim Assistance Disability Determination Process

The Alaska Public Assistance program provides financial assistance to “aged, blind, or disabled needy [Alaska] resident[s].”⁴⁷ Applicants who are under the age of 65 years are required to apply to the Social Security Administration and qualify for Supplemental Security Income (SSI) as a prerequisite to receiving Adult Public Assistance benefits.⁴⁸ Once an applicant is approved for SSI, he or she is then eligible to receive Adult Public Assistance benefits.⁴⁹

Interim Assistance is a monthly payment in the amount of \$280 provided to Adult Public Assistance applicants while they are waiting for the Social Security Administration to approve their Supplemental Security Income applications.⁵⁰ In order to qualify for Interim Assistance, the applicant must be “likely to be found disabled by the Social Security Administration.”⁵¹ An Interim Assistance applicant has the burden of proving, by a preponderance of the evidence, that he or she is likely to be found disabled by the SSA.⁵²

The SSA uses a five-step evaluation process in making its disability determinations.⁵³ Each step is considered in order, and if the SSA finds the applicant not to be disabled at steps one, two, or four, it does not consider subsequent steps.⁵⁴

The first step looks at the applicant’s current work activity. If the applicant is performing “substantial gainful activity,” the applicant is not disabled.⁵⁵ If the applicant is not performing “substantial gainful activity,” it is necessary to proceed to step two.

The second step requires the evaluation of the severity and duration of the applicant’s impairment. Medical evidence, which consists of “signs, symptoms, and laboratory findings, not only [the applicant’s] statement of symptoms,” is required to establish an applicant’s impairment.⁵⁶ In order to be considered disabled, the impairment or combination of impairments must be severe,⁵⁷ and must be expected to result in death or must have lasted or be expected to last at least 12

⁴⁷ AS 47.25.430.

⁴⁸ 7 AAC 40.170(a). Adult Public Assistance applicants whose income exceeds the Supplemental Security Income standards are not required to apply for Supplemental Security Income benefits. 7 AAC 40.170(a).

⁴⁹ 7 AAC 40.030(a); 7 AAC 40.170(a).

⁵⁰ 7 AAC 40.170(a) and (b); AS 47.25.455.

⁵¹ 7 AAC 40.180(b)(1).

⁵² See 2 AAC 64.290(e) and 7 AAC 49.135; see also *State, Alcoholic Beverage Control Board v. Decker*, 700 P.2d 483, 485 (Alaska 1985) (the party who is seeking a change in the status quo bears the burden of proof); *Amerada Hess Pipeline v. Alaska Public Utilities Comm’n*, 711 P.2d 1170, 1179 n. 14 (Alaska 1986) (the standard of proof in an administrative proceeding, unless otherwise specified, is the preponderance of the evidence standard).

⁵³ 20 C.F.R. § 416.920.

⁵⁴ 20 C.F.R. § 416.920(a)(4).

⁵⁵ 20 C.F.R. § 416.920(a)(4)(i).

⁵⁶ 20 C.F.R. § 416.908.

⁵⁷ A severe impairment is one that “significantly limits [a person’s] physical or mental ability to do basic work activities.” 20 C.F.R. § 416.920(c).

months.⁵⁸ If the impairment is not severe or does not meet the duration requirement, then the applicant is not disabled. If the impairment is severe and meets the duration requirement, then it is necessary to proceed to step three.

The third step requires the evaluation of whether the applicant's impairment satisfies certain impairment-specific criteria (known as "Listings") adopted by the SSA.⁵⁹ If the impairment satisfies a Listing, the applicant is deemed disabled at step three.⁶⁰ If the impairment does not satisfy a Listing, the analysis proceeds to step four.

At step four, the SSA examines the applicant's ability to perform his or her past relevant work.⁶¹ If the applicant is able to perform his or her past relevant work, the applicant is deemed not disabled. If the applicant is not able to perform his or her past relevant work, the analysis proceeds to the fifth and last step.

Finally, at step five, the SSA examines the applicant's capacity for work, age, education, and work experience to determine whether the applicant can perform other work in the national economy.⁶² At this stage, in SSI cases, the burden of proof shifts from the applicant to the SSA.⁶³ If the applicant is not capable of performing other work, he or she is deemed disabled.⁶⁴

Since 2012, Alaska's Interim Assistance program had been interpreted as incorporating only steps one through three of the SSA's five step analysis.⁶⁵ However, while this case was pending, the Alaska Supreme Court issued its decision in *State of Alaska, Department Of Health And Social Services, Division Of Public Assistance v. Gross*, 2015 WL 1874584 (Alaska, April 24, 2015).⁶⁶ In *Gross*, the court held that the Division's interpretation of 7 AAC 40.180, to include only steps one, two, and three of the SSA's SSI disability analysis in determining eligibility for Interim Assistance, improperly excluded from Interim Assistance eligibility the entire category of persons eligible for SSI at step five of the SSA's disability analysis. The *Gross* decision did not, however, specify a particular analysis to be used after step three of the disability analysis.

