

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

In the Matter of:)	
)	
N S. T)	OAH No. 13-1246-CMB
_____)	DPA Case No.

DECISION

I. Introduction

The issue in this case is whether N T is disabled for purposes of Alaska's Adult Public Assistance (APA) and Working Disabled Medicaid programs. Ironically, the applicable law is such that a person applying for Working Disabled Medicaid (to obtain medical treatment in order to *continue working*) must *first* prove that he or she is disabled (and thus *unable to work*) based on state and federal disability criteria.

This decision finds, based on the testimony and medical records presented, that Mr. T can no longer perform his past relevant work due to his physical impairments. However, the preponderance of the evidence indicates that Mr. T can still perform light and/or sedentary work. Accordingly, Mr. T does not satisfy the disability criteria necessary to receive Working Disabled Medicaid benefits under 7 AAC 100.426, 7 AAC 100.002, and 7 AAC 40.170(c). The Division's decision denying APA and Working Disabled Medicaid benefits to Mr. T is therefore affirmed.

II. Facts

A. Mr. T's Physical Impairments

Mr. T is 32 years old.¹ He was involved in a serious motor vehicle accident in 1994, and his musculoskeletal problems began after that accident.² He suffers from kyphosis and chronic back pain caused, at least in part, by multiple compression fractures of his thoracic vertebrae.³ He also has mild thoracic and lumbar scoliosis, as well as infrequent episodes of dislocation of his right shoulder and left little and ring fingers.⁴ His medical records indicate that his ability to recover from his shoulder injury through physical therapy is limited and that

¹ Ex. 1.

² Ex. 3.20.

³ Exs. 3.4, 6.1. These compression fractures (at the T-4 through T-10 vertebrae) have been confirmed by radiography (Exs. 3.35, 3.85).

⁴ Exs. 6.1, 6.2.

surgery will be required to correct the problem.⁵ Mr. T has reported to his doctors that he has knee pain and that he has been told he has "serious knee damage" and "needs knee replacement [surgery] sometime in the future."⁶ His primary care provider has written him prescriptions for methadone, Percocet, and Flexeril to help control pain.⁷

A physician who examined Mr. T on August 24, 2012 wrote in his notes that he felt Mr. T "is very motivated to be well" and that "all of his [medical history] is compatible with records obtained."⁸

B. Mr. T's Neurological Impairments

Mr. T suffered head trauma during a car accident in 1994.⁹ He reports that he began having seizures about ten years after his car accident (i.e. in about 2004).¹⁰ His medical history includes a diagnosis of seizure disorder and/or generalized convulsive epilepsy.¹¹ An EEG performed on or about May 1, 2012 indicated mild asymmetry but no definite evidence of seizure activity.¹² Mr. T has been unable to obtain a more definitive neuropsychological evaluation because of his lack of medical insurance.¹³

Mr. T was not taking any anti-seizure medications prior to 2011, and prior to receiving medications he was having two to three seizures per year.¹⁴ Mr. T reported that when his seizures occurred they are of the grand mal type, that they lasted up to ten minutes, and that they often occurred at night.¹⁵ In 2011 Mr. T was prescribed and began taking Neurontin (gabapentin) and Luminal (phenobarbital) to help prevent seizures.¹⁶ He has not had any seizures since being placed on these medications.¹⁷

⁵ Ex. 3.10.

⁶ Ex. 3.20.

⁷ Ex. 3.4.

⁸ Ex. 3.19.

⁹ Ex. 3.92.

¹⁰ Ex. 3.20.

¹¹ Exs. 3.8, 3.38, 3.40, 3.42, 3.93.

¹² Exs. 3.19, 3.37, 3.86, 3.94. An electroencephalogram (EEG) detects abnormalities in the brain waves or electrical activity of the brain. Johns Hopkins Health Library article, accessed online at http://www.hopkinsmedicine.org/healthlibrary/test_procedures/neurological/electroencephalogram_eeg_92,P07655/ (date accessed November 27, 2013). The EEG is used to evaluate several types of brain disorders, including epilepsy. *Id.* When epilepsy is present, seizure activity will appear as rapid spiking waves on the EEG. *Id.*

¹³ Ex. 3.29.

