

**STATE OF WASHINGTON, DEPARTMENT OF SOCIAL AND HEALTH SERVICES**

**BOARD OF APPEALS**

In Re: ) Docket No. 10-2013-A-0220  
)  
[APPELLANT'S NAME] ) **REVIEW DECISION AND FINAL ORDER**  
)  
Appellant ) Aged, Blind, Disabled Assistance (ABDA)

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**I. NATURE OF ACTION**

1. The Department of Social and Health Services (Department) terminated the Appellant's benefits under the Aged, Blind, and Disabled Assistance Program (ABDA). The Department based its termination of ABDA benefits on the Social Security Administration's (SSA) final denial of Appellant's application for federal benefits. The Appellant requested an administrative hearing to challenge the Department's termination of ABDA benefits. Administrative Law Judge Jason Poydras held an administrative hearing on November 26, 2013, and mailed an *Initial Order* on February 5, 2014. In this order, the Administrative Law Judge (ALJ) reversed the Department's termination of the Appellant's benefits under the ABDA program.

2. The Department filed a petition for review of the *Initial Decision* with the Department's Board of Appeals (BOA) on February 14, 2014. The Department argues that the Appellant has not shown that his condition has worsened since the SSA denial. The Appellant submitted a response to the Department's petition for review with the BOA on February 25, 2014, asserting that the *Initial Order* should be affirmed.

**II. FINDINGS OF FACT**

1. On October 18, 2010, the Appellant applied for Supplement Security Income (SSI).<sup>1</sup> On January 12, 2011, the Appellant's SSI application was denied.<sup>2</sup> On

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<sup>1</sup> Exhibit 21.

<sup>2</sup> *Id.*

February 15, 2011, the Appellant filed a request for reconsideration, and on June 10, 2011, his request for reconsideration was denied.<sup>3</sup> On July 6, 2011, the Appellant requested an administrative hearing with a Federal Administrative Law Judge to contest the denial of his application for SSI.<sup>4</sup> On May 22, 2012, a Federal Administrative Law Judge denied the Appellant's SSI claim.<sup>5</sup> On June 27, 2012, the Appellant filed an appeal with the Social Security Administration's (SSA) Appeals Council.<sup>6</sup>

2. Exhibit A contains a list of exhibits considered by the Federal Administrative Law Judge.<sup>7</sup> The medical records admitted into evidence during the Appellant's November 26, 2013, administrative hearing that were also considered by the Federal Administrative Law Judge were the psychological/psychiatric evaluations from October 20, 2009, October 12, 2010, and August 9, 2011.<sup>8</sup>

3. On October 20, 2009, the Department received a Psychological/Psychiatric Evaluation completed by [DOCTOR 1], Psy.D.<sup>9</sup> [DOCTOR 1] conducted a mental status exam (MSE).<sup>10</sup> [DOCTOR 1] additionally assessed the Appellant using the Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition – Text Revised (DSM IV-TR).<sup>11</sup> Depression NOS (not otherwise specified); Anxiety Disorder NOS; and Polysubstance Dependence, in early remission, onset in adulthood; were listed as Axis I diagnosis for the Appellant.<sup>12</sup> Rule out Personality Disorder NOS with narcissistic features, onset in adolescence was listed as an

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<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> Exhibit A, p.p. 17-20.

<sup>8</sup> It should be noted that the Federal Administrative Law Judge additionally considered the Appellant's [FACILITY 1] outpatient records, which are contained in Exhibit 8.

<sup>9</sup> Exhibit 4.

<sup>10</sup> Exhibit 4, page 6.

<sup>11</sup> Exhibit 4, page 3.