⁵⁸ 20 C.F.R. § 416.909; 20 C.F.R. § 416.920(a)(4)(ii).

⁵⁹ See 20 C.F.R. Part 404, Subpart P, Appendix 1 (hereafter "Appendix 1").

⁶⁰ 20 C.F.R. § 416.920(a)(4)(iii) and (d).

⁶¹ 20 CFR § 416.920(a)(4)(iv).

⁶² 20 CFR § 416.920(a)(4)(v).

⁶³ See 20 CFR § 416.920(a)(4)(v); *Bowen v. Yuckert*, 482 U.S. 137, 144 (1987); *Kail v. Heckler*, 722 F.2d 1496, 1498 (9th Cir.1984); *Embrey v. Bowen*, 849 F.2d 418, 422 (9th Cir.1988); *Smolen v. Chater*, 80 F.3d 1273, 1289 (9th Cir. 1996); *Tackett v. Apfel*, 180 F.3d 1094, 1099 (1999); *Bustamante v. Massanari*, 262 F.3d 949, 953–954 (9th Cir. 2001); *Valentine v. Commissioner, Social Security Administration*, 574 F.3d 685, 689 (9th Cir.2009).

⁶⁴ 20 CFR § 416.920(a)(4)(v).

⁶⁵ See *In Re M.H.*, OAH Case No. 12-0688-APA (Commissioner of Health and Social Services 2012).

⁶⁶ Because this decision was only recently issued, there is as yet no official Pacific Reporter citation available.

The *Gross* decision appears to envision use of at least *some* aspects of the SSA's disability analysis through steps four and five. However, the *Gross* decision also appears to indicate that the process of making an Interim Assistance eligibility determination should not be unduly cumbersome. In an attempt to balance these competing considerations, I will apply steps four and five of the SSA's disability analysis. However, I will not shift the burden of proof to the agency at step five of the analysis, as would be done were this an SSI case being determined by the SSA.⁶⁷

C. Application of the Interim Assistance Disability Criteria to This Case

1. Step 1 - Is the Applicant Engaged in Substantial Gainful Activity?

The first step of the disability analysis asks whether the applicant is performing “any substantial gainful activity.”⁶⁸ Ms. P testified that she is not currently working, and the Division did not dispute this.⁶⁹ Accordingly, Ms. P has proven that she is not engaged in substantial gainful activity, and has satisfied Step 1 of the Interim Assistance disability analysis.

2. Step 2 - Are the Severity and Durational Requirements Satisfied?

a. Severity

At step two of the sequential evaluation process, the adjudicator must determine which of the applicant's impairments, if any, are “severe.”⁷⁰ An impairment should be found to be “non-severe” only when the evidence establishes a “slight abnormality” that has “no more than a minimal effect” on an individual's ability to work.⁷¹ The inquiry at Step 2 is “a *de minimis* screening device to dispose of groundless claims.”⁷² If an adjudicator is unable to clearly determine the effect of an impairment or combination of impairments on the individual's ability to do basic work activities, the sequential evaluation should not end with the Step 2 “severity” evaluation.⁷³ Further, even if no single impairment is found to be severe under this lenient standard, each impairment still must be considered in combination with all other impairments to determine whether the combined effect of multiple impairments is medically severe.⁷⁴

⁶⁷ Because the Commissioner has not yet issued any Interim Assistance decisions applying the Alaska Supreme Court's decision in the *Gross* case, the specific analysis to be applied at steps four and five of the Interim Assistance disability analysis is an issue of first impression in this case.

⁶⁸ 20 C.F.R. § 416.972 defines “substantial gainful activity” as work that (a) involves doing significant and productive physical or mental duties, and (b) is done (or intended) for pay or profit.

⁶⁹ Exs. 4.1 and 4.3; V P hearing testimony; Jamie Lang hearing testimony.

⁷⁰ 20 C.F.R. § 404.1521.

⁷¹ *Social Security Ruling (SSR)* 85-28, 1985 WL 56856 at 3 (SSA 1985); *see also Yuckert v. Bowen*, 841 F.2d 303, 306 (9th Cir. 1988); *Webb v. Barnhart*, 433 F.3d 683, 686 (9th Cir. 2006); *Kirby v. Astrue*, 500 F.3d 705, 707–08 (8th Cir. 2007); 20 C.F.R. §§ 404.1521(a), 416.921(a).