¹⁴ Ex. 3.21.

¹⁵ Exs. 3.18, 3.21, 3.39, 3.41.

¹⁶ Exs. 3.5, 3.8, 3.19. These medications appear to have been paid for by Medicaid while Mr. T was living in Florida (Ex. 3.76).

¹⁷ Exs. 3.19, 3.21.

Mr. T has reported having panic attacks since 2009, and appears to have taken Zoloft for this in the past.¹⁸ However, the evidence indicates that he is no longer having these attacks, and he has not asserted in this proceeding that he is disabled (in whole or in part) due to panic attacks.

C. Mr. T's Functional Limitations

Mr. T completed the Division's *Disability and Vocational Report* form on January 6, 2013.¹⁹ He wrote that he has limited mobility and range of motion, and "intense pain that is pretty constant." He wrote that he still has seizures, which he stated are induced by over-exertion.²⁰ Mr. T testified that he cannot sit for extended periods due to his back pain.²¹

On October 10, 2013 Mr. T underwent a Physical Residual Functional Capacity Assessment performed by the Division of Vocational Rehabilitation (DVR).²² The assessment found that Mr. T can stand or walk (with normal breaks) for about six hours per eight hour work day; that he can sit (with normal breaks) for about six hours per eight hour work day; that he can frequently lift up to 10 pounds and occasionally lift up to 20 pounds; and that his ability to operate hand and foot controls is unlimited. The assessment found that Mr. T should never work using ropes, ladders, or scaffolds due to intermittent seizures, but that he could occasionally stoop, kneel, crouch, and crawl, and that he could frequently balance and climb ramps and stairs.²³ The assessment also found that Mr. T has a limited reaching ability (especially with regard to reaching overhead), but that he had unlimited fine and gross dexterity / manipulative ability.²⁴

With regard to environmental limitations, the assessment found that Mr. T can tolerate unlimited exposure to noise and humidity, but that he should avoid concentrated exposure to wetness, dust, and fumes, and that he should avoid even moderate exposure to extreme heat and cold.²⁵ The assessment also found that Mr. T's neck pain usually occurred "with cold and extension," and that vibration may exacerbate Mr. T's back pain.²⁶ Finally, the assessor stated that Mr. T's current work "is at a higher level than appropriate given his significant kyphosis;"

¹⁸ Exs. 3.23, 3.25, 3.26.

¹⁹ All references in this paragraph are based on Exs. 3.104 - 3.108 unless otherwise stated.

²⁰ This is contrary to the information in Mr. T's medical records, which records state that Mr. T told his doctors that he no longer has seizures now that he is taking anti-seizure medications.

²¹ All references in this paragraph are based on Mr. T's hearing testimony unless otherwise stated.

²² All references in this paragraph are based on Exs. 6.0 - 6.7 unless otherwise stated.

²³ Ex. 6.2.

²⁴ Ex. 6.3.

²⁵ Ex. 6.4.

²⁶ Ex. 6.4.

that the assessor suspected that Mr. T's complaints of pain were probably due to "inappropriate lifting / carrying rather than exaggeration;"²⁷ and that the assessor suspected that Mr. T's back pain was being caused by performing manual labor above the "light duty" level.²⁸

D. Mr. T's Relevant Educational and Vocational Background

Mr. T has an eighth grade education.²⁹ He has not attended trade / vocational school or college. He can speak English, but asserts that he cannot write very well because he has dysgraphia. However, there does not appear to be any reference to dysgraphia in Mr. T's medical records, and his handwritten responses on the Division's *Disability and Vocational Report* form are fairly legible.

Mr. T's representative provided documentation through post-hearing filings which, she asserts, demonstrate that Mr. T has an intelligence quotient (IQ) of 131.³⁰ However, Mr. T's representative also asserts that the test results submitted as post-hearing filings show that Mr. T reads and writes at no more than a seventh grade level.³¹ The Division questions these assertions, arguing that the tests results are old (1996), that they are incomplete, that they utilize outdated test instruments / methods, and that Mr. T's representative does not have the credentials necessary to properly interpret the tests.³²

Mr. T worked in a fast food restaurant from May to December 2000.³³ He worked as a shoe repairman from December 2000 until September 2003. Mr. T testified at hearing that he enjoyed working as a cobbler, but had to stop due to the physical requirements of the job. Mr. T worked part time as a salesman at a pet shop from December 2003 until February 2004. He did not work from February 2004 until late June 2012³⁴ due to his impairments, during which time he relied primarily on his family and friends for support.

