

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

In the Matter of:)	
)	
E S. J)	OAH Case No. 12-0587-APA
)	Former OHA Case No.
)	DPA Case No.
_____)	

ORDER ESTABLISHING FACTS AND CLOSING THE RECORD

I. Introduction

A Fair Hearing for Ms. E J was scheduled for August 21, 2012 at 1:00 p.m. During the previous hearing of July 25, 2012 the undersigned had ordered the Division of Public Assistance (DPA or Division) to make arrangements for a neuropsychological evaluation for Ms. J, at its expense, pursuant to 7 AAC 49.140. However, during the status conference on August 17, 2012 the Division's Hearing Representative advised that the Division had not done so. The Division's Hearing Representative explained that he had contacted another DPA employee to make arrangements for issuance of a Medicaid coupon or voucher to cover the neuropsychological evaluation, but that he had been told that such a coupon or voucher would not cover a neuropsychological evaluation. The Division did not bring its alleged inability to provide a neuropsychological evaluation to the attention of this Office until the issue was raised by Ms. J at the status conference only four days prior to the August 21st hearing date.

Because it would have been pointless to resume the hearing of this case in the absence of the neuropsychological evaluation, the hearing scheduled for August 21, 2012 was cancelled. The Division was ordered to provide a written explanation, by August 23, 2012, as to why it did not or could not provide the neuropsychological evaluation, as previously ordered, pursuant to 7 AAC 49.140. The Division's written explanation was timely filed.

A telephonic status conference was held on August 24, 2012. At that time the Division was given the opportunity to further explain its position. After hearing argument the undersigned ruled that 7 AAC 49.140 requires the Division to provide a neuropsychological evaluation for the applicant to determine her eligibility for Interim Assistance. However, following that ruling, counsel for the Division advised that the Division would not comply with the order to provide the neuropsychological evaluation.

The undersigned then gave the Division the option of either providing the neuropsychological evaluation, or (alternatively) having an establishment / preclusion order entered, establishing in Ms. J' favor all facts which could reasonably be determined through a neuropsychological evaluation. The Division chose the latter option.

II. Discussion

A. The Division was Legally Required to Provide the Examination That Was Ordered.

One of the primary issues in this case is whether Ms. J' depression and/or other mental impairments meet the criteria of the applicable Listing of Impairments contained in the Social Security regulations at 20 C.F.R. Part 404, Subpart P, Appendix 1. The Division asserted at the August 24, 2012 hearing that its Interim Assistance regulations limit its responsibility for obtaining a medical determination of disability to the completion, by a physician, of its Form AD-2. The Division did arrange for a brief examination of Ms. J for the purpose of completion of the Division's Form AD-2.¹ However, review of the pertinent regulations demonstrates that more is required.

First, by its own terms, the Division's form asks the physician only for a diagnosis.² However, federal regulations expressly state that an impairment cannot be found to meet the criteria of a Listing based solely on a diagnosis.³ Accordingly, a more in-depth examination is clearly required, particularly where, as here, the physician who completed the Division's form herself opines that Ms. J "needs a formal neuropsych assessment to determine [her] level of cognitive dysfunction."⁴ Nothing in the text of the Division's two Interim Assistance regulations which require medical examinations, 7 AAC 40.050(c) and 7 AAC 40.180(a), limits the scope of the required examination to the completion of the Division's Form ADA-2. Given the fact that, under applicable law, a determination of disability cannot be made based on a mere diagnosis, the only reasonable interpretation of 7 AAC 40.050(c) and 7 AAC 40.180(a) is that they require a much more thorough examination and report than that provided by a Form AD-2.

Second, once an applicant requests a hearing, the Department's Fair Hearing regulations, located at 7 AAC 49.010 - 7 AAC 49.900, come into play. Once they come into play, they take precedence over program-specific regulations as to all matters related to hearing procedures.

¹ Exs. 3.3 - 3.4.

² Ex. 3.4, top of page.

³ 20 CFR § 416.925(d).

⁴ Ex. 3.4.

Fair Hearing regulation 7 AAC 49.140 provides in relevant part that, "[i]f the hearing involves medical issues, the division *shall* provide for a medical assessment by a qualified person" (emphasis added). This regulation clearly authorizes, and perhaps even requires, the ordering of a neuropsychological evaluation in this case.