⁷² *Smolen v. Chater*, 80 F.3d 1273, 1290 (9th Cir. 1996), *citing Bowen v. Yuckert*, 482 U.S. 137 (1987).

⁷³ SSR 85-28.

⁷⁴ 20 C.F.R. § 404.1523 states:

The Division found that Ms. P's impairments are "severe" as defined by the applicable regulations.⁷⁵ Ms. P thus satisfies the first half of Step 2 of the disability analysis.

b. Duration

The next step, pursuant to 20 C.F.R. 416.909, is to decide whether or not Ms. P's impairments have lasted, or can be expected to last, for a continuous period of at least 12 months. In this regard, it is important to note that the 12 month duration requirement of 20 C.F.R. 416.909 is retrospective as well as prospective; it looks back in time as well as forward in time (i.e. the impairment "must have lasted or must be expected to last"). The Division did not dispute that Ms. P's impairments have lasted or are expected to last for 12 months or longer.⁷⁶ Ms. P therefore also satisfies the second half of Step 2 of the disability analysis.

3. Step 3 - Whether the Applicant "Meets the Listing"

The third step of the Interim Assistance program's disability analysis is to determine whether an applicant's impairments meet or equal the criteria of any one "Listing" within the SSA's Listing of Impairments, contained in the SSA's regulations at 20 C.F.R. Part 404, Subpart P, Appendix 1 ("the Listings"). The applicant bears the burden of establishing that his or her impairment satisfies the requirements of a "Listings" impairment.⁷⁷ To satisfy a Listing, an impairment must meet *all* of the Listing's specified criteria; an impairment that manifests only some of these criteria, no matter how severely, does not qualify.⁷⁸

The record indicates that Ms. P has six basic types of impairments. These are (1) back pain caused by spinal problems; (2) hepatitis C; (3) hypertension; (4) chronic obstructive pulmonary disease (COPD), (5) migraine headaches; and (6) depression.⁷⁹ The Social Security Administration has different criteria ("Listings") for each of these impairments. Accordingly, each of the impairments must be analyzed separately.

In determining whether your physical or mental impairment or impairments are of a sufficient medical severity that such impairment or impairments could be the basis of eligibility under the law, we will consider the combined effect of all of your impairments without regard to whether any such impairment, if considered separately, would be of sufficient severity. If we do find a medically severe combination of impairments, the combined impact of the impairments will be considered throughout the disability determination process.

⁷⁵ Ex. 4.3; Jamie Lang hearing testimony.

⁷⁶ Ex. 4.3; Jamie Lang hearing testimony.

⁷⁷ *Tackett v. Apfel*, 180 F.3d 1094, 1098-1099 (9th Cir.1999); *Sullivan v. Zebley*, 493 U.S. 521, 530-531, 110 S.Ct. 885, 107 L.Ed.2d 967 (1990).

⁷⁸ *Sullivan, supra*, 493 U.S. at 530.

⁷⁹ See Exs. 3.198, 4.3, 4.4, and Section II, above.

a. Ms. P's Spinal Problems / Back Pain

The Social Security disability system classifies Ms. P's spinal problems and attendant back pain under the Musculoskeletal Listing at 20 C.F.R. Part 404, Subpart P, Appendix 1, § 1.04. This Listing, titled "Disorders of the Spine," provides in relevant part:⁸⁰

1.04 Disorders of the spine (e.g., herniated nucleus pulposus, spinal arachnoiditis, spinal stenosis, osteoarthritis, degenerative disc disease, facet arthritis, vertebral fracture), resulting in compromise of a nerve root (including the cauda equina) or the spinal cord. With:

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); or

B. Spinal arachnoiditis, confirmed by an operative note or pathology report of tissue biopsy, or by appropriate medically acceptable imaging, manifested by severe burning or painful dysesthesia, resulting in the need for changes in position or posture more than once every 2 hours; or

C. Lumbar spinal stenosis resulting in pseudoclaudication, established by findings on appropriate medically acceptable imaging, manifested by chronic nonradicular pain and weakness, and resulting in inability to ambulate effectively, as defined in 1.00B2b.

With regard to Section 1.04A, x-rays taken in September 2013 showed mild degenerative changes of Ms. P's thoracic spine with osteophytic lipping (irregular bone formation or bone spurs around the vertebral bodies).⁸¹ This and other medical evidence indicates that Ms. P's spinal problems satisfy *some* of the criteria in Section 1.04A (neuro-anatomic distribution of pain and limitation of motion of the spine). However, there is no medical evidence of compromise of a nerve root, nerve root compression, muscle atrophy, reflex loss, or a positive result on a straight-leg raising test. Accordingly, Ms. P's back problems do not satisfy the criteria of Section 1.04A.