Mr. T testified at hearing that, over the last six months, he has been offered two jobs paying \$20.00 per hour, but he could not accept them because they are out of town jobs, and it could be dangerous if he had a seizure while working out of town. Mr. T's brother B F testified

²⁷ Ex. 6.5.

²⁸ Ex. 6.7.

²⁹ All references in this paragraph are based on Ex. 3.108 unless otherwise stated.

³⁰ Ex. A2.

³¹ Ex. A2.

³² Ex. 6.0. Based on the regulations which determine whether a person of Mr. T's age is considered to be able to perform light and/or sedentary work, it is not necessary to resolve these conflicting allegations.

³³ All references in this paragraph are based on Exs. 3.106 - 3.107 unless otherwise stated.

³⁴ Mr. T testified at hearing that he worked for a demolition company for a few days in 2005, and for a duct work cleaning business for about two weeks in 2008. However, he testified that he had to leave each of these jobs, shortly after beginning work, because the jobs were too physically demanding.

at hearing that he owns a photography business and an automobile detailing business, and that he would like Mr. T to work for him at one of these businesses. However, he testified that he could not employ Mr. T in his photography business because he was unable to perform the physical demands of the job, such as moving lighting equipment and lifting camera bags. Mr. F also testified that he would like to employ his brother as a detailer or as the office manager at his car detailing business, but that Mr. T could not perform the physical work required of a detailer, and that he could not perform the clerical work required of an office manager due to his alleged dyslexia and dysgraphia. Since June 2012 Mr. T has worked in town as a floral delivery driver for about \$10.00 per hour, which income is insufficient to purchase health insurance or pay for his medical expenses out-of-pocket.³⁵

E. Relevant Procedural History

Mr. T applied for Adult Public Assistance (APA) and Medicaid on December 7, 2012.³⁶ The Division denied Mr. T's application on September 9, 2013.³⁷ Mr. T requested a hearing on September 9, 2013.³⁸ Mr. T's hearing was held on October 16, 2013. Mr. T, his representative K R, and his brother B F attended the hearing in person and testified. Public Assistance Analyst Jeff Miller participated in the hearing by phone and represented the Division. Disability Determination Services Chief Patricia Trott participated by phone and testified on the Division's behalf. Following the hearing the record was left open for post-hearing filings through October 23, 2013, at which time the record closed.³⁹

III. Discussion

A. Working Disabled Medicaid

In an effort to improve employment opportunities for individuals with disabilities, Congress authorized the establishment of the Medicaid Buy-in Program, allowing states to expand Medicaid coverage to include working individuals with disabilities whose income and assets would otherwise make them ineligible for traditional Medicaid.⁴⁰ The program was

³⁵ Mr. T's hearing testimony.

³⁶ Exs. 2.0 - 2.8.

³⁷ Exs. 4, 5.1.

³⁸ Exs. 5.0, 5.2.

³⁹ Mr. T's representative submitted a response to the Division's post-hearing filing on October 25, 2013.

However, because the record was already closed, and there was no request to re-open the record, this filing was not considered in the adjudication of this case.

⁴⁰ Unless otherwise noted, all references in this paragraph are from Kehn, *Enrollment, Employment, and Earnings in the Medicaid Buy-In Program 2011* (May 20, 2013), accessed online at http://www.mathematica-mpr.com/publications/pdfs/health/medicaid_buyin_enrollment.pdf (date accessed November 27, 2013). The report was commissioned by the federal Centers for Medicare & Medicaid Services (CMS). *Id.*

authorized by the Balanced Budget Act (BBA) of 1997⁴¹ and reauthorized by the Ticket to Work and Work Incentives Improvement Act of 1999.⁴² The program is designed to allow individuals with disabilities to pursue employment without fear of losing access to necessary health care services and supports. The federal Centers for Medicare & Medicaid Services (CMS) has granted states the flexibility to tailor their programs and policies to better align with state resources and to meet the specific needs of their state's target population. This flexibility has led to considerable variations in program design among the states.