<sup>12</sup> *Id.*

Axis II diagnosis for the Appellant.<sup>13</sup> A Global Assessment of Functioning (GAF) score of 45 was also recorded based on the Appellant’s serious impairment in social and occupation functioning; the Appellant’s presentation in the session; psychometric tests administered during the examination; the Appellant’s report of history; and the records reviewed.<sup>14</sup>

4. [DOCTOR 1] additionally assessed the degree in which the Appellant’s impairments limit the Appellant’s ability to perform on a normal day-to-day work basis.<sup>15</sup>

[DOCTOR 1]’s ratings of the Appellant’s ability to perform basic work activities are located on Exhibit 4, page 4, and they are also reflected in the following table:

Cognitive Functions	None	Mild	Moderate	Marked	Severe
a. Ability to understand, remember, and follow simple (one or two step) instructions	X				
b. Ability to understand, remember, and follow complex (more than two step) instructions		X			
c. Ability to learn new task			X		
d. Ability to exercise judgment and make decisions			X		
e. Ability to perform routine tasks			X		
Social Functions	None	Mild	Moderate	Marked	Severe
a. Ability to relate appropriately to co-workers and supervisors			X		
b. Ability to interact appropriately in public contacts			X		
c. Ability to respond appropriately to and tolerate the pressures and expectations of a normal work setting				X	
d. Ability to care for self, including personal hygiene and appearance		X			
e. Ability to maintain appropriate behavior in a work setting			X		

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> Exhibit 4, p. 4.

5. The October 20, 2009, evaluation further indicated that the duration of the Appellant's impairments would last six months, and that mental health intervention likely would restore or substantially improve his ability to work for pay in a regular and predictable manner.<sup>16</sup>

6. On October 12, 2010, the Department received a Psychological/Psychiatric Evaluation completed by [DOCTOR 2], MD, FAPA.<sup>17</sup> [DOCTOR 2] conducted a mental status exam (MSE). [DOCTOR 2] additionally assessed the Appellant using the DSM IV-TR.<sup>18</sup> Depression NOS and PSA (Polysubstance Abuse): reports sustained remission were listed as Axis I diagnosis for the Appellant. Personality Disorder NOS with narcissistic features was listed as an Axis II diagnosis for the Appellant. A Global Assessment of Functioning (GAF) score of 48 was also recorded based on the Appellant's serious impairment in several areas of functioning.<sup>19</sup>

7. [DOCTOR 2] additionally assessed the degree in which the Appellant's impairments limit his ability to perform on a normal day-to-day work basis.<sup>20</sup> [DOCTOR 2]'s ratings of the Appellant's ability to perform basic work activities are located on Exhibit 5, page 4, and they are also reflected in the following table:

<b>Cognitive Factors</b>	<b>None</b>	<b>Mild</b>	<b>Moderate</b>	<b>Marked</b>	<b>Severe</b>
a. Ability to understand, remember, and follow simple (one or two step) instructions	X				
b. Ability to understand, remember, and follow complex (more than two step) instructions	X				

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<sup>16</sup> Exhibit 4, p. 5.

<sup>17</sup> Exhibit 5.

<sup>18</sup> Exhibit 5, p. 3.

<sup>19</sup> *Id.*

<sup>20</sup> Exhibit 5, p. 4 (the pages of Exhibit 5 start with page 2, so the *Initial Order* misidentifies the page number by one in this cite).

<b>Cognitive Factors</b>	<b>None</b>	<b>Mild</b>	<b>Moderate</b>	<b>Marked</b>	<b>Severe</b>
c. Ability to learn new task	X				
d. Ability to exercise judgment and make decisions	X				
e. Ability to perform routine tasks	X				
<b>Social Factors</b>	<b>None</b>	<b>Mild</b>	<b>Moderate</b>	<b>Marked</b>	<b>Severe</b>
a. Ability to relate appropriately to co-workers and supervisors					X
b. Ability to interact appropriately in public contacts			X		
c. Ability to respond appropriately to and tolerate the pressures and expectations of a normal work setting					X
d. Ability to care for self, including personal hygiene and appearance			X		
e. Ability to maintain appropriate behavior in a work setting					X

8. The October 12, 2010, evaluation further indicated that the duration for the Appellant's impairments was six months to one year.<sup>21</sup>

9. On August 22, 2011, the Department received a Psychological/Psychiatric Evaluation completed by [DOCTOR 1], Psy.D.<sup>22</sup> [DOCTOR 1] conducted a mental status exam (MSE). [DOCTOR 1] additionally assessed the Appellant using the Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition – Text Revised (DSM IV-TR).<sup>23</sup> Depression NOS; Anxiety Disorder NOS; and Polysubstance Dependence, in early remission, were listed as Axis I diagnosis for the Appellant. Personality Disorder NOS was listed as an Axis II diagnosis for the

<sup>21</sup> Exhibit 5, page 5.