With regard to Section 1.04B, there is no medical evidence of spinal arachnoiditis. Finally, with regard to Section 1.04C, there is no evidence of lumbar spinal stenosis. Further, although Ms.

⁸⁰ Appendix 1, §1.04.

⁸¹ Ex. 3.168. Osteophytic lipping around or between the vertebral bodies can result in pressure being put on nerves that pass between them from the spinal cord, which in turn can lead to pain, tingling, and numbness in other parts of the body. See article on the website of the U.S. National Library of Medicine, National Institute of Health, accessed online at <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC2697338> (accessed on May 6, 2015).

P's ability to walk may be somewhat impaired, under the SSA's regulations, the "inability to ambulate effectively" has very specific criteria, and is defined in relevant part as:⁸²

(1) Inability to ambulate effectively means an extreme limitation of the ability to walk; *i.e.*, an impairment(s) that interferes very seriously with the individual's ability to independently initiate, sustain, or complete activities. Ineffective ambulation is defined generally 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

(2) *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 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

Accordingly, Ms. P does not satisfy the specific criteria of Listing 1.04(C).

In summary, Ms. P's spinal problems, while clearly painful, do not satisfy the specific criteria of SSA Listing Section 1.04. It is therefore necessary to determine whether one of her other impairments satisfies the requirements of a relevant SSA Listing.

b. Ms. P's Hepatitis C

Ms. P's Hepatitis C is analyzed under "Category of Impairments, Digestive System" (20 CFR Part 404, Subpart P, Appendix 1, § 5.05). *See* Section 5.0(D)(4)(a)(ii) ii) ("We evaluate . . . chronic viral Hepatitis infections under 5.05 or any listing in an affected body system(s).")

The criteria of Section 5.05 are extremely technical.⁸³ The Division's Medical Reviewer found that the severity of the Ms. P's Hepatitis C did not meet the requirements of Section 5.05.⁸⁴

⁸² Appendix 1, §1.00(B)(2)(b).

⁸³ In order for Ms. P to meet the criteria set out in Listing Section 5.05, there must be evidence of:

A. Hemorrhaging from esophageal, gastric, or ectopic varices or from portal hypertensive gastropathy, demonstrated by endoscopy, x-ray, or other appropriate medically acceptable imaging, resulting in hemodynamic instability as defined in 5.00D5, and requiring hospitalization for transfusion of at least 2 units of blood. Consider under a disability for 1 year following the last documented transfusion; thereafter, evaluate the residual impairment(s). OR

B. Ascites or hydrothorax not attributable to other causes, despite continuing treatment as prescribed, present on at least two evaluations at least 60 days apart within a consecutive 6-month period. Each evaluation must be documented by: (1) Paracentesis or thoracentesis; or (2) Appropriate medically acceptable imaging or physical examination and one of the following: (a) Serum albumin of 3.0 g/dL or less; or (b) International Normalized Ratio (INR) of at least 1.5. OR

C. Spontaneous bacterial peritonitis with peritoneal fluid containing an absolute neutrophil count of at least 250 cells/mm³. OR

An independent review of Ms. P's medical records confirms that the specific requirements of Listing 5.05 are not met here. It is therefore necessary to determine whether any of Ms. P's other impairments satisfy the requirements of the relevant SSA Listing.

c. Ms. P's Hypertension

The SSA Listing which applies to Ms. P's hypertension is Section 4.00 (Cardiovascular System), and specifically Section 4.00(H)(1). That Listing states in relevant part that, "[b]ecause hypertension (high blood pressure) generally causes disability through its effects on other body systems, we will evaluate it by reference to the specific body system(s) affected (heart, brain, kidneys, or eyes) when we consider its effects under the listings." The Division's Medical Reviewer found that the severity of Ms. P's hypertension does not meet the requirements of Section 4.00(H)(1) because the hypertension has not had a debilitating effect on any specific organs or systems.⁸⁵ Independent review of Ms. P's medical records likewise fails to disclose a nexus between Ms. P's hypertension and any specific debilitating effect. Ms. P's hypertension thus does not satisfy the requirements of Listing 4.00(H)(1). It is therefore necessary to determine whether any of her other impairments satisfy the requirements of another relevant SSA Listing.