The regulation implementing Alaska's Working Disabled Medicaid program is 7 AAC 100.426. That regulation allows individuals with disabilities, who are ineligible for Adult Public Assistance and APA-related Medicaid because of the amount of income earned by the individual or his/her spouse, to never-the-less qualify for Medicaid by meeting certain criteria. The primary criteria are (1) the Department of Labor and Workforce Development or the United States Social Security Administration must determine that the individual is disabled according to SSI criteria; (2) the individual's nonexcludable resources must not exceed \$10,000 for the individual or, (if the individual is living with a spouse) \$15,000; (3) the individual must satisfy all other nonfinancial eligibility criteria for Adult Public Assistance; and (4) the individual must pay a monthly premium (*i.e.* a portion of the cost of the coverage).⁴³ Only the first requirement - whether Mr. T satisfies SSI disability criteria - is at issue in this case.

B. APA and SSI Criteria That are Applicable to Working Disabled Medicaid

The disability standards applicable to Adult Public Assistance, incorporated by reference into Working Disabled Medicaid, are based on AS 47.25.430(a), which states in relevant part that "financial assistance shall be given . . . to every aged, blind, or disabled needy resident . . ."⁴⁴ AS 47.25.615(5) defines "disabled" for purposes of Adult Public Assistance and "state-only" disability determinations as "being unable to engage in substantial gainful activity by reason of a medically determinable physical or mental impairment that can

⁴¹ Public Law 105-33. The individual provisions of the Act have been codified in multiple sections of the United States Code too numerous to mention here.

⁴² Public Law 106-170, 113 Stat. 1862, 42 U.S.C. 1148 *et. seq.*

⁴³ See 7 AAC 100.426. Pursuant to Alaska Medicaid regulation 7 AAC 100.400(a), many APA regulations apply to Medicaid eligibility determinations for Working Disabled (and other) Medicaid eligibility categories. One of those is 7 AAC 40.170(c), which states in relevant part that "[a]n otherwise eligible applicant whose income exceeds SSI income standards but is within the income standards of this chapter, must be determined by the division of vocational rehabilitation of the Department of Labor and Workforce Development to meet the definition of disability contained in Title XVI of the Social Security Act, as amended (42 U.S.C. 1382c(a)(3))" (*i.e.* SSI disability criteria).

⁴⁴ See also AS 47.25.590(b) ("[t]he purpose of AS 47.25.430 - 47.25.615 is to furnish financial assistance as far as practicable to needy aged, blind, and disabled persons, and to help them attain self-support or self-care.")

be expected to result in death or that has lasted or can be expected to last for a continuous period of not less than 12 months."⁴⁵

The regulation which implements AS 47.25.430(a) and AS 47.25.615(5) (discussed above) is 7 AAC 40.170(c). That regulation requires disability applicants to meet the definition of disability contained in 42 USC 1382c(a)(3). The federal statutory definition (essentially the same as that contained in AS 47.25.615(5), quoted above) is the definition applied by the Social Security Administration (SSA) in determining eligibility for Supplemental Security Income (SSI). The SSA's regulations on disability determinations for SSI are found in Part 416 of Title 20 of the Code of Federal Regulations (CFR).

C. *The Five Step Disability Analysis Used for SSI and Working Disabled Medicaid Determinations*

The SSA uses a five-step evaluation process in making its disability determinations.⁴⁶ Each step is considered in order, and if the evaluation shows the applicant to be disabled at any step, it does not go on to consider subsequent steps.⁴⁷ As noted above, 7 AAC 100.400(a) and 7 AAC 40.170(c) incorporate the SSI criteria into Working Disabled Medicaid determinations.