<sup>22</sup> Exhibit 6.

<sup>23</sup> Exhibit 6, page 2.

Appellant. A Global Assessment of Functioning (GAF) score of 45 was also recorded based on the Appellant's presentation in the session; the Appellant's report of history; the records reviewed; and the Appellant's characterization of current living conditions.<sup>24</sup>

10. [DOCTOR 1] additionally assessed how the Appellant's impairments affect his ability to perform basic work activities over a normal workday and workweek on an ongoing, appropriate, and independent basis.<sup>25</sup> [DOCTOR 1]'s ratings of the Appellant's ability to perform basic work activities are located on Exhibit 6, page 3, and they are also reflected in the following table:

<b>Cognitive and social factors</b>	<b>None</b>	<b>Mild</b>	<b>Moderate</b>	<b>Marked</b>	<b>Severe</b>
a. Ability to understand, remember, and persist in tasks following simple instructions		x			
b. Understand, remember, and persists in tasks by following complex instructions of three or more steps				X	
c. Ability to learn new task			X		
d. Ability to perform routine tasks without undue supervision			X		
e. Ability to be aware of normal hazards and take appropriate precautions			X		
f. Ability to communicate and perform effectively in a work setting with public contact				X	
g. Ability to communicate and perform effectively in a work setting with <u>limited</u> public contact			X		

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<sup>24</sup> *Id.*

<sup>25</sup> Exhibit 6, page 3.

<b>Cognitive and social factors</b>	<b>None</b>	<b>Mild</b>	<b>Moderate</b>	<b>Marked</b>	<b>Severe</b>
h. Maintain appropriate behavior in a work setting				X	

11. The August 9, 2011, evaluation further indicated that the duration of the Appellant's impairments was one year, and that mental health treatment would improve the Appellant's overall quality of life and mitigate the risk of his functioning deteriorating even further.<sup>26</sup>

12. On August 17, 2012, the Department issued a letter that approved the Appellant for ABDA benefits, effective November 1, 2011.<sup>27</sup>

13. On September 12, 2013, the Department learned that the Appellant's application for SSI was denied at the post appeal level by the Appeals Council on July 10, 2013.<sup>28</sup> In addition to the Federal Administrative Law Judge's decision, the Appeals Council reviewed all of the information provided through May 22, 2012.<sup>29</sup> The July 18, 2012,<sup>30</sup> psychological evaluation from [DOCTOR 1] was also reviewed; however, the Appeal Council did not consider it in its decision.<sup>31</sup>

14. On September 18, 2013, the Department issued a letter that approved the Appellant for Medical Care Services (MCS) benefits, effective October 1, 2013.<sup>32</sup> The Appellant's ABDA benefits were terminated because the SSA determined that he does not meet federal SSI disability requirements.<sup>33</sup>

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<sup>26</sup> Exhibit 6, page 4.

<sup>27</sup> Exhibit 16, page 1.

<sup>28</sup> Exhibit 3, page 8, 09/12/2013 entry.

<sup>29</sup> Exhibit B, page 2.

<sup>30</sup> A review of the totality of the evidence supports the finding that the July 18, 2012, evaluation referenced by the Appeals Council is the same evaluation that has been admitted as Exhibit 11.

<sup>31</sup> Exhibit B, page 2.

<sup>32</sup> Exhibit 25.

<sup>33</sup> *Id.*

15. The September 18, 2013, letter additionally indicated that the Appellant could request an administrative hearing if he disagreed with the Department's decision.<sup>34</sup>

16. On September 30, 2013, the Appellant requested an administrative hearing.<sup>35</sup> An administrative hearing was subsequently held on November 26, 2013.