D. Hepatorenal syndrome as described in 5.00D8, with one of the following: (1) Serum creatinine elevation of at least 2 mg/dL; or (2) Oliguria with 24-hour urine output less than 500 mL; or (3) Sodium retention with urine sodium less than 10 mEq per liter. OR

E. Hepatopulmonary syndrome as described in 5.00D9, with: (1) Arterial oxygenation (P_aO_2) on room air of: (a) 60 mm Hg or less, at test sites less than 3000 feet above sea level, or (b) 55 mm Hg or less, at test sites from 3000 to 6000 feet, or (c) 50 mm Hg or less, at test sites above 6000 feet; or (2) Documentation of intrapulmonary arteriovenous shunting by contrast-enhanced echocardiography or macroaggregated albumin lung perfusion scan. OR

F. Hepatic encephalopathy as described in 5.00D10, with 1 and either 2 or 3:

1. Documentation of abnormal behavior, cognitive dysfunction, changes in mental status, or altered state of consciousness (for example, confusion, delirium, stupor, or coma), present on at least two evaluations at least 60 days apart within a consecutive 6-month period; and

2. History of transjugular intrahepatic portosystemic shunt (TIPS) or any surgical portosystemic shunt; or

3. One of the following occurring on at least two evaluations at least 60 days apart within the same consecutive 6-month period as in F1: (a) Asterixis or other fluctuating physical neurological abnormalities; or (b) Electroencephalogram (EEG) demonstrating triphasic slow wave activity; or (c.) Serum albumin of 3.0 g/dL or less; or (d) International Normalized Ratio (INR) of 1.5 or greater. OR

G. End stage liver disease with SSA CLD scores of 22 or greater calculated as described in 5.00D11. Consider under a disability from at least the date of the first score.

⁸⁴ Ex. 4.3; Jamie Lang hearing testimony.

⁸⁵ Ex. 4.3; Jamie Lang hearing testimony.

d. Ms. P's Chronic Obstructive Pulmonary Disease (COPD)

Ms. P's Chronic Obstructive Pulmonary Disease (COPD) is analyzed under "Category of Impairments, Respiratory System" (20 C.F.R. Part 404, Subpart P, Appendix 1, § 3.00 *et. seq.*). Section 3.00 generally requires a series of spirometric tests (spirometry), and/or arterial blood gas studies (ABGS), in order to satisfy the requirements of the Listing. The Division's Medical Reviewer correctly noted that there are no such tests or studies in the record sufficient to satisfy Section 3.00.⁸⁶ Accordingly, Ms. P's COPD does not meet the specific requirements of the SSA's Listing for COPD, and Ms. P thus cannot be found to be disabled based on her COPD.

e. Ms. P's Migraine Headaches

The Social Security Administration has not yet officially classified headaches under a particular listing.⁸⁷ However, several federal district court cases indicate that SSA Listing Section 11.03 is an appropriate listing under which to analyze headaches. SSA Question and Answer ("Q & A") document 09-036 is the SSA's current guidance for determining whether headaches are a medically determinable impairment.⁸⁸ According to the SSA, Listing 11.03 is still the most analogous listing for considering medical equivalence of headaches. The Q & A document 09-036 describes the essential components of Listing 11.03, as those components apply to headaches, as a typical headache event pattern that is documented by detailed descriptions, including all associated phenomena (e.g., premonitory symptoms, aura, duration, intensity, treatment), that occurs more frequently than once weekly with alteration of awareness or an effect that significantly interferes with activity during the day (e.g., need for a darkened quiet room, lying down without moving, or sleep disturbance that impacts daytime activities).

Ms. P began taking Topamax for her migraine headaches at some time prior to April 2014.⁸⁹ One June 17, 2014 Ms. P's doctor wrote that, prior to starting Topamax, Ms. P had been having four to six migraines per week, but that, after starting Topamax, Ms. P was only having one or two migraines per week.⁹⁰ On July 2, 2014 Ms. P's doctor wrote that a combination of Topamax and Tramadol was giving Ms. P 95% relief from migraines for four to six hours after each use.⁹¹ On

⁸⁶ Ex. 4.3; Jamie Lang hearing testimony.

⁸⁷ This has been confirmed in several federal district court decisions, including *Miller v. Astrue*, 2011 WL 671752 (D. Ariz. 2011); *Tonsor v. Commissioner of Social Sec.*, 2011 WL 1231602 (C.D. Ill. 2011); *Watts v. Astrue*, 2012 WL 3150369 (C.D. Ill. 2012); and *Romonosky v. Colvin*, 2013 WL 4052921 (W.D. Pa. 2013).

⁸⁸ The SSA document is quoted in *Miller v. Astrue*, 2011 WL 671752 (D. Ariz. 2011).

