

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

In the Matter of:	)	
	)	
Z O	)	OAH No. 15-1146-APA
_____	)	DPA Case No.

**DECISION**

**I. Introduction**

The issue in this case is whether Z O satisfies the Interim Assistance program’s disability criteria. The Division of Public Assistance (DPA or Division) determined that Ms. O is not currently engaged in substantial gainful activity; that at least one of her impairments is medically severe; and that at least one of her medically severe impairments has lasted long enough to satisfy the 12 month durational requirement.<sup>1</sup> However, the Division also determined that none of Ms. O's impairments satisfy the specific criteria of any of the Social Security Administration's (SSA's) impairment "Listings."<sup>2</sup> Accordingly, the Division denied Ms. O’s application for Interim Assistance.<sup>3</sup>

Independent review of the record indicates that Ms. O is not engaged in substantial gainful activity, that she suffers from several medically severe impairments, and that these impairments satisfy the 12 month durational requirement. However, none of Ms. O's impairments currently satisfy the specific criteria of any of SSA's applicable impairment "Listings." Although Ms. O's impairments prevent her from performing some of her prior relevant work, they do not appear to prevent her from performing the more sedentary of the jobs she has previously held. Similarly, Ms. O would not be considered to be disabled under the SSA’s Medical-Vocational Guidelines ("the Grids"). In short, the preponderance of the evidence indicates that Ms. O can still perform some types of sedentary work. Accordingly, Ms. O does not currently satisfy the Interim Assistance program’s eligibility requirements. The Division’s decision denying Ms. O’s application for Interim Assistance is therefore affirmed.

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<sup>1</sup> Exs. 4.0 - 4.4.  
<sup>2</sup> Exs. 4.0 - 4.4.  
<sup>3</sup> Ex. 6.

## II. Facts

### A. *Ms. O's Medical Condition and Impairments per her Medical Records*

Ms. O is 47 years old.<sup>4</sup> Her current diagnoses include anxiety, insomnia, left shoulder pain, right shoulder pain / arthralgia, major depressive disorder, neck pain, numbness, obesity and sciatica.<sup>5</sup>

Ms. O's anxiety and depression appear to have been caused by the deaths of several members of her family over the last five years.<sup>6</sup> Ms. O lost her mother in 2011, her father in 2013, and a brother in 2014.

On October 3, 2011, an MRI was taken of Ms. O's lower spine.<sup>7</sup> The MRI indicated left L5-S1 paracentral disc protrusion without significant spinal stenosis.

On November 5, 2014, another MRI was taken of Ms. O's cervical spine.<sup>8</sup> The MRI indicated mild cervical spondylosis, including mild posterior disc osteophyte complexes and mild spinal stenosis, at the C4-5 and C5-6 levels.

On February 2, 2015, Ms. O slipped, fell on a tile floor, and dislocated her right shoulder.<sup>9</sup> The dislocation was surgically repaired through a closed reduction, and Ms. O was then placed in a shoulder immobilizer and given medications for the pain.

On April 5, 2015, an MRI was taken of Ms. O's right shoulder to see how it was healing.<sup>10</sup> The radiologist's report from the MRI concluded in relevant part as follows:

1. Fatty atrophy of the teres minor. Correlate for quadrilateral space syndrome.
2. Bony defect at the superior aspect of the humerus could represent a Hill-Sachs injury given history of dislocation.
3. Full-thickness tear of the anterior leading edge of the supraspinatus tendon . . . .
4. Abnormal signal extending through the anterior labrum . . . is suspicious for a focal labral tear.

On May 13, 2015, M D, M.D. completed the Division's Form AD-2.<sup>11</sup> Dr. D reported Ms. O's diagnoses as major depression, chronic left shoulder pain, and sciatica. Dr. D wrote that Ms. O was not expected to recover from these conditions.

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<sup>4</sup> Ex. 1.

<sup>5</sup> Exs. 3.4, 3.5,

<sup>6</sup> All factual findings in this paragraph are based on Ex. 3.6 unless otherwise stated.

<sup>7</sup> All factual findings in this paragraph are based on Exs. 3.18 - 3.19 unless otherwise stated.

<sup>8</sup> All factual findings in this paragraph are based on Exs. 3.16 - 3.17 unless otherwise stated.

<sup>9</sup> All factual findings in this paragraph are based on Exs. 3.10 - 3.13 unless otherwise stated.

<sup>10</sup> All factual findings in this paragraph are based on Exs. 3.14, 3.15, and 3.25 unless otherwise stated.

<sup>11</sup> All factual findings in this paragraph are based on Exs. 3.39 - 3.40 unless otherwise stated.

