

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

In the Matter of)
)
L C)
OAH No. 14-0553-CMB
Agency No.
_____)

DECISION

I. Introduction

L C applied to the Division of Public Assistance for Interim Assistance¹ because she has severe neck and back pain, chronic obstructive pulmonary disease (COPD), asthma, and mental health issues. The Division denied her application for Interim Assistance, finding that she was not likely to be granted Supplemental Security Income disability benefits. Ms. C appealed.² Because the evidence in this record establishes that her impairments meet or equal the criteria in the Social Security Administration’s listings of impairments, the Division’s denial is reversed.

II. Facts³

L C is a 51-year-old woman who lives in No Name. She has not worked full time since 1987, when she was a prep cook. Ms. C dropped out of school and got her GED. She has no other specialized training. She had to quit her most recent part time job processing sea cucumbers after 3 days because she could not breathe. Ms. C is homeless and stays either at the No Name shelter or the home of M B.⁴ She has one minor child who is in her ex-husband’s custody. Ms. C said she could “take care of herself” but her testimony contradicts this statement with regards to qualifying for Interim Assistance.

Ms. C has been diagnosed with: chronic back pain, disc degeneration, COPD, asthma, posttraumatic stress disorder (PTSD), major depressive order, severe burns, sciatica, and chronic alcoholism.⁵ Medical records were replete with instances of emergency room visits for breathing obstruction, back pain, and inebriation.⁶

¹ Exhibit 2. Ms. C originally appealed the denial of both Interim Assistance and chronic and acute medical assistance (CAMA). At hearing, Ms. C withdrew her appeal of CAMA benefits.

² Exhibit 5.

³ Facts were established through hearing testimony and the record.

⁴ Mr. B cannot have overnight guests in his home, so Ms. C does not stay very often. She does spend large portions of the day at his home.

⁵ Exhibits 3.7, 3.145, 3.150, 3.170.

⁶ Exhibits 3-3.204; 32-32.4.

Ms. C testified that she has had severe back and neck pain for years. She has had two neck surgeries and will require a third. Ms. C reported she cannot put her head to her chest or turn her neck. She must turn her whole body to turn her head or she will experience “hot poker” like pain. Her back pain is more significant than her neck pain. Ms. C uses a wheelchair and walker. Sitting is painful and she must lie down flat regularly to deal with pain. If using the walker, she can only go about five feet before stopping because of pain and to catch her breath. Ms. C relies on Mr. B or her adult son to push her wheelchair. Ms. C had coughing spells and her breathing difficulties were audible during her testimony. She has two different prescription inhalers which she uses 4 and 6 times per day respectively.⁷

In addition, Ms. C was involved in a fire in 2011 that caused serious burns, inhalation damage, and permanently damaged her left hand.⁸ Her hand balls into a fist which she cannot open. Ms. C is deaf in one ear and she is incontinent.⁹

Ms. C is able to use a cell phone and can shop using a motorized cart, but only with great difficulty. She cannot cook, but can feed herself. Ms. C testified credibly that she is unable to toilet or bathe herself without assistance. Mr. B confirmed her assertion with testimony describing helping her get off the floor, where she lies because of back pain, assisting her with toileting, dressing, and bathing. He described her condition as worsening over the last two years. Physically, both Ms. C and Mr. B described Ms. C as having severe functional limitations, preventing her from doing many activities of daily living.

Ms. C suffers from PTSD and depression. She does not generally socialize. Ms. C has a long history of alcoholism, but claims to have been sober for several months prior to the hearing. Most of Ms. C’ visits to the ER note chronic inebriation with complaints of pain or shortness of breath.

On February 20, 2014, Ms. C submitted an application for Interim Assistance to the Division of Public Assistance.¹⁰ She signed release forms, and the Division received copies of her medical records. Ms. C also applied to the Social Security Administration for Supplemental

⁷ Ms. C quit smoking six months ago.

⁸ Ms. C is right handed.

⁹ Ms. C states her incontinence is constant and happens “pretty much every time I cough.”