The first step in the SSI disability determination process looks at the applicant's current work activity. If the applicant is performing "substantial gainful activity," the SSA will find that the applicant is not disabled.⁴⁸ This finding is made regardless of the applicants' medical condition, age, education, or work experience.⁴⁹

The second step in the analysis is to determine whether the applicant's impairment is "severe" as defined by the applicable Social Security regulations. A severe impairment is one that significantly limits a person's physical or mental ability to perform "basic work activities."⁵⁰ 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.⁵¹ In order to be considered severe, the impairment or combination of impairments must also be

⁴⁵ Alaska's statutory definition of "disabled" (above) is virtually identical to the SSA's definition of "disability" for purposes of its SSI program. Pursuant to 20 CFR § 416.905(a), "disability" is defined as "the inability to do any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months." The same basic definition of disability is found in the Division's *Alaska Adult Public Assistance Manual* at Sections 425-1 and 425-2 D.

⁴⁶ 20 CFR §416.920.

⁴⁷ 20 CFR §416.920(a)(4).

⁴⁸ 20 CFR §416.920(a)(4)(i).

⁴⁹ 20 CFR §416.920(b).

⁵⁰ 20 CFR § 416.920(c); 20 CFR § 416.921(a).

⁵¹ 20 CFR § 416.908.

expected to result in death, or must have lasted or be expected to last at least 12 months.⁵² If the impairment is not severe under this definition, then the applicant is not disabled.

At step three, the SSA determines whether the applicant's severe impairment meets or medically equals the criteria contained in the SSA's "Listing of Impairments."⁵³ If it does, the applicant is considered disabled.⁵⁴

If an applicant is not determined to be disabled at step three, the SSA proceeds to step four and looks at the applicant's ability to perform past relevant work.⁵⁵ If the applicant is able to perform his or her past relevant work, the applicant is not disabled.

Finally, if the applicant is unable to perform his or her past relevant work, the SSA proceeds to step five and examines the applicant's age, education, and work experience to determine whether the applicant can perform any other work in the national economy.⁵⁶

D. Step 1 - Substantial Gainful Activity

The first step of the disability analysis normally asks whether the applicant is performing "any substantial gainful activity."⁵⁷ The Division agreed at hearing that Mr. T is not currently performing substantial gainful activity and/or that he otherwise meets this requirement. Accordingly, Mr. T has satisfied Step 1 of the disability analysis.

E. Step 2 - Are Any of Mr. T's Impairments Medically Severe?

In order to avoid being found to be *not disabled* at this stage, Mr. T must prove that at least one of his impairments is medically severe. Pursuant to 20 CFR § 416.920(c), a "severe impairment" is one that "significantly limits [a person's] physical or mental ability to do basic work activities." Regulation 20 CFR § 416.921(b) defines "basic work activities:"

[B]asic work activities [mean] the abilities and aptitudes necessary to do most jobs. Examples . . . include - (1) physical functions such as walking, standing, sitting, lifting, pushing, pulling, reaching, carrying, or handling; (2) capacities for seeing, hearing, and speaking; (3) understanding, carrying out, and remembering simple instructions; (4) use of judgment; (5) responding appropriately to supervision, co-workers and usual work situations; and (6) dealing with changes in a routine work setting.

⁵² 20 CFR § 416.920(a)(4)(ii); 20 CFR §416.909.

⁵³ See 20 CFR § 404, Subpart P, Appendix 1 (hereafter "Appendix 1").

⁵⁴ 20 CFR § 416.920(a)(4)(iii).

⁵⁵ 20 CFR § 416.920(a)(4)(iv).

⁵⁶ 20 CFR § 416.920(a)(4)(v).

⁵⁷ 20 CFR § 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.

The Division agreed at hearing that Mr. T's physical (musculoskeletal) impairments are medically severe as defined by 20 CFR § 416.920(c). Accordingly, Mr. T satisfies the "step 2" severity requirement.

F. Step 2 - Do Mr. T's Impairments Satisfy the Duration Requirement?

The SSA's durational regulation states in relevant part that, "[u]nless your impairment is expected to result in death, it must have lasted or must be expected to last for a continuous period of at least 12 months."⁵⁸ The record indicates that Mr. T's musculoskeletal problems and his seizures began after his 1994 car accident and have existed to some degree for a continuous period of almost 20 years. Further, the Division stipulated at hearing that Mr. T's impairments satisfy the 12 month durational requirement. Accordingly, Mr. T satisfies the "step 2" durational requirement.