On May 15, 2015, Ms. O completed the Division's *Disability and Vocational Report* form.<sup>12</sup> In completing that form, Ms. O wrote that she can see, hear, and speak; that she can follow simple instructions; that she can respond to anticipated changes in a home or work environment; that her judgment is sufficient to make safe choices; that she is able to walk short distances; that she is able to prepare simple meals, feed herself, tend to her personal hygiene, make telephone calls, and use public transportation services, but that she cannot lift ten pounds or sit for a continuous period of thirty minutes.<sup>13</sup>

On June 4, 2015, Ms. O was seen by M D, M.D., her primary treating physician.<sup>14</sup> At that time, Dr. D reported that Ms. O was taking two different medications for her anxiety and depression, and that her anxiety and depression were "decently controlled" on those medications. Dr. D also reported that Ms. O's right shoulder (injured in a slip-and-fall accident in February 2015) was becoming more painful. Dr. D reported that Ms. O had pain from her right shoulder down to her elbow; that the pain had caused a decrease in Ms. O's range of motion (ROM); and that Ms. O had intermittent numbness in all five fingers of her right hand, with the numbness lasting for 10 - 15 minutes.

On July 14, 2015, Ms. O was seen by a physician's assistant (PA-C) at No Name Clinic.<sup>15</sup> The notes from that examination state in relevant part as follows:

History of Present Illness: [Ms. O] was living in California in February 2015 when she dislocated her right shoulder. They reduced it and then . . . she had an MRI . . . . She has already had surgery on her left shoulder where they did a pretty good-sized clean out through the anterior incision that left a pretty healthy keloid. She is doing well with the left, but her right has become a problem . . . . She is not able to get the range of motion that she had before the dislocation . . . . Her shoulder is weak, painful, and sometimes gets stiff and numb.

. . . .

Review of Systems: Her 12 point review of systems is positive for weight gain, chills, night sweats, rashes, lesions, hoarseness from hay fever, visual and hearing problems, chest pain, rheumatoid arthritis, nausea, depression, headaches, and dizziness.

Physical Examination: [S]he is able to actively raise [her right shoulder] to 70 degrees in abduction and in flexion . . . . [and] to 65 degrees in extension. She can reach over to the far shoulder without any problems, but it is kind of painful . . . . She is able to get only to her belt level when she reaches around her back. Her external

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<sup>12</sup> All factual findings in this paragraph are based on Exs. 3.41 - 3.47 unless otherwise stated.

<sup>13</sup> Ex. 3.41.

<sup>14</sup> All factual findings in this paragraph are based on Exs. 3.4 - 3.9 unless otherwise stated.

<sup>15</sup> All factual findings in this paragraph are based on Ex. B pp. 1 - 3 unless otherwise stated.

rotation strength is pretty good . . . . She does not have any neurovascular symptoms today. Distally, she has good active and passive range of motion to the elbow, wrist, and hand. Sensation is intact to light touch and capillary refill is brisk.

Data Reviewed: The MRI was reviewed . . . .

Assessment: Early frozen shoulder.

Plan: We are going to get her working with physical therapy . . . . She is not really excited about having surgery at this time . . . .

**B. Ms. O's Hearing Testimony**

At hearing Ms. O testified in relevant part as follows:

1. She completed high school, attended junior college for one year, and then attended a university for another 1.5 years. She was working toward a Bachelor's Degree in Human Services.
2. She began working as a personal care-giver or personal care assistant in about 2000. In this job she helped people who had various impairments to perform their activities of daily living (walking, transfers, dressing, eating, toilet use, personal hygiene, bathing, etc.). One of her clients weighed over 200 pounds, and so assisting the client with transfers and walking was physically demanding.<sup>16</sup>
3. She also worked for No Name County from about 2000 - 2002. Her job involved an analysis of electronic voting procedures used by the county.
4. She worked as the lead cashier at a truck stop from about 2002 - 2003. In this position she would run the main cash register, stock the shelves with food, stock the refrigerator with drinks, sign off on deliveries, count the receipts for daily bank drops, and complete shift-related paperwork.<sup>17</sup>
5. She worked as a case manager for a non-profit homeless shelter from about 2006 - 2009. In this position she would conduct intake interviews, write case notes, file case notes, and use a computer; she also needed to walk a lot as part of this job.<sup>18</sup>
6. The last time she worked as a personal care assistant was in 2011.
7. She worked part time as an auditor in about 2012. This job involved scanning and comparing of large volumes of documents. This is the most recent paid position she has worked.
8. In about 2005 she underwent surgery to remove the rotator cuff of her left shoulder, which had become arthritic.

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<sup>16</sup> See also Ex. 3.44.

<sup>17</sup> See also Ex. 3.46.

<sup>18</sup> See also Ex. 3.42.