¹⁰ Ex. 2. Ms. C also applied for health insurance, CAMA, food stamps, adult public assistance, and general relief assistance. Interim Assistance is the only benefit at issue in this case.

Security Income disability benefits.¹¹ Her application was denied on March 28, 2013, but she is appealing.

Ms. C' application and records were reviewed by the Division's medical reviewer, Jamie Lang. To determine whether Ms. C was eligible for Interim Assistance, Ms. Lang applied steps 1-3 of the Social Security Administration's five-step sequential process for evaluating disability claims.¹² She found that Ms. C met step one because she was not working.¹³ Ms. C met step two because she had severe, medically determinable impairments.¹⁴ Ms. Lang found that Ms. C did not meet step three, however, because the medical records do not support a finding that Ms. C' impairments met or equaled Social Security's published criteria setting out when an impairment is considered disabling.¹⁵ Accordingly, Ms. Lang recommended that Ms. C's application for Interim Assistance be denied.

On April 24, 2014, the Division notified Ms. C that her application for Interim Assistance was denied.¹⁶ Ms. C requested a fair hearing on April 9, 2014.¹⁷ A telephonic hearing was held on June 6, 2014. Ms. C was represented by attorney Teka Lamade. M B, a friend of Ms. C, testified on her behalf. Jeff Miller represented the Division. Ms. Lang testified on behalf of the Division.

III. Discussion

A. Interim Assistance regulations and the Social Security Administration process

The State of Alaska's Adult Public Assistance program provides financial assistance to needy aged, blind, and disabled persons. The administration of the state Adult Public Assistance program is closely connected to the federal Supplemental Security Income program. Applicants for Adult Public Assistant must apply for Supplemental Security Income and must meet Supplemental Security Income eligibility requirements.¹⁸ During the time that the application

¹¹ Ex. 3.181; Ex. 5.

¹² Ex. 5-5.6.

¹³ Ex. 5.5

¹⁴ Ex. 5-5.6; Lang testimony.

¹⁵ Ex. 5.1, 5.6. Ms. Lang and Social Security's website refer to Social Security's Publication as the "Blue Book." This publication is available at <http://www.ssa.gov/disability/professionals/bluebook/AdultListings.htm>. This decision will refer to the relevant criteria as "Appendix 1" because it is adopted into regulation at 20 C.F.R. 404, subpart P, appendix 1.

¹⁶ Ex. 4, 5-5.6.

¹⁷ Ex. 9.4.

¹⁸ See 7 AAC 40.030, 7 AAC 40.060.

for Supplemental Security Income is pending, an applicant for Adult Public Assistance may receive Interim Assistance if the Division determines that the applicant is disabled.¹⁹

Under the Interim Assistance regulations, the Division must conduct a medical review to determine “whether the applicant is likely to be found disabled by the Social Security Administration.”²⁰ For an applicant who does not have one of the presumptive disabling conditions, the Division will consider “whether the applicant’s impairment meets [the] Social Security Administration disability criteria for the listings of impairments.”²¹ The listing of impairments is contained in an appendix to Social Security’s regulations, and will be referred to in this decision as “Appendix 1.”²² Under 7 AAC 40.180(c), the Division must consider the following to determine whether Ms. C’ impairment meets or equals a listing:

- the medical evidence;
- Ms. C’ ability to do activities of daily living;
- whether Ms. C can do work (including sedentary work) other than her former employment; and

¹⁹ 7 AAC 40.170(b). This regulation instructs the Division to determine whether the applicant is disabled by applying the tests required in 7 AAC 40.180.

²⁰ 7 AAC 40.180(b)(1).

²¹ *Id.* The regulations specifically adopt 20 C.F.R. 404, subpart P, appendix 1, as revised as of September 1, 2013 (Appendix 1), by reference.