17. The Appellant was born on [DATE], and is [AGE] years old.<sup>36</sup> Although the Appellant did not finish high school, he obtained a GED, and he also attended several years of college for [TRAINING].<sup>37</sup> The last time the Appellant attended school was in 2008, and he hopes to return when his condition improves.<sup>38</sup>

18. The last time the Appellant held a steady job was also in 2008.<sup>39</sup> The Appellant worked with a fishing company; however, he sustained a back injury in 2008, and he believes he became an "undesirable" employee after his back injury.<sup>40</sup> The Appellant worked as a fish processor, a fish packager, and a deck hand when he worked with the fishing company.<sup>41</sup> Since 2008, the Appellant has worked at times performing day labor jobs; however, it has been difficult to do so because the jobs are based on physical work.<sup>42</sup> In April 2013, the Appellant reinjured his back when he tripped over a footstool.<sup>43</sup> A subsequent MRI revealed that he had multiple cracked vertebrae.<sup>44</sup>

19. In addition to his back pain, the Appellant has been participating in mental health treatment since 2008.<sup>45</sup> He received mental health treatment at the [FACILITY 1] once a

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<sup>34</sup> Exhibit 25, page 3.

<sup>35</sup> Exhibit 1. It should be noted that the Appellant was approved continued ABDA benefits while the results of his administrative hearing were pending. See Exhibit 27, page 1.

<sup>36</sup> Exhibit 1.

<sup>37</sup> Testimony of the Appellant.

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> Exhibit A, page 11.

<sup>42</sup> Testimony of the Appellant.

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*



week for three years, and for the past two years he has been attending [FACILITY 2] once a week.<sup>46</sup> The Appellant indicated that his mental health conditions make him angry and they also make him want to be alone.<sup>47</sup> The Appellant has been addressing issues related to childhood trauma since he began attending treatment with [FACILITY 2].<sup>48</sup> The Appellant grew up without a [PARENT] and he held a lot of anger due to unanswered questions about his [PARENT].<sup>49</sup>

20. The Appellant asserts that his condition has deteriorated and that he has a new potentially disabling condition that the SSA did not consider when it denied his SSI application. The Appellant submitted copies of psychological/psychiatric evaluations and physical evaluations that were not considered by SSA when it reviewed his SSI application to support this position.<sup>50</sup> The Appellant submitted psychological/psychiatric evaluations from July 20, 2012, and October 3, 2013. The Appellant additionally submitted physical evaluations from November 1, 2011, April 17, 2012, and October 16, 2013.<sup>51</sup>

21. Contrary to the Appellant's position, the Department asserted that the Appellant's conditions have not worsened.<sup>52</sup>

22. On July 20, 2012, the Department received a Psychological/Psychiatric Evaluation completed by [DOCTOR 1], Psy.D.<sup>53</sup> [DOCTOR 1] conducted a mental status exam (MSE).<sup>54</sup> [DOCTOR 1] additionally assessed the Appellant using the DSM IV-TR.<sup>55</sup> Major

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<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> According to the list of exhibits attached to the May 22, 2012, Federal Administrative Law Judge's decision, no medical records obtained after November 8, 2011, were considered by the SSA when it reviewed the Appellant's SSI application. See Exhibit A.

<sup>51</sup> It should also be noted that the psychological/psychiatric evaluations and physical evaluations were submitted to the Department prior to the November 26, 2013, administrative hearing.

<sup>52</sup> Testimony of John Emmerson.

<sup>53</sup> Exhibit 11.

<sup>54</sup> Exhibit 11, page 4.

<sup>55</sup> Exhibit 11, page 2.

Depressive Disorder, chronic, recurrent, severe w/ psychotic features; Post Traumatic Stress Disorder (PTSD), onset in childhood with exacerbation in adulthood; and Polysubstance Dependence, in full sustained remission, were listed as Axis I diagnosis for the Appellant.<sup>56</sup> Personality Disorder NOS with paranoid and avoidant features was listed as an Axis II diagnosis for the Appellant.<sup>57</sup> A Global Assessment of Functioning (GAF) score of 40 was also recorded based on the Appellant's overall presentation in the clinical interview; the Appellant's reported symptoms; the records reviewed; and any testing performed during the course of the examination.<sup>58</sup>