9. She has had sciatica since about 2006. The pain from her sciatica extends from her lower back, down both legs, all the way to her ankles. It is very painful.
10. She also has numbness in both hands. This may or may not be related to her spinal problems. Her doctor initially thought it might be diabetic neuropathy, but now her doctor is uncertain about the cause of the numbness.
11. She began having problems with her cervical spine in about 2011. She also has headaches which she believes are related to her neck pain.
12. She has suffered from major anxiety, major depression, and mood swings since about April 2011 following the death of her mother. The physician she was seeing for her depression in California was a general practitioner. This doctor was able to dispense anti-depressant medications for her (such as Zoloft, which she is currently taking). However, because the doctor is not a psychiatrist, the state has not accepted this doctor's diagnosis on behavioral health issues.
13. In 2012 or 2013 she went to a hospital emergency room because she thought she might be having a heart attack. It turned out that she was having a panic attack. Her doctor increased her dosage of Zoloft in response to the panic attack.
14. In about February 2015 she injured her right shoulder when she was moving a dresser while in the process of moving. She is supposed to have surgery on her right shoulder to correct the problem, but she cannot afford to have the needed surgery until she is approved to receive Medicaid in Alaska. This in turn makes it impossible for her to work, because she is right-handed, and her right arm is affected by the shoulder problem.
15. She previously received Medi-Cal (Medicaid) when she lived in California. She currently receives Chronic and Acute Medical Assistance (CAMA). However, she has had problems receiving the CAMA benefits to which she is entitled because, due to clerical errors and / or computer problems, her CAMA coverage has not rolled forward from month to month as it should. This has been very frustrating for her.
16. She currently takes six different prescription medications each day. One of those medications, which she must take three times per day, makes her drowsy.
17. Ms. O currently lives with her brother, sister-in-law, and nephew in their house. On a typical day she wakes up at about 9:00 a.m., washes her face, and brushes her teeth. She does not eat breakfast. She spends the rest of the morning reading books and writing in her journal. At noon or so she eats lunch. She usually has a sandwich or noodles, which she prepares herself. She then usually watches television for the rest of the afternoon.
18. In the early evening her sister-in-law makes dinner, and then everyone prays and has dinner together. After dinner, Ms. O returns to watching television, or reads e-books on her i-pad, until she falls asleep at about 3:00 a.m.

19. With regard to social activities, she sometimes attends church, but has not gone for the last three months or so. She has conversations with her brother, sister-in-law, and nephew, but typically does not join them in games or other activities. She calls a sister in California every three months or so and talks to her for about ten minutes. She has a total of five siblings in Anchorage, but, other than the brother she lives with, she has only seen them twice since coming to Alaska. She plays and interacts with her brother's dog, but does not take the dog outside.

20. She is able to do her own laundry. She goes grocery shopping with her nephew; she drives sometimes. She does not like to stay at the store for very long because of her anxiety.

21. She recently took a trip back to California for about two weeks to see family members there and to participate in a memorial for one of her brothers, who passed away during the prior year. She had to take medications (sleeping pills) to enable her to tolerate the plane ride. While in California, she stayed with her uncle. She took a side-trip to see her aunt in Nevada. She did not drive a car during her trip.

22. She has a number of symptoms which are considered to be indicators of depression. She has gained about 45 pounds over the past year. She has no energy and always feels fatigued. She has trouble concentrating. She has problems with her short-term and long-term memory. She has not tried to hurt herself, and she does not have hallucinations. However, she does have feelings of paranoia.

### ***C. Relevant Procedural History***

Ms. O initially applied to the Social Security Administration (SSA) for Supplemental Security Income (SSI) on August 31, 2011.<sup>19</sup> Ms. O's application was denied at the first level by Disability Determination Services,<sup>20</sup> and she requested a hearing by an SSA administrative law judge (ALJ). The SSA's ALJ found Ms. O not to be disabled.<sup>21</sup> Ms. O then requested review of the SSA ALJ's decision by the SSA's Appeals Council.<sup>22</sup> On September 16, 2015 SSA notified Ms. O that its Appeals Council had upheld the ALJ's decision.<sup>23</sup>

Ms. O applied for Interim Assistance on June 15, 2015.<sup>24</sup> On August 11, 2015 the Division denied Ms. O's application based on its finding that her medical condition did not appear to satisfy

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<sup>19</sup> Ex. 3.36.

<sup>20</sup> Ex. 4.0.

<sup>21</sup> Exs. 4.0 - 4.1.

<sup>22</sup> Ex. 4.1.

<sup>23</sup> Exs. A1 - A3.