²² *Id.* The Department has interpreted its regulations to require application of the first three steps of the Social Security Administration’s five-step sequential evaluation process for determining whether an applicant is disabled. *In re M.H.*, OAH No. 12-0688-APA at Commissioner’s Decision (Commissioner Dep’t Health and Soc. Serv., Aug. 20, 2012). Those steps require that

(i) At the first step, we consider your work activity, if any. If you are doing substantial gainful activity, we will find that you are not disabled. (*See* paragraph (b) of this section.)

(ii) At the second step, we consider the medical severity of your impairment(s). If you do not have a severe medically determinable physical or mental impairment that meets the duration requirement in § 416.909, or a combination of impairments that is severe and meets the duration requirement, we will find that you are not disabled. (*See* paragraph (c) of this section.)

(iii) At the third step, we also consider the medical severity of your impairment(s). If you have an impairment(s) that meets or equals one of our listings in appendix 1 to subpart P of part 404 of this chapter and meets the duration requirement, we will find that you are disabled. (*See* paragraph (d) of this section.)

20 C.F.R. §416.920(a)(4). The parties agree that Ms. C’ impairments meet steps one and two. Therefore, this decision will focus on step three, whether Ms. C’ impairments meet or equal a listing in Appendix 1 as required in 7 AAC 40.180(b). As to steps four and five, although an Alaska superior court has held that the Department should apply steps four and five, that decision has been appealed. *See Gross v. State, Dep’t of Health and Social Services, Division of Public Assistance*, Alaska Superior Ct., Case No. 3 AN-12-09838CI (Sept. 26, 2013). Because the outcome of this case can be decided at step three, this decision does not consider steps four and five.

- whether Ms. C' impairment has lasted for more than 12 months.²³

While it is not clear precisely how the Division considers these factors when determining whether an applicant meets or equals an Appendix 1 listing, this decision assumes that evidence of each adds or takes away from to the likelihood that the Division will find an applicant meets a listing. In other words, the Division does not rely strictly on the medical evidence, but also weighs length of impairment, ability to work, and if the applicant can take care of him or herself.

The parties agree that Ms. C' impairments have lasted for more than 12 months. The other considerations are discussed below. Ms. C' history of alcoholism is also discussed.

B. The medical evidence shows that Ms. C meets or equals a listing (7 AAC 40.180(c)(1) and (2)).

Appendix 1 has detailed descriptions of what the medical evidence must show for a person to meet or equal a listing.²⁴ Appendix 1 has general categories which are broken down into more specific listings. Ms. C has impairments that fall under the general categories musculoskeletal,²⁵ respiratory,²⁶ and mental disorders.²⁷ At hearing and in the Division's denial letter, Ms. Lang stated that the medical evidence does not support a finding that Ms. C would meet or equal an Appendix 1 listing.²⁸ The Division's determination that Ms. C does not meet or equal a listing, based solely on medical records and without talking with Ms. C, was reasonable. However, the evidence overall, including testimony,²⁹ supports a finding that Ms. C meets or equals an Appendix 1 listing.

²³ 7 AAC 40.180(c). The text of subsection (c) provides:
(c) In determining whether an applicant's disability meets the criteria set out in (b)(1)(B) of this section, the department will consider whether the
(1) applicant's condition is listed as an impairment category [in Appendix 1] ;
(2) medical information obtained under (b) of this section documents the applicant's impairment;
(3) impairment affects the applicant's activities of daily living;
(4) the applicant can perform any other work, including sedentary work; and
(5) the applicant's impairment has lasted or is expected to last for a continuous period of not less than 12 months.

²⁴ <http://www.ssa.gov/disability/professionals/bluebook/bluebook/AdultListings.htm>.

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

²⁶ 20 C.F.R. 404, subpart P, appendix 1, § 3.00.

²⁷ 20 C.F.R. 404, subpart P, appendix 1, § 12.00.

²⁸ At hearing, Ms. Lang stated that Ms. C might well be found disabled at the "ALJ level." This decision assumes, without knowing, that Ms. Lang was referring to the ALJ hearing Ms. C' SSI denial appeal. In that appeal, the ALJ will consider steps 4 and 5 of Social Security's disability determination. The state's Interim Assistance program does not currently apply these steps.