23. [DOCTOR 1] additionally assessed how the Appellant's impairments affect his ability to perform basic work activities over a normal workday and workweek on an ongoing, appropriate, and independent basis.<sup>59</sup> [DOCTOR 1]'s ratings of the Appellant's ability to perform basic work activities are located on Exhibit 11, page 3, and they are also reflected in the following table:

<b>Basic Work Activity</b>	<b>None or Mild</b>	<b>Moderate</b>	<b>Marked</b>	<b>Severe</b>	<b>Severity Indeterminate</b>
a. Understand, remember, and persist in tasks by following very short and simple instructions	X				
b. Understand, remember, and persists in tasks by following detailed instructions		X			
c. Perform activities within a schedule, maintain regular attendance, and be punctual with customary tolerances without special supervision				X	

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> Exhibit 11, page 3.

<sup>59</sup> *Id.*

Basic Work Activity	None or Mild	Moderate	Marked	Severe	Severity Indeterminate
d. Learn new tasks		X			
e. Perform routine tasks without special supervision		X			
f. Adapt to changes in a routine work setting			X		
g. Make simple work-related decisions		X			
h. Be aware of normal hazards and take appropriate precautions		X			
i. Ask simple questions or request assistance		X			
j. Communicate and perform effectively in a work setting				X	
k. Complete a normal work day and work week without interruptions from psychologically based symptoms				X	
l. Maintain appropriate behavior in a work setting				X	
m. Set realistic goals and plan independently		X			

24. The July 18, 2012 evaluation further indicated that the duration of the Appellant's impairments was 24 months with available treatment, and that the impairments are not the result of alcohol or drug use within the past 60 days.<sup>60</sup> Recommendations were additionally made for mental health treatment and case management at a community mental health center.<sup>61</sup>

25. On October 3, 2013, the Department received a Psychological/Psychiatric Evaluation completed by [DOCTOR 3], Psy.D.<sup>62</sup> [DOCTOR 3] assessed the Appellant using the DSM IV-TR.<sup>63</sup> Major Depressive Disorder, chronic, severe w/ psychotic features; Post

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<sup>60</sup> Exhibit 11, page 4.

<sup>61</sup> *Id.*

<sup>62</sup> Exhibit 28.

<sup>63</sup> Exhibit 28, page 2.

Traumatic Stress Disorder (PTSD), Chronic Severe (by hx); and Polysubstance Dependence, in full sustained remission, r/o (rule out) somatization disorder, were listed as Axis I diagnosis for the Appellant in the October 3, 2013, evaluation.<sup>64</sup> Personality Disorder NOS (paranoid and avoidant features) was listed as an Axis II diagnosis for the Appellant in the October 3, 2013, evaluation.<sup>65</sup> A Global Assessment of Functioning (GAF) score of 40 was also recorded due to the Appellant's serious impairment in social and occupational functioning.<sup>66</sup> See Exhibit 28, page 3. The GAF score was based on the Appellant's presentation; administration of a Mental Status Examination (MSE); the Appellant's self-report; and the records reviewed.<sup>67</sup>

26. [DOCTOR 3] additionally assessed how the Appellant's impairments affect his ability to perform basic work activities over a normal workday and workweek on an ongoing, appropriate, and independent basis.<sup>68</sup> [DOCTOR 3]'s ratings of the Appellant's ability to perform basic work activities are located on Exhibit 28, page 3, and they are also reflected in the following table:

<b>Basic Work Activity</b>	<b>None or Mild</b>	<b>Moderate</b>	<b>Marked</b>	<b>Severe</b>	<b>Severity Indeterminate</b>
a. Understand, remember, and persist in tasks by following very short and simple instructions		X			
b. Understand, remember, and persists in tasks by following detailed instructions			X		
c. Perform activities within a schedule, maintain regular attendance, and be punctual with customary tolerances without special supervision				X	
d. Learn new tasks		X			
e. Perform routine tasks without special supervision		X			

<sup>64</sup> *Id.*

<sup>65</sup> Exhibit 28, page 3.