<sup>24</sup> Ex. 2.

the Interim Assistance program's disability criteria.<sup>25</sup> Ms. O requested a hearing to contest the Division's determination on August 14, 2015.<sup>26</sup>

Ms. O's hearing was held on September 17, 2015 and October 14, 2015. Ms. O attended the hearing in person, represented herself, and testified on her own behalf. Public Assistance Analyst Jeff Miller participated in the hearing by phone and represented the Division. The record closed at the end of the hearing.

### **III. Discussion**

#### **A. *The Interim Assistance Disability Determination Process***

The Alaska Public Assistance program provides financial assistance to “aged, blind, or disabled needy [Alaska] resident[s].”<sup>27</sup> 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.<sup>28</sup> Once an applicant has been approved by SSA to receive SSI, he or she is then eligible to receive Adult Public Assistance from DPA.<sup>29</sup>

*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.<sup>30</sup> In order to qualify for Interim Assistance, the applicant must be “likely to be found disabled by the Social Security Administration.”<sup>31</sup> 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.<sup>32</sup>

The SSA uses a five-step evaluation process in making its disability determinations.<sup>33</sup> 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 proceed to the subsequent steps of the disability analysis.<sup>34</sup>

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<sup>25</sup> Ex. 3.0; Ex. 6; Ex. 7.

<sup>26</sup> Ex. 7.1.

<sup>27</sup> AS 47.25.430.

<sup>28</sup> 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).

<sup>29</sup> 7 AAC 40.030(a); 7 AAC 40.170(a).

<sup>30</sup> 7 AAC 40.170(a) and (b); AS 47.25.455.

<sup>31</sup> 7 AAC 40.180(b)(1).

<sup>32</sup> 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 Commission*, 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).

<sup>33</sup> 20 C.F.R. § 416.920.

<sup>34</sup> 20 C.F.R. § 416.920(a)(4).

The first step of the SSA's evaluation looks at the applicant's current work activity. If the applicant is performing "substantial gainful activity," the applicant is not disabled.<sup>35</sup> If the applicant is not performing "substantial gainful activity," the analysis proceeds to step two.

The second step of the SSA's analysis 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.<sup>36</sup> In order to be considered disabled, the impairment or combination of impairments must be severe,<sup>37</sup> and must be expected to result in death or must have lasted or be expected to last at least 12 months.<sup>38</sup> 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 the analysis proceeds to step three of the disability analysis.

The third step of the SSA's analysis requires the evaluation of whether the impairment satisfies certain impairment-specific criteria (known as "Listings") adopted by the SSA.<sup>39</sup> If one of the applicant's impairments "meets the Listing," the applicant is considered disabled<sup>40</sup> and qualifies for SSI<sup>41</sup> or Interim Assistance, as applicable. Otherwise, the SSA's analysis proceeds to step four.

At step four, the SSA examines the applicant's ability to perform his or her past relevant work.<sup>42</sup> 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.

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

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<sup>35</sup> 20 C.F.R. § 416.920(a)(4)(i).

<sup>36</sup> 20 C.F.R. § 416.908.

<sup>37</sup> 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).

<sup>38</sup> 20 C.F.R. § 416.909; 20 C.F.R. § 416.920(a)(4)(ii).

<sup>39</sup> See 20 C.F.R. Part 404, Subpart P, Appendix 1 (hereafter "Appendix 1").

<sup>40</sup> 20 C.F.R. § 416.920(a)(4)(iii) and (d).

<sup>41</sup> 20 C.F.R. § 416.920(a)(4)(iii) and (d).

<sup>42</sup> 20 CFR § 416.920(a)(4)(iv).



economy.<sup>43</sup> At this stage, *in SSI cases*, the burden of proof shifts from the applicant to the SSA.<sup>44</sup> If the applicant is not capable of performing other work, he or she is deemed disabled.<sup>45</sup>

Since 2012, Alaska's Interim Assistance program had been interpreted as incorporating *only steps one through three* of the SSA's five step analysis.<sup>46</sup> However, in the spring of 2015 the Alaska Supreme Court issued its decision in *State of Alaska, Department Of Health And Social Services, Division Of Public Assistance v. Gross*, 347 P.3d 116 (Alaska 2015).<sup>47</sup> In *Gross*, the court held that the Division's interpretation of 7 AAC 40.180, which after 2012 included only steps one, two, and three of the SSA's SSI disability analysis in determining eligibility for Interim Assistance, was deficient because it 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 thus indicates that eligibility determinations in Interim Assistance cases should include *some aspects* of steps four and five of the SSI's disability analysis. The *Gross* decision does not, however, specify a *particular analysis* to be used after step three of the disability analysis.