⁸⁹ Ex. 3.147.

⁹⁰ Ex. 3.138. During that appointment, Ms. P indicated that Topamax had been a "wonder drug" for her.

⁹¹ Ex. 3.136.

July 11, 2014 Ms. P confirmed to her doctor that, since starting Topamax, her headaches were fewer and less intense.⁹²

The medical evidence in the record indicates that, prior to beginning Topamax, the severity of Ms. P's migraines may have been sufficient to satisfy the criteria of SSA document 09-036. However, it is clear that, by the time Ms. P applied for Interim Assistance, her migraines were well-controlled with Topamax. Accordingly, Ms. P cannot currently be found to be disabled on the basis of her headaches. It is therefore necessary to determine whether any of her other impairments satisfy the criteria of a relevant SSA Listing.

f. Ms. P's Depression

The Social Security Administration classifies depression under its Listing for "Affective Disorders" at 20 C.F.R. Part 404, Subpart P, Appendix 1, § 12.04. 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
2. Manic syndrome characterized by at least three of the following: (a) hyperactivity; or (b) pressure of speech; or (c) flight of ideas; or (d) inflated self-esteem; or (e) decreased need for sleep; or (f) easy distractibility; or (g) involvement in activities that have a high probability of painful consequences which are not recognized; or (h) hallucinations, delusions or paranoid thinking; or
3. Bipolar syndrome, with a history of episodic periods manifested by the full symptomatic picture of both manic and depressive syndromes (and currently characterized by either or both syndromes);

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

⁹² Ex. 3.133.

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.

The record indicates that Ms. P meets seven out of nine of the criteria under § 12.04(A)(1). However, Ms. P satisfies only one the four criteria of § 12.04(B) (which requires that a minimum of two of the four criteria be met), and currently satisfies none of the three alternative requirements of § 12.04(C). Accordingly, although Ms. P's depression has to date proven itself to be resistant to treatment,⁹³ her depression is not currently severe enough to satisfy Listing § 12.04. Accordingly, it is now necessary to proceed to "Step 4" of the disability analysis and determine whether Ms. P can perform her prior work.

4. *Step 4 - Can Ms. P Perform her Past Relevant Work?*

The next step in the disability analysis is to determine whether Ms. P's impairments prevent her from performing her past relevant work. The SSA defines "past relevant work" as "work that [the applicant has] done within the past 15 years, that was substantial gainful activity, and that lasted long enough for [the applicant] to learn to do it."⁹⁴ If the applicant is not prevented from performing his previous relevant work, he is not disabled.⁹⁵

Ms. P's past relevant work was as a taxi cab driver, and as a delivery driver and counter person for an auto parts store.⁹⁶ Ms. P told her doctors that she was forced to quit that job in April 2014 because she was depressed, was often forgetting things, was becoming confused, and was getting lost, even though she was familiar with the area.

Although Ms. P's depression is not severe enough to satisfy the requirements of the SSA's Listing (as discussed above), the medical records do indicate that Ms. P's depression is both serious and (to date) resistant to treatment by medication. Ms. P's medical records

⁹³ All factual findings in this paragraph are based on Ex. 3.060 unless otherwise stated.

⁹⁴ 7 CFR § 416.960(b)(1).

⁹⁵ 20 CFR § 416.920(a)(4)(iv); 20 CFR § 416.960(b)(2-3).

⁹⁶ All factual findings in this paragraph are based on Exs. 3.054, 3.055, and 3.201 unless otherwise stated.

support her assertion that she can no longer perform her prior work as a delivery driver due to problems with periodic confusion and lack of focus.⁹⁷

Accordingly, Ms. P has carried her burden and proven, by a preponderance of the evidence, that she can no longer perform her prior work as a cab driver or delivery driver. It is therefore necessary to proceed to the final step in the disability analysis and determine whether Ms. P can perform other work.

5. Step 5 - Do Ms. P's Impairments Prevent her From Performing Any Work?

Under 20 CFR § 416.920(a)(4)(v) and 20 CFR § 416.960(c), if it is determined that an applicant cannot perform his or her past relevant work, it is then necessary to decide whether the applicant is capable of performing any other work. In order to do this, it is typically necessary to determine whether the applicant retains a particular exertional capacity and whether the applicant has acquired transferable skills; to identify specific jobs that the applicant can perform with the restrictions he or she has been found to have; and to verify that the jobs the applicant can do exist in significant numbers in the national economy.⁹⁸