²⁹ Ms. C testimony alone cannot support a finding that her impairments meet or equal a listing. *See* 20 C.F.R. § 416.908. Here, Ms. C' and Mr. B' testimony is supported by medical records.

To meet or equal a listing under the mental disorders category, the medical evidence must demonstrate significant impairment.³⁰ Ms. C’ medical records do not support a determination that she meets or equals a listing with regards to mental disorders. She has a history of PTSD and depression and suffers from social anxiety, but neither the information contained in the medical records nor Ms. C testimony support a finding of disability based on mental disorders. Here, the medical evidence regarding Ms. C’ psychological condition does not demonstrate that she meets the listing for a psychological disorder. However, Ms. C does meet the threshold for musculoskeletal impairment.

Ms. C suffers from “degenerative disk disease lumbar spine with severe canal stenosis that is not expected to recover from.”³¹ This diagnosis is analyzed under musculoskeletal, disorders of the spine, in Appendix 1. In order to meet or equal a listing, her spine disorder must result in

compromise of a nerve root (including the cauda equine) or the spinal cord with 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... 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.³²

Ms. C’ straight leg raise is positive bilaterally³³ and she experiences pseudoclaudication,³⁴ but the record lacks evidence of nerve root compromise. Ms. C does not meet or equal the specific spine disorder listing in 1.04, but her impairments support a finding

³⁰ Ex. 26- 26.26; 20 C.F.R. 404, subpart P, appendix 1 at § 12, which lists the following evidentiary requirements for a finding of disability for based on mental disorders. The medical evidence does not show that Ms. C has this level of psychological impairment required to meet or equal a listing based on psychological disorders.

³¹ Ex. 3.186.

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

³³ Ex. 3.152.

³⁴ Pseudoclaudication is unilateral limb discomfort caused by spinal nerve root/s irritation; characterized by pain, numbness or weakness (radiating distally from buttock to thigh/lower leg) exacerbated by walking or standing, associated sensory and motor dysfunction, reduction/loss of limb tendon reflexes, but no vascular abnormality; symptoms are induced by elevation of affected limb, i.e. by hip flexion with knee in full extension. *See* <http://medical-dictionary.thefreedictionary.com/pseudoclaudication>. Ms. C medical records contain ample evidence of back pain and its relief upon lying flat.

that she is unable to effectively ambulate, which is the touchstone of a disability finding under musculoskeletal.

In order to meet or equal a listing under the general musculoskeletal category, Ms. C must show loss of function is defined as:

the inability to ambulate effectively on a sustained basis for any reason, including pain associated with the underlying musculoskeletal impairment, or the inability to perform fine and gross movements effectively on a sustained basis for any reason, including pain associated with the underlying musculoskeletal impairment. The inability to ambulate effectively or the inability to perform fine and gross movements effectively must have lasted, or be expected to last, for at least 12 months. For the purposes of these criteria, consideration of the ability to perform these activities must be from a physical standpoint alone.³⁵

The inability to ambulate effectively is defined as, “an extreme limitation of the ability to walk; i.e., an impairment(s) that interferes very seriously with the individual’s ability to independently initiate, sustain, or complete activities.”³⁶ To ambulate effectively, Ms. C must be able to sustain a reasonable walking pace over a sufficient distance to be able to carry out activities of daily living and must be able to travel without companion assistance to a place of employment.³⁷ “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.”³⁸

The medical records reference Ms. C use of a walker and wheelchair, but some of the evidence is contradictory.³⁹ In February 2014, a physician who did a complete work up of Ms. C’ notes that she has an abnormal stance and gait and uses a walker.⁴⁰ A few weeks earlier, a

³⁵ Ex. 25-25.14; 20 C.F.R. 404, subpart P, appendix 1 at § 1.00B(2)(a).

³⁶ 20 C.F.R. 404, subpart P, appendix 1, § 1.00B(2)(b).

³⁷ 20 C.F.R. 404, subpart P, appendix 1, § 1.00B(2)(b).