**B. Application of the Interim Assistance 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.”<sup>48</sup> Ms. O testified that she has not worked since 2012, the Division eligibility technician (ET) found that Ms. O is not currently engaged in substantial gainful activity,<sup>49</sup> and the Division did not assert otherwise during the hearing process. Accordingly, Ms. O has satisfied the first step 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.”<sup>50</sup> An impairment should be found to be “non-

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<sup>43</sup> 20 CFR § 416.920(a)(4)(v).

<sup>44</sup> 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 (9th Cir. 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).

<sup>45</sup> 20 CFR § 416.920(a)(4)(v).

<sup>46</sup> See *In Re M.H.*, OAH Case No. 12-0688-APA (Commissioner of Health and Social Services 2012).

<sup>47</sup> Coincidentally, the undersigned heard the *Gross* case at the administrative level, and the counsel in the present case are the same counsel who represented the parties in the *Gross* case at the administrative level.

<sup>48</sup> 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.

<sup>49</sup> Ex. 4.1.

<sup>50</sup> 20 C.F.R. § 404.1521.

severe” only when the evidence establishes only a “slight abnormality” that has “no more than a minimal effect” on an individual's ability to work.<sup>51</sup> The inquiry at Step 2 is “a *de minimis* screening device to dispose of groundless claims.”<sup>52</sup> 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.<sup>53</sup> 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.<sup>54</sup> The Division found that Ms. O's impairments are "severe" as defined by the applicable regulations.<sup>55</sup> Accordingly, Ms. O's impairments satisfy 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. O'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 record in this case indicates that, at this point, Ms. O's anxiety, depression, left shoulder pain, and spinal problems / back pain / sciatica have already existed for at least two years. The only one of Ms. O's impairments which to date has not lasted (and is not expected to last) for 12 months or longer is her right shoulder pain, which dates only to February 2015.<sup>56</sup> Ms. O therefore satisfies the second half of Step 2 of the disability analysis.

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<sup>51</sup> *Social Security Ruling (SSR) 85-28*, 1985 WL 56856 at 3 (SSA 1985); *see also Yuckert v. Bowen*, 841 F.2d 303, 306 (9<sup>th</sup> 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).

<sup>52</sup> *Smolen*, 80 F.3d at 1290 (citing *Bowen v. Yuckert*, 482 U.S. 137 (1987)).

<sup>53</sup> SSR 85-28.

<sup>54</sup> 20 C.F.R. § 404.1523 states:

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.

<sup>55</sup> Ex. 2.0(b); Ex. 2.0(e); Jamie Lang hearing testimony.

<sup>56</sup> Exs. 3.10 - 3.13; Z O's hearing testimony.

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

The third step of the SSA's and the Interim Assistance program's disability analysis is to determine whether an applicant's impairments meet or equal the criteria of any one of 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.<sup>57</sup> To satisfy a Listing, an impairment must meet *all* of the Listing's specified criteria; an impairment that satisfies only some of the criteria, no matter how severely, does not qualify.<sup>58</sup>

The record indicates that Ms. O currently suffers from four basic types of impairments. These are (1) neck and back pain and sciatica caused by spinal problems; (2) chronic left shoulder pain; (3) depression; and (4) anxiety.<sup>59</sup> The Social Security Administration has different criteria ("Listings") for each impairment, so each must be analyzed separately.

#### a. Ms. O's Spinal Problems and Related Sciatic Pain

The Social Security disability system classifies Ms. O's spinal problems and attendant back pain, neck pain, and sciatica under the Musculoskeletal Listing at 20 C.F.R. Part 404, Subpart P, Appendix 1, § 1.04. This Listing provides in relevant part as follows:<sup>60</sup>

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)<sup>[61]</sup> or the spinal cord. With:

A. Evidence of nerve root compression<sup>[62]</sup> characterized by neuro-anatomic distribution of pain,<sup>[63]</sup> limitation of motion of the spine, motor loss (atrophy with associated muscle weakness or muscle weakness) accompanied by sensory

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<sup>57</sup> *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).

<sup>58</sup> *Sullivan, supra*, 493 U.S. at 530.

<sup>59</sup> Ex. 3.40.

<sup>60</sup> Appendix 1, §1.04.

<sup>61</sup> The cauda equina is a bundle of spinal nerve roots arising from the lumbosacral enlargement and medullary cone and running through the lumbar cistern (subarachnoid space) within the vertebral canal below the first lumbar vertebra; it comprises the roots of all the spinal nerves below the first lumbar vertebrae which control movement and sensation in the legs. *See* Mosby's Medical Dictionary, 8th Edition (Elsevier 2009).

<sup>62</sup> Nerve root compression is chronic pressure on a nerve root in or adjacent to the spinal column. *See* Merck Manual, Professional Edition, accessed online at <http://www.merckmanuals.com/professional/neurologic-disorders/peripheral-nervous-system-and-motor-unit-disorders/nerve-root-disorders> (accessed on June 5, 2015).