In SSI disability cases, the SSA shifts the burden of proof at this stage from the applicant to the agency.⁹⁹ However, the *Gross* decision appears to indicate that the process of making an Interim Assistance eligibility determination should be speedier and less cumbersome than the SSI disability determination.¹⁰⁰ In an attempt to balance the competing considerations referenced in *Gross*, I will apply step five of the SSA's disability analysis, but I will not shift the burden of proof to the agency as would be done were this an SSI case being determined by SSA.¹⁰¹

The preferred method for determining whether an applicant for disability benefits still has the capability to perform some type of work is through the testimony of a vocational expert.¹⁰² However, the Interim Assistance program does not currently provide for case review by a vocational expert, and applicants like Ms. P do not have the financial resources to hire their own vocational expert. Thus, there was no expert vocational testimony in this case.

⁹⁷ While periodic confusion and lack of focus would not prevent a person from performing many jobs, these symptoms would make performing jobs involving the operation of a motor vehicle unsafe.

⁹⁸ *Haddock v. Apfel*, 196 F.3d 1084 (10th Cir. 1999).

⁹⁹ See 20 CFR § 416.960(c)(2); see also *Bowen v. Yuckert*, 482 U.S. 137, 144 (1987); *Smolen v. Chater*, 80 F.3d 1273, 1289 (9th Cir.1996); *Tacket v. Apfel*, 180 F.3d 1094, 1099 (9th Cir. 1999); *Bustamante v. Massanari*, 262 F.3d 949, 953–954 (9th Cir.2001); *Valentine v. Commissioner of SSA*, 574 F.3d 685, 689 (9th Cir. 2009).

¹⁰⁰ See discussion of the *Gross* decision at page 9, above.

¹⁰¹ Because the Commissioner has not yet issued any Interim Assistance decisions applying the Alaska Supreme Court's decision in the *Gross* case, the specific analysis to be applied at steps four and five of the Interim Assistance disability analysis is an issue of first impression in this case.

¹⁰² *Lopez v. Califano*, 481 F.Supp. 392 (D.C. Cal. 1979).

In many SSI cases, a decision on whether an applicant is disabled can be made, even in the absence of expert vocational testimony, by using the Social Security Administration's Medical-Vocational Guidelines (located at 20 CFR, Part 404, Subpart P, Appendix 2). These guidelines, known as "the Grids," are fact-based generalizations about the availability of jobs for people of varying ages, educational backgrounds, and previous work experience, with differing degrees of exertional impairment.¹⁰³ The Grids "are used to evaluate the applicant's age, education, past work experience, and RFC [residual functional capacity] in order to determine whether that applicant is disabled."¹⁰⁴

In this case, Ms. P is 49 years old, is literate and able to communicate in English, has a high school education, and has previously performed unskilled work (see Section II, above). Accordingly, if the Grids are applied, and if Ms. P were found to be able to perform any work, it would be under Rule 201 of "the Grids" ("Maximum sustained work capability limited to sedentary work as a result of severe medically determinable impairment(s)"). The specific sub-rule is Rule 201.18. According to that rule, where (as here) a person's age is between 45 – 49 years, the person is literate, able to communicate in English, and was previously engaged in unskilled work, the person is deemed *not* to be disabled.

Based on the testimony and medical evidence discussed in Section II, above, I find that Ms. P's impairments currently limit her to sedentary work. Accordingly, if the Grids were strictly followed, Ms. P would be found not to be disabled.

It is well established, however, that "the Grids" do not apply if the applicant has a significant non-exertional impairment.¹⁰⁵ Non-exertional impairments include mental impairments, sensory impairments, and impairments involving environmental limitations.¹⁰⁶

In this case, Ms. P has three non-exertional impairments: depression,¹⁰⁷ migraine headaches,¹⁰⁸ and chronic pain.¹⁰⁹ Accordingly, the Grids should not be strictly applied where (as here) a significant portion of the applicant's impairments are non-exertional impairments.

¹⁰³ *Holley v. Massanari*, 253 F.3d 1088, 1093 (8th Cir. 2001).

¹⁰⁴ *Poole v. Astrue*, 2010 WL 2231873 (W. D. Ark. 2010).

¹⁰⁵ *Cole v. Secretary of Health and Human Services*, 820 F.2d 768, 771 (6th Cir. 1987); *Payan v. Chater*, 959 F.Supp. 1197 (C.D. Cal. 1996).

¹⁰⁶ *See Cole, supra*, 820 F.2d at 772; *see also Johnson v. Secretary*, 872 F.2d 810, 814 (8th Cir. 1989).