G. Step 3 - Do any of Mr. T's Impairments Meet or Equal a "Listing?"

The next step in the analysis is to determine whether any of Mr. T's impairments meet the criteria of any of the specific impairments listed in the SSA's regulations at 20 CFR 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.⁵⁹ To meet a listing, an impairment must meet *all* of the listing's specified criteria; an impairment that manifests only some criteria, no matter how severely, does not qualify.⁶⁰

Mr. T's musculoskeletal problems fall within two separate listings. His joint problems fall within Listing 1.02 ("major dysfunction of a joint due to any cause"). His back problems fall within Listing 1.04 ("disorders of the spine"). In addition, Mr. T's representative asserted at hearing that Mr. T satisfies Listing 11.02 (epilepsy) and Listing 11.08 ("spinal cord or nerve root lesions"). Mr. T's impairments will be analyzed, under the above-referenced Listings, in the order stated.

1. Mr. T's Joint Problems

Mr. T experiences infrequent episodes of dislocation of his right shoulder and left little and ring fingers,⁶¹ and his medical records indicate that surgery will be required to correct the shoulder problem.⁶² Mr. T has also reported to his doctors that he has knee pain and that he

⁵⁸ 20 CFR § 416.909.

⁵⁹ *Tackett v. Apfel*, 180 F.3d 1094, 1098-1099 (9th Cir.1999); *Sullivan v. Zebley*, 493 U.S. 521, 530-531 (1990).

⁶⁰ *Sullivan, supra*, 493 U.S. at 530.

⁶¹ Exs. 6.1, 6.2.

⁶² Ex. 3.10.

has been told he has "serious knee damage" and "needs knee replacement" surgery."⁶³ These musculoskeletal problems (pertaining to the finger, shoulder, and knee joints) are analyzed under SSA Listing 1.02, which provides 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:

A. Involvement of one major peripheral weight-bearing joint (i.e., hip, knee, or ankle), resulting in inability to ambulate effectively, as defined in 1.00B2b

The medical evidence pertaining to Mr. T's musculoskeletal problems may or may not satisfy the criteria contained in the first six lines of Section 1.02; this is difficult to determine without medical expertise. However, Mr. T's functional limitations, while significant, are not severe enough to satisfy the requirements of Section 1.02(A) (quoted above). Section 1.02(A) requires that the joint problem(s) result in an "inability to ambulate effectively, as defined in [Section] 1.00B2b." That regulation (20 CFR Part 404, Subpart P, Appendix 1, §§ 1.00(B)(2)(b)) defines the ability to ambulate effectively in relevant part as follows:

(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. They must have the ability to travel without companion assistance to and from a place of employment or school. Therefore, examples of ineffective ambulation include, but are not limited to, the inability to walk without the use of a walker, two crutches or two canes, the inability to walk a block at a reasonable pace on rough or uneven surfaces, the inability to use standard public transportation, the inability to carry out routine ambulatory activities, such as shopping and banking, and the inability to climb a few steps at a reasonable pace with the use of a single hand rail.

Mr. T's ability to walk is somewhat impaired. However, the record (and, in particular, DVR's detailed Physical Residual Functional Capacity Assessment of October 10, 2013)⁶⁴ clearly shows that Mr. T's difficulty ambulating does not rise to the level of the examples listed in § 1.00(B)(2)(b)(2), above. Accordingly, Mr. T does not have "an extreme limitation of the ability to walk" as defined by 20 CFR Part 404, Subpart P, Appendix 1, §§ 1.00(B)(2)(b). Because Mr. T has

⁶³ Ex. 3.20.

⁶⁴ Exs. 6.0 - 6.7.

not established “an extreme limitation of the ability to walk,” he does not meet or medically equal the "Listings" criteria for joint problems under SSA Listing 1.02.

2. Mr. T's Back Problems

Mr. T's back problems fall under SSA Listing 1.04, which provides in relevant part:

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.

Mr. T's history of back pain is substantial. However, there are no medical reports in the record indicating that his back problems satisfy the specific requirements of SSA Listing 1.04.