³⁸ 20 C.F.R. 404, subpart P, appendix 1, § 1.00B(2)(b).

³⁹ The medical records reviewed by Ms. Lang reference use of a walker or wheelchair, but do not contain information identifying a provider prescribing or supplying Ms. C with either. Ms. C answered credibly that she received her walker and wheelchair from No Name Independent Living and that her walker and wheelchair were prescribed by No Name Hospital.

⁴⁰ Ex. 3.153.

different physician reported that, in his opinion, Ms. C did not need a walker or wheelchair.⁴¹ On April 18, 2014, her provider recommended a walker.⁴² While Ms. C' records raise some concerns for malingering,⁴³ her medical records overall and testimony support her need for a walker. Ms. C' breathing difficulties also prevent her from effectively ambulating.

Ms. C, per Ms. Lang's hearing testimony and the medical records, is very close to equaling a listing under Appendix 1's respiratory listing for her COPD or asthma.⁴⁴ According to Ms. Lang, the difficulty with Ms. C' case is that many of the medical records relate to inebriation, which can't be considered for purposes of Interim Assistance. Because the records are so closely tied with Ms. C' alcoholism, treatments administered for non-alcohol related impairments, such as breathing and back and neck pain, are obscured in the records. The evidence shows that Ms. C has multiple asthma attacks and her spirometry⁴⁵ result is close to equaling a listing, but falls short under a straight respiratory analysis.

Reviewing Ms. C' medical records together with her credible testimony support a finding that she cannot ambulate effectively, the basic requirement for a disability finding under musculoskeletal. Furthermore, consideration of the effects of Ms. C' impairments on her activities of daily living and ability to do any work, as required by 7 AAC 40.180(c)(3), demonstrate that she meets or equals a listing and would likely be found disabled by the Social Security Administration.

C. The effect of Ms. C' impairments on her activities of daily living support a finding that she meets or equals a listing (7 AAC 40.180(c)(3)).

Ms. C' and Mr. B' testimony established that her activities of daily living are severely affected by her conditions. Ms. C cannot toilet or bathe without assistance. Mr. B' described his level of assistance with toileting as follows: every time she has go to toilet he helps her get up, he brings her to the toilet and turns her around, she hangs onto his arms because of her back pain

⁴¹ Ex. 3.73 – 74.

⁴² Ex. 269.

⁴³ Ex. 3.50.

⁴⁴ Ex. 33.18-19; 20 C.F.R. 404, subpart P, appendix 1 at § 3.03B reads: "Attacks (as defined in 3.00C), in spite of prescribed treatment and requiring physician intervention, occurring at least once every 2 months or at least six times a year. Each in-patient hospitalization for longer than 24 hours for control of asthma counts as two attacks, and an evaluation period of at least 12 consecutive months must be used to determine the frequency of attacks." Ms. Lang stated that the evidence shows that Ms. C received treatment for asthma attacks 4 times in 2012 and 4 times in 2013, some of which were overnight, which could count as two visits. Many of Ms. C ER visits for intoxication also result in intervention because of breathing difficulties.

⁴⁵ Ex. A1-A7, Lang testimony.

and he helps her with “tp.” Ms. C cannot, even with her walker, walk more than a few feet without stopping and she must lie down throughout the day. During the hearing she had multiple coughing spells and her difficulty breathing was audible. She has asthma attacks in spite of prescribed treatment. She does not ambulate effectively.⁴⁶ She does not cook for herself, do laundry, or perform household chores.⁴⁷ She is, however, able to feed herself and can ambulate when someone pushes her wheelchair.⁴⁸ Ms. C is also able to manage her own funds.⁴⁹

Ms. C’ functional impairments are such that she cannot, without assistance, carry out many activities of daily living.

D. The effect of Ms. C’ impairments on her ability to perform any other work, including sedentary work, support a finding that she meets or equals a listing (7 AAC 40.180(c)(4)).