B. The Division Intentionally Disobeyed a Valid Order From This Office.

From the time of the hearing of July 25, 2012 (at which the undersigned ordered the Division to make arrangements for a neuropsychological evaluation for Ms. J) until the Division filed its response to the show-cause order on August 23, 2012, it was not absolutely certain as to whether the Division's non-compliance was inadvertent or intentional. However, any doubt on this issue was removed by the Division's written filings of August 23 and 24, 2012, and by the Division's counsel's statements at hearing on August 24, 2012.⁵

C. An Establishment - Preclusion Order is Appropriate in this Case.

There are two independent bases for issuance of an establishment-preclusion order in this case. First, pursuant to 2 AAC 64.360(a), if a party to a proceeding before this Office "fails to comply with an order . . . the administrative law judge may impose an appropriate sanction, proportionate to the party's conduct, including . . . denial of the admission of evidence into the hearing record, or dismissal of the case." There is no indication in the regulation that the list of sanctions specifically referenced in the regulation is exclusive.

Alternatively, issuance of an establishment-preclusion order may appropriately be based on the common law rule of evidence known as "the adverse inference rule." That rule states that, when parties have relevant evidence within their control which they fail to produce, this failure gives rise to an inference that the evidence is unfavorable to them.⁶

In this case, an establishment-preclusion order as to those facts which might have been gleaned from a neuropsychological evaluation is appropriate under both of the authorities

⁵ It is understood that the Division's counsel was simply stating the position of his client. Accordingly, there is no issue here under Rules 1.2 or 1.13 of the Alaska Rules of Professional Responsibility.

⁶ See, e.g., *Armory v. Delamirie, 1 Strange 505, 93 ER 664 (K.B. 1722)*; *Northern Railway Co. v. Page, 274 U.S. 65, 74, 47 S.Ct. 491, 71 L.Ed. 929 (1927)*; *Interstate Circuit, Inc. v. United States, (1939)*; 2 J. Wigmore, *Evidence* § 285 (Third Edition 1940); *In re Chicago Rys. Co., 175 F.2d 282, 290 (7th Cir. 1949)*; *Washington Gas Light Co. v. Biancaniello, 183 F.2d 982, 985 (D.C. Cir. 1950)*; *Tendler v. Jaffe, 203 F.2d 14, 19 (D.C. Cir. 1953)*; *United States v. Roberson, 233 F.2d 517, 519 (5th Cir. 1956)*; 1 B. Jones, *Evidence*, § 28, p. 62 (5th Edition 1958); *Transcontinental Gas Pipe Line Corp. v. Mobile Drilling Barge, 424 F.2d 684, 694 (5th Cir. 1970)*; 2 K. Broun et al., *McCormick on Evidence* § 264 (6th ed. 2006).

referenced above.⁷ It is appropriate *as a shifter of the evidentiary burden* because the Division has the ability to pay for a neuropsychological evaluation while Ms. J does not. It is also appropriate *as a sanction* because the Division's refusal to comply with an order of this Office undermined this Office's ability to properly adjudicate Ms. J' case and delayed the ultimate resolution of this case. Because the Division has flatly declined to change its refusal and obtain the essential evaluation, there is no lesser sanction that will suffice to remedy the prejudice to Ms. J and to the adjudicatory process.

III. Order

The undersigned has no intent to vilify the Division as an institution; the Division does much good work in an important area of public service under often difficult circumstances. However, for the reasons stated above, an establishment-preclusion order is appropriate in this case. Accordingly, an establishment / preclusion order is entered establishing in Ms. J' favor all facts which could reasonably have been determined through a neuropsychological evaluation. The record is closed. A decision will issue in due course.

DATED this 31st day of August, 2012.

Signed _____
Jay Durych
Administrative Law Judge

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

⁷ An administrative law judge is well within his authority in imposing a preclusionary sanction in cases involving a party's willful failure to comply with an order. *Metadure Corp. v. U.S.*, 6 Cl.Ct. 61, 66-68 (Cl. Ct. 1984).