<sup>63</sup> "Neuro-anatomic distribution of pain" is the emanation of pain through the neural tissue or the nervous system (often a nerve root) in a radicular fashion ("radicular pain"), indicating that the pain is generated by the nerve which has been compromised or compressed by the spinal condition. *See* Appendix 1 at §1.00(K)(3); *see also* article published on the website of the U.S. National Library of Medicine and National Institutes of Health, accessed on December 2, 2015 at <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC2753622/>.

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,<sup>[64]</sup> established by findings on appropriate medically acceptable imaging, manifested by chronic nonradicular pain<sup>[65]</sup> and weakness, and resulting in inability to ambulate effectively, as defined in 1.00B2b.

As indicated above, there are three alternative ways of satisfying Listing 1.04 (*i.e.* under subsections (A), (B), or (C)). However, before discussing each subsection, it must be determined whether the applicant satisfies the requirements of the "lead-in" paragraph. In this case, an MRI of Ms. O's lower spine dated October 3, 2011 indicated left L5-S1 paracentral disc protrusion without significant spinal stenosis.<sup>66</sup> An MRI of Ms. O's cervical spine dated November 4, 2015 indicated mild cervical spondylosis, including mild posterior disc osteophyte complexes and mild spinal stenosis, at the C4-5 and C5-6 levels.<sup>67</sup> These two MRIs show that Ms. O has a disorder of the spine, specifically disc protrusion and mild spinal stenosis. However, there is no evidence that this mild spinal stenosis has resulted in the compromise of the spinal cord or a nerve root. Accordingly, Ms. O's spinal problems do not satisfy the requirements of the "lead-in" paragraph of Listing 1.04, or Section 1.04A (which requires evidence of nerve root compression).

There is no medical evidence that Ms. O has spinal arachnoiditis as required by Listing 1.04B. Accordingly, Ms. O does not satisfy the requirements of Listing 1.04B.

Turning to Listing 1.04C, this listing requires lumbar spinal stenosis. Ms. O's two MRIs (discussed above) show that she has mild spinal stenosis at C4-5 and C5-6 (*i.e.* she has *cervical spinal stenosis*). However, the MRI of Ms. O's *lumbar* spine shows that she has *no significant*

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<sup>64</sup> Pseudoclaudication is leg pain while standing or walking, and is often caused by spinal stenosis. See the Mayo Clinic website at <http://www.mayoclinic.org/diseases-conditions/spinal-stenosis/expert-answers/pseudoclaudication/faq-20057779> (date accessed December 2, 2015).

<sup>65</sup> Nonspecific or nonradicular low back pain is not associated with neurologic symptoms or signs. Levin, *Low Back Pain*, published online by the Cleveland Clinic at <http://www.clevelandclinicmeded.com/medicalpubs/diseasemanagement/neurology/low-back-pain/Default.htm> (date accessed December 2, 2015). In general, the pain is localized to the spine or paraspinal regions (or both) and does not radiate into the leg. *Id.* Nonspecific low back pain might or might not be associated with significant pathology on magnetic resonance imaging (MRI). *Id.*

<sup>66</sup> All factual findings in this paragraph are based on Exs. 3.18 - 3.19 unless otherwise stated.

<sup>67</sup> All factual findings in this paragraph are based on Exs. 3.16 - 3.17 unless otherwise stated.

*lumbar* spinal stenosis. Listing 1.04C requires stenosis in the lumbar region. Accordingly, Ms. O does not satisfy the requirements of Listing 1.04C.

In summary, Ms. O's back problems, neck problems, and sciatica do not satisfy the specific criteria of SSA Listing Section 1.04. It is therefore necessary to analyze Ms. O's other impairments to determine whether any of them satisfy an applicable Listing.

b. Ms. O's Shoulder Problems

The Social Security disability system classifies Ms. O's shoulder problems and shoulder pain under the Musculoskeletal Listing at 20 C.F.R. Part 404, Subpart P, Appendix 1, Section 1.02B.

Section 1.02B requires in relevant part as follows:

1.02 Major dysfunction of a joint(s) (due to any cause): Characterized by gross anatomical deformity (e.g., subluxation, contracture, bony or fibrous ankylosis, instability) and chronic joint pain and stiffness with signs of limitation of motion or other abnormal motion of the affected joint(s), and findings on appropriate medically acceptable imaging of joint space narrowing, bony destruction, or ankylosis of the affected joint(s). With . . . (B) Involvement of one major peripheral joint in each upper extremity (i.e., shoulder, elbow, or wrist-hand), resulting in inability to perform fine and gross movements effectively, as defined in 1.00(B)(2)(c).