¹⁰⁷ *Van Winkle v. Barnhart*, 55 Fed. Appendix 784 (8th Cir. 2003); *Case v. Barnhart*, 165 Fed. Appendix 492 (8th Cir. 2006) (depression is a non-exertional impairment).

¹⁰⁸ *McKinzey v. Astrue*, 641 F.3d 884, 889 (7th Cir. 2011); *May v. Commissioner of Social Security Admin.*, 226 Fed. Appx. 955, 960 (11th Cir. 2007) (migraines are a non-exertional impairment).

¹⁰⁹ Pain has long been considered a non-exertional impairment. *E.g., Baker v. Barnhart*, 457 F.3d 882, 894 (8th Cir. 2006); *Haley v. Massanari*; 258 F.3d 742, 747 (8th Cir. 2001); *Gray v. Apfel*, 192 F.3d 799, 802 (8th Cir. 1999); *Cline v. Sullivan*, 939 F.2d 560, 565 (8th Cir.1991); *Prince v. Bowen*, 894 F.2d 283, 287 (8th Cir.1990).

However, even if the Grids are not *strictly* applied, the preponderance of the evidence indicates that Ms. P can perform types of sedentary work which do not involve driving. I reach this conclusion primarily for two reasons. First, the only medical professional to render an opinion as to Ms. P's ability to work indicated that Ms. P could perform light lifting and limited lifting, bending, and sitting.¹¹⁰ Second, when Ms. P completed the Division's *Disability and Vocational Report* form,¹¹¹ she did not assert that she was completely *disabled*, but rather that she was "in need of retraining."¹¹²

In summary, because Ms. P can perform sedentary work not involving driving, she is not considered disabled, and does not currently qualify for Interim Assistance.

D. Ms. P Failed to Appeal SSA's Denial of her SSI as Required

The third basis for the Division's denial of Ms. P's request for Interim Assistance was that she failed to appeal the SSA's denial of her application for Supplemental Security Income (SSI), within ninety days, as required by the Division's regulations and policy manual.¹¹³ Interim Assistance regulation 7 AAC 40.190 states in relevant part as follows:

(a) Interim assistance will end upon the division's receipt of notification of the Social Security Administration's final determination of eligibility or ineligibility for SSI benefits. An applicant will continue to receive interim assistance until the applicant (1) is approved for SSI; (2) *receives an adverse SSI decision and fails to appeal it to the next appeal level*; (3) withdraws or abandons an appeal at any level; or (4) receives a notice of dismissal or an adverse decision from the Social Security Appeals Council. [Emphasis added].

The Division's Adult Public Assistance Manual, Section 426-6(B) states in relevant part that "SSI allows up to 60 days from the point of notice of adverse action for the client to file for the next level of appeal," and that the client must be given "at least 30 days to offer proof of re-entry into the SSI appeals process." Interpreting 7 AAC 40.190 and Manual Section 426-6(B) liberally, an applicant for Interim Assistance whose application for SSI is denied has 60 days to appeal the SSI denial to SSA, and another 30 days after that to inform the Division that he or she has done so.

In this case, SSA denied Ms. P's application for SSI on August 15, 2014.¹¹⁴ Thus, in order to keep her application for Interim Assistance pending, Ms. P was required to prove to the Division by about November 15, 2014 that she had filed a request for reconsideration with

¹¹⁰ Ex. 3.040.

¹¹¹ Exs. 3.199 - 3.203.

¹¹² Ex. 3.199.

¹¹³ Ex. 33.

¹¹⁴ Ex. 10.

SSA. As of January 23, 2015, Ms. P had filed no reconsideration request or appeal with SSA.¹¹⁵ Accordingly, the Division was correct to deny Ms. P's request for Interim Assistance on that basis.

IV. Conclusion

The Division erred in concluding that Ms. P's income, at the time of her application and the Division's determination, exceeded the maximum income limit for the Adult Public Assistance Program (APA), of which Interim Assistance is a part. However, the Division correctly concluded that Ms. P does not currently satisfy the Interim Assistance program's disability criteria. The Division also correctly concluded that Ms. P failed to appeal the SSA's denial of her application for SSI within the time period required by the Division's regulations and policy manual. Accordingly, the Division correctly determined that Ms. P is not currently eligible for Interim Assistance. The Division's decision denying Ms. P's application for Interim Assistance is therefore affirmed.

DATED this 11th day of May, 2015.

By: Signed _____
Name: Jay D. Durych
Title: Administrative Law Judge, DOA/OAH

Adoption

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

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

DATED this 21st day of May, 2015.

By: Signed _____
Name: Jay D. Durych
Title: Administrative Law Judge, DOA/OAH

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

¹¹⁵ Ex. 10.