3. Mr. T's Seizures

Mr. T's representative asserts that his seizures fall under SSA Listing 11.02 (Epilepsy-convulsive), and that he satisfies the criteria of that Listing. Listing 11.02 provides as follows:

Epilepsy – convulsive epilepsy, (grand mal or psychomotor), documented by detailed description of the typical seizure pattern, including all associated phenomena; occurring more frequently than once a month in spite of at least 3 months of prescribed treatment. With (A) Daytime episodes (loss of consciousness and convulsive seizures) or (B) Nocturnal episodes manifesting residuals which interfere significantly with activity during the day.

The record indicates that, prior to sometime in 2011, Mr. T's seizure disorder likely satisfied all or most of the criteria contained in Listing 11.02. However, In 2011 Mr. T was prescribed and

began taking Neurontin (gabapentin) and Luminal (phenobarbital) to help prevent seizures.⁶⁵ Although Mr. T testified at hearing that he is still having seizures, his *medical records*, many of which are quite recent, state that *he has not had any seizures since being placed on his current medications.*⁶⁶ Mr. T cannot satisfy the requirements of Listing 11.02 without medical documentation confirming that he is still currently having seizures at least once per month.

4. Spinal or Nerve Root Lesions

Finally, Mr. T's representative asserts that he meets the criteria of SSA Listing 11.08, which requires evidence of "spinal cord or nerve root lesions, due to any cause", along with "disorganization of motor function as described in [Listing] 11.04B." Listing 11.04B in turn requires "significant and persistent disorganization of motor function in two extremities, resulting in sustained disturbance of gross and dexterous movements, or gait and station."

It is undisputed that Mr. T was involved in a serious motor vehicle accident in 1994. However, there is no medical evidence in the record indicating that Mr. T has "significant and persistent disorganization of motor function in two extremities, resulting in sustained disturbance of gross and dexterous movements, or gait and station." Accordingly, Mr. T does not satisfy the specific criteria of SSA Listing 11.08.

5. Summary - None of Mr. T's Impairments Satisfy "the Listings"

While Mr. T's impairments are significant, they do not satisfy the specific criteria of any SSA "listing." It is therefore necessary to proceed to the next step of the disability analysis.

H. Step 4 - Can Mr. T Perform his Past Relevant Work?

The next step is to determine whether Mr. T's impairments prevent him from performing his past relevant work. "Past relevant work" is defined 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."⁶⁷ If the applicant is not prevented from performing his previous relevant work, he is not disabled.⁶⁸

Mr. T worked in a fast food restaurant from May to December 2000.⁶⁹ He worked as a shoe repairman from December 2000 until September 2003. He worked part time as a

⁶⁵ Exs. 3.5, 3.8, 3.19. These medications appear to have been paid for by Medicaid while Mr. T was living in Florida (Ex. 3.76).

⁶⁶ Exs. 3.19, 3.21.

⁶⁷ 7 CFR § 416.960(b)(1).

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

⁶⁹ All references in this paragraph are based on Exs. 3.106 - 3.107 unless otherwise stated.

salesman at a pet shop from December 2003 until February 2004. Since June 2012 Mr. T has worked in town as a floral delivery driver.

Mr. T's prior work was somewhat physical work. Mr. T testified that he can no longer perform his prior work because of his back, knee, and shoulder problems. This assertion is credible based on the functional limitations discussed by Mr. T at hearing and described in DVR's Physical Residual Functional Capacity Assessment of October 10, 2013.⁷⁰ In addition, the Division did not take a position on whether Mr. T can still perform his prior relevant work, relying instead on the assertion (discussed in "step five" of the disability analysis, below) that Mr. T can perform sedentary work. Accordingly, while the evidence is not overwhelming, it is more likely than not that Mr. T can no longer perform his prior, somewhat physical work. It is therefore necessary to proceed to the final step in the disability analysis and determine whether Mr. T can perform any other work.

I. Step 5 - Do Mr. T's Impairments Prevent Him 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 (1) determine whether the applicant retains a particular exertional capacity; (2) determine whether the applicant has acquired transferable skills; (3) identify specific jobs that the applicant can perform with the restrictions he or she has been found to have; and (4) verify that the jobs the applicant can do exist in significant numbers in the regional or national economies.⁷¹ At this stage the burden of proof shifts from the applicant to the agency.⁷² Further, the ALJ cannot provide vocational evidence; it must be in the record.⁷³

The preferred method for an agency to carry its burden at step five is through the testimony of a vocational expert.⁷⁴ In this case, the Division presented no vocational expert. However, in many 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

⁷⁰ Exs. 6.0 - 6.7.