Ms. O could be found to be disabled by her *upper extremity joint pain* under Section 1.02(B) if she had a bad joint in each arm, and were she unable to perform fine and gross movements effectively. Section 1.00(B)(2)(c) defines "inability to perform fine and gross movements effectively" as follows:

Inability to perform fine and gross movements effectively means an extreme loss of function of both upper extremities . . . [E]xamples of inability to perform fine and gross movements effectively include, but are not limited to, the inability to prepare a simple meal and feed oneself, the inability to take care of personal hygiene, the inability to sort and handle papers or files . . .

In this case, there is no question that Ms. O's shoulder problems cause pain and limit her upper body strength and functionality to some degree. However, there is no evidence in the medical records of gross anatomical deformity, joint space narrowing, or bony destruction. In addition, Ms. O testified that she is able to wash her face, brush her teeth, write in her journal, prepare a simple meal like a sandwich or noodles, and do her own laundry. This indicates that she still has the ability to perform fine and gross motor movements effectively as those terms are defined by Section 1.00(B)(2)(c). Accordingly, Ms. O's shoulder problems do not satisfy the specific criteria of SSA Listing Section 1.02(B). It is therefore necessary to determine whether any of her other impairments satisfy the requirements of a relevant SSA Listing.

c. Ms. O's Anxiety

SSA classifies anxiety and post-traumatic stress disorder (PTSD) under its Listing for anxiety-related disorders at 20 C.F.R. Part 404, Subpart P, Appendix 1, § 12.06. In order to meet or equal the criteria of listing § 12.06, Ms. O must satisfy the following test:

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

A. Medically documented findings of at least one of the following:

1. Generalized persistent anxiety accompanied by three out of four of the following signs or symptoms: (a) motor tension; or (b) autonomic hyperactivity; or (c) apprehensive expectation; or (d) vigilance and scanning; or
2. A persistent irrational fear of a specific object, activity, or situation which results in a compelling desire to avoid the dreaded object, activity, or situation; or
3. Recurrent severe panic attacks manifested by a sudden unpredictable onset of intense apprehension, fear, terror and sense of impending doom occurring on the average of at least once a week; or
4. Recurrent obsessions or compulsions which are a source of marked distress; or
5. Recurrent and intrusive recollections of a traumatic experience, which are a source of marked distress;

AND

B. Resulting in at least two of the following: (1) marked restriction of activities of daily living; or (2) marked difficulties in maintaining social functioning; or (3) marked difficulties in maintaining concentration, persistence, or pace; or (4) repeated episodes of decompensation, each of extended duration.

OR

C. Resulting in complete inability to function independently outside the area of one's home.

If § 12.06 allowed an applicant to qualify under the listing based *solely* on the applicant's own testimony, Ms. O would satisfy the criteria of § 12.06. Ms. O testified at hearing to facts indicating that she meets the criteria of § 12.06(A)(1), (A)(2), and (A)(5), and well as § 12.06(B)(1), (B)(2), and (B)(3). However, § 12.06(A) specifically requires that its criteria be satisfied by

"medically documented findings." In this case, there is no medical documentation indicating that Ms. O satisfies the criteria of § 12.06(A). Instead, Dr. M D's exam notes dated June 4, 2015 state that Ms. O has been taking two different medications for her anxiety and depression, and that her anxiety and depression are "decently controlled" on those medications.<sup>68</sup> Accordingly, based on her current medical records, Ms. O cannot be found to be disabled based on her anxiety. It is therefore necessary to determine whether her remaining impairment satisfies the requirements of the relevant SSA Listing.

d. Ms. O'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

. . . .

AND

B. Resulting in at least two of the following: (1) marked restriction of activities of daily living; or (2) marked difficulties in maintaining social functioning; or (3) marked difficulties in maintaining concentration, persistence, or pace; or (4) repeated episodes of decompensation, each of extended duration;

OR

C. Medically documented history of a chronic affective disorder of at least 2 years' duration that has caused more than a minimal limitation of ability to do basic work activities, with symptoms or signs currently attenuated by medication or psychosocial support, and one of the following:

1. Repeated episodes of decompensation, each of extended duration; or
2. A residual disease process that has resulted in such marginal adjustment that even a minimal increase in mental demands or change in the environment would be predicted to cause the individual to decompensate; or

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<sup>68</sup> Exs. 3.4 - 3.9.

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.