The Division does not look take a hard look at residual functional capacity and ability to do other forms of work, including sedentary work, when determining Interim Assistance applications.⁵⁰ Ms. C has not worked full time in 27 years. Ms. C is not well educated. She obtained her GED decades ago and has had no education or job-training since. She has no marketable job skills and had to quit her last job scraping sea cucumbers because of breathing difficulties.

The evidence in the record suggests it is very unlikely that Ms. C could perform even sedentary work. Ms. C must lie down regularly and cannot toilet herself. She has regular coughing fits and shortness of breath, even with the use of her prescribed medicines. Her mental health records contain evidence of anti-social behavior.⁵¹ These circumstances combined would make it very difficult for her to successfully secure employment.

While there may be a time in the future when Ms. C is able to perform work, she is presently unable to do so and nothing in the record indicates her impairments are likely to improve any time soon.

⁴⁶ 20 C.F.R. 404, subpart P, appendix P, at § 1.00B.1.(a)(2).

⁴⁷ C testimony.

⁴⁸ C testimony.

⁴⁹ C testimony.

⁵⁰ Lang testimony. The full vocational and educational analysis done by SSA is not done by the Division, which only completes steps 1-3 of the 5 step SSA process.

⁵¹ Examples include being unable to return to No Name shelter and screaming at treating physicians.

E. Ms. C' history of alcoholism does not preclude a finding that she would likely be found disabled by the Social Security Administration.

Ms. C' medical records document a long history of alcohol abuse. The medical records contain more information on Ms. C' inebriation than on her physical impairments. It is not clear from the multiple ER visit records that her providers thoroughly addressed her underlying symptoms or if they were more focused on getting Ms. C sober enough for release. Ms. Lang speculated that she may have initially been denied SSI benefits because of the amount of alcohol and withdrawal information in the medical records.

Addiction to drugs or alcohol is not a disability for purposes of the Division's determination.⁵² The Division must make a determination whether the addiction is a contributing factor to the disability.⁵³ At the time of hearing, Ms. C had been sober for several months and still showed a high level of impairment. Ms. C' alcoholism may have exacerbated her physical and mental problems, but it is not the basis of her disability. If all evidence of her alcoholism were removed from her medical records, she would still have severe back and neck pain, breathing difficulties, and psychological issues. She would still be unable to care for herself and unable to ambulate effectively. Ms. C' level of impairment meets or equals a listing necessary for a disability finding, regardless of her history of alcoholism.

IV. Conclusion

Ms. C has met her burden of proving that she is likely to meet the Social Security Administration's criteria for disability. She has severe functional limitations due to her impairments. She cannot ambulate effectively due to her back and neck pain and breathing difficulties. She cannot bathe or toilet herself. While the medical evidence shows Ms. C may exaggerate symptoms or malingering, it does not contradict the findings that Ms. C has significant impairments and would likely be found disabled by Social Security.

⁵² 7 AAC 40.200(a). Under the Social Security Act, an individual cannot be considered disabled for SSI benefits if alcoholism would be a contributing factor material to the disability determination. *See* http://ssa.gov/OP_Home/rulings/di/01/SSR2013-02-di-01.html If Ms. C limitations would still meet the definition of disability absent her alcoholism, her alcoholism would not be considered a material contributing factor. *See* http://ssa.gov/OP_Home/rulings/di/01/SSR2013-02-di-01.html; 20 C.F.R. 404, subpart P, §1535. Ms. C limitation, absent her alcoholism, would still meet the definition of disability.

⁵³ 7 AAC 40.200(b).

Accordingly, Ms. C is eligible for Interim Assistance, and the Division's decision denying her Interim Assistance is reversed.

DATED this 25th of August, 2014.

Signed
Bride Seifert
Administrative Law Judge

Adoption

Under a delegation from the Commissioner of Health and Social Services, I adopt this Decision as the final administrative determination in this matter, under the authority of AS 44.64.060(e)(1).

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

DATED this 11th day of September, 2014.

By: Signed
Signature
Bride A. Seifert
Name
Administrative Law Judge
Title

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