⁷¹ *Haddock v. Apfel*, 196 F.3d 1084 (10th Cir. 1999).

⁷² 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).

⁷³ *Wilson v. Califano*, 617 F.2d 1050, 1053-1054 (4th Cir. 1980).

⁷⁴ *Lopez v. Califano*, 481 F.Supp. 392 (D.C. Cal. 1979).

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.⁷⁵ 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.”⁷⁶

The first variable which must be determined in order to properly apply the Grids is to determine whether the applicant is able to perform sustained work which is “very heavy,” or, alternatively, “heavy,” “medium,” “light,” or “sedentary.”⁷⁷ The opinion of the assessor who conducted Mr. T's Physical Residual Functional Capacity assessment on October 10, 2013 (less than two months ago) is that Mr. T can perform light duty work.⁷⁸ This opinion is credible because it is based on the assessor's direct observation of Mr. T's performance of various physical tests, and because the assessment reports the results of those tests in detail.

The Grids' rules, applicable to persons whose maximum exertional capacity is limited to light work, are found in Table 3 of the Grids. In this case, Mr. T is 32 years old. He is literate and able to communicate in English, although he asserts that he cannot write very well because he has dysgraphia. He has an eighth grade education,⁷⁹ and has not attended trade / vocational school or college. The only skilled work he has performed was his work as a cobbler (see Section II (D), above). Based on these facts, Rules 202.16 through 202.22 of “the Grids” all dictate a finding that Mr. T is *not* disabled according to SSA criteria.

Further, even assuming for the sake of argument that Mr. T does not have the physical ability to perform *light-duty* work, and can only perform *sedentary*⁸⁰ work, Rules 201.23

⁷⁵ *Holley v. Massanari*, 253 F.3d 1088, 1093 (8th Cir. 2001).

⁷⁶ *Poole v. Astrue*, 2010 WL 2231873 (W. D. Ark. 2010).

⁷⁷ See “the Grids” at Tables 1, 2, and 3.

⁷⁸ 20 CFR 416.967(b) defines “light work” as follows:

Light work involves lifting no more than 20 pounds at a time with frequent lifting or carrying of objects weighing up to 10 pounds. Even though the weight lifted may be very little, a job is in this category when it requires a good deal of walking or standing, or when it involves sitting most of the time with some pushing and pulling of arm or leg controls. To be considered capable of performing a full or wide range of light work, you must have the ability to do substantially all of these activities. If someone can do light work, we determine that he or she can also do sedentary work, unless there are additional limiting factors such as loss of fine dexterity or inability to sit for long periods of time.

⁷⁹ Ex. 3.108.

⁸⁰ 20 CFR 416.967(a) defines “sedentary work” as follows:

Sedentary work involves lifting no more than 10 pounds at a time and occasionally lifting or carrying articles like docket files, ledgers, and small tools. Although a sedentary job is defined as one which involves sitting, a certain amount of walking and standing is often necessary in carrying out job duties. Jobs are sedentary if walking and standing are required occasionally and other sedentary criteria are met.

through 201.29 of “the Grids” still dictate a finding that Mr. T is not disabled according to SSA criteria.

In summary, Mr. T proved that he can no longer perform his prior work; the burden of proof shifted to the Division, and the Division then proved, using the Grids, that Mr. T is capable of performing light or sedentary work. Mr. T is therefore deemed not to be disabled based on the SSA’s regulations and case law which are incorporated into Alaska’s APA Working Disabled Medicaid program.

IV. Conclusion

Mr. T is not currently engaged in substantial gainful activity, he has medically severe impairments which have lasted for a continuous period of at least 12 months, and he is no longer capable of performing his prior work. However, Mr. T's impairments do not satisfy the specific criteria of any of SSA's applicable listings, and the preponderance of the evidence indicates that Mr. T can still perform light or sedentary work. The Division’s decision denying Mr. T's application for Working Disabled Medicaid benefits is therefore affirmed.

Dated this 6th day of December, 2013.

Signed _____
Jay 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 17th day of December, 2013.

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.]