If § 12.04 allowed an applicant to qualify under the listing based *solely* on the applicant's own testimony, Ms. O would satisfy the criteria of § 12.04. Ms. O testified at hearing to facts indicating that she meets the criteria of § 12.04(A)(1)(a), (A)(1)(b), (A)(1)(e), (A)(1)(g), and (A)(1)(i), well as § 12.04(B)(1), (B)(2), and (B)(3). However, § 12.04(A) specifically requires that satisfaction of its criteria be "medically documented." In this case, there is no medical documentation indicating that Ms. O satisfies the criteria of § 12.04(A). To the contrary, Dr. M D's exam notes dated June 4, 2015 state that Ms. O has been taking two different medications for her anxiety and depression, and that her anxiety and depression are "decently controlled" on those medications.<sup>69</sup> Accordingly, based on her current medical records, Ms. O cannot be found to be disabled based on her depression. It is therefore necessary to proceed to "Step 4" of the disability analysis and determine whether Ms. O can perform any of her prior relevant work.

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

The next step in the disability analysis is to determine whether Ms. O'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."<sup>70</sup> If the applicant is not prevented from performing his or her previous relevant work, the applicant is considered not disabled.<sup>71</sup>

Ms. O's hearing testimony indicates that she has worked in five different occupations over the last 15 years. The first of these was working as a personal care-giver or personal care assistant. This job involved physically assisting people in the performance of their activities of daily living. Ms. O testified that one of her clients weighed over 200 pounds. Because of her shoulder problems and sciatica, it would be unreasonable to expect Ms. O to continue to perform that kind of physically demanding work at the present time.

Ms. O's next occupation involved working as the lead cashier at a truck stop. This job involved, among other things, stocking shelves and refrigerators with food and drinks. This type of job, by its nature, involves a lot of bending, stooping, and reaching. Because of her shoulder

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<sup>69</sup> Exs. 3.4 - 3.9.

<sup>70</sup> 7 CFR § 416.960(b)(1).

<sup>71</sup> 20 CFR § 416.920(a)(4)(iv); 20 CFR § 416.960(b)(2-3).



problems and sciatica, it would be unreasonable to expect Ms. O to continue to perform that kind of work at the present time.

Ms. O's next occupation involved working as a case manager for a non-profit homeless shelter. That position was not very physically demanding overall. However, Ms. O did testify that it involved a lot of walking. Because of her sciatica, it would be unreasonable to expect Ms. O to continue to perform that kind of work at the present time.

Ms. O's next occupation involved the analysis of electronic voting procedures used by a county government. This work was not physically demanding. Accordingly, the preponderance of the evidence indicates that Ms. O could still perform this type of light or sedentary work, even with her shoulder problems and sciatica.

Ms. O's last occupation involved working as a part-time auditor, scanning and comparing large volumes of documents. Again, this work was not physically demanding. Accordingly, the preponderance of the evidence indicates that Ms. O could still perform this type of sedentary work, even with her shoulder problems and sciatica.

In summary, the preponderance of the evidence indicates that Ms. O still has the functional capacity to perform two of her five previous occupations. Accordingly, she is considered to be not disabled, and able to work, under the applicable regulations.

It should also be noted that, even were Ms. O found to be unable to perform any of her prior work, she would still be found not to be disabled (at Step 5) under 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.<sup>72</sup> 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."<sup>73</sup>

In this case, Ms. O is 47 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. O 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

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<sup>72</sup> *Holley v. Massanari*, 253 F.3d 1088, 1093 (8th Cir. 2001).

<sup>73</sup> *Poole v. Astrue*, 2010 WL 2231873 (W. D. Ark. 2010).

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.

It is true that “the Grids” should not be strictly applied if the applicant has a significant non-exertional impairment<sup>74</sup> such as Ms. O's anxiety<sup>75</sup> and depression.<sup>76</sup> However, as discussed above, it is the opinion of Ms. O's primary treating physician that her anxiety and depression are well-controlled by her medications.

#### **IV. Conclusion**

Ms. O is not currently working, she suffers from a number of significant impairments, and most of those impairments satisfy the 12 month durational requirement. However, Ms. O has not presented evidence demonstrating that any of her impairments satisfy the specific criteria of any SSA "Listing." Finally, the preponderance of the evidence indicates that Ms. O can still perform the work associated with two of her five prior occupations. Accordingly, the Division correctly determined that Ms. O is not currently eligible for Interim Assistance. The Division's decision denying Ms. O's application for Interim Assistance is therefore affirmed.

DATED this 14th day of December, 2015.

*Signed* \_\_\_\_\_

Jay D. Durych

Administrative Law Judge

### **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 29th day of December, 2015.

By: *Signed* \_\_\_\_\_

Name: Jay D. Durych

Title: Administrative Law Judge

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

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<sup>74</sup> *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).

<sup>75</sup> *See Cole, supra*, 820 F.2d at 772; *see also Johnson v. Secretary*, 872 F.2d 810, 814 (8th Cir. 1989).

<sup>76</sup> *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).