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

Basic Work Activity	None or Mild	Moderate	Marked	Severe	Severity Indeterminate
f. Adapt to changes in a routine work setting			X		
g. Make simple work-related decisions		X			
h. Be aware of normal hazards and take appropriate precautions		X			
i. Ask simple questions or request assistance		X			
j. Communicate and perform effectively in a work setting			X		
k. Maintain appropriate behavior in a work setting				X	
l. Complete a normal work day and work week without interruptions from psychologically based symptoms				X	
m. Set realistic goals and plan independently				X	

27. The October 3, 2013, evaluation further indicated that the duration of the Appellant's impairments was 24 months with available treatment.<sup>69</sup> Recommendations were additionally made for medical coverage to provide weekly therapy to increase skills and manage the Appellant's current level of symptoms.<sup>70</sup>

28. On October 9, 2013, the Department completed a disability determination based on the October 3, 2013, evaluation.<sup>71</sup> The October 9, 2013, disability determination indicated that the Appellant meets the SSI listing of impairment criteria for mental disorders and that his disability should be approved.<sup>72</sup> The Appellant was subsequently approved for ABDA benefits through September 30, 2015.<sup>73</sup>

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<sup>69</sup> Exhibit 28, page 4.

<sup>70</sup> *Id.*

<sup>71</sup> Exhibit 29.

<sup>72</sup> Exhibit 29, page 4.

<sup>73</sup> Exhibit 30.

29. On November 8, 2011, the Department received a Physical Functional Evaluation that addressed the Appellant's complaints of lower back pain.<sup>74</sup> The Physical Functional Evaluation was based on an examination conducted on August 10, 2011.<sup>75</sup> A physician's assistant, [PHYSICIAN'S ASSISTANT 1], administered the examination, and his supervising physician signed off on the examination on November 8, 2011.<sup>76</sup> According to the Physical Functional Evaluation, the Appellant's work function was impaired by a medically determinable physical condition that was expected to last three months.<sup>77</sup> The Physical Functional Evaluation additionally indicated that the Appellant can sit for most of the day, and walk or stand for brief periods.<sup>78</sup> It further indicated that the Appellant can lift a maximum of 50 pounds, and that he could frequently lift or carry 10 pounds.<sup>79</sup>

30. On April 17, 2012, the Department received an additional Physical Functional Evaluation that addressed the Appellant's complaints of lower back pain.<sup>80</sup> This Physical Functional Evaluation was based on an examination conducted on April 17, 2012.<sup>81</sup> Physician's assistant, [PHYSICIAN'S ASSISTANT 1], administered the examination, and his supervising physician signed off on the examination on the same day.<sup>82</sup> According to the Physical Functional Evaluation, the Appellant's work function was impaired by a medically determinable physical condition that was expected last four months.<sup>83</sup> The Physical Functional Evaluation additionally indicated that the Appellant can sit for most of the day, and walk or stand for brief

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<sup>74</sup> Exhibit 7.

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> Exhibit 10.

<sup>81</sup> Exhibit 10, page 2.

<sup>82</sup> *Id.*

<sup>83</sup> Exhibit 10, page 1.

periods.<sup>84</sup> It further indicated that the Appellant can lift a maximum of 50 pounds, and that he could frequently lift or carry 10 pounds.<sup>85</sup>

31. On October 16, 2013, the Department received the most recent Physical Functional Evaluation that addressed the Appellant's complaints of lower back pain.<sup>86</sup> It confirmed that the Appellant suffered a ground level fall in April 2013, and that he fractured some of his lumbar vertebra and suffered a 12<sup>th</sup> rib fracture.<sup>87</sup> The October 16, 2013 evaluation assigned a severity rating of three to the Appellant's lower back pain.<sup>88</sup> The Appellant's lower back pain was assessed as "moderate", which was defined as a significant interference with the ability to perform one or more basic work-related activities.<sup>89</sup> The examining professional further indicated that the Appellant was capable of "light work," which was defined as the ability to lift 20 pounds maximum; frequently lift or carry up to 10 pounds; walk or stand six out of eight hours per day; and sit and use pushing or pulling arm or leg movements most of the day.<sup>90</sup> The examining professional estimated that the Appellant's current physical limitations for work activities would persist for six months with available medical treatment.<sup>91</sup>

### III. CONCLUSIONS OF LAW

1. The petition for review was timely filed and is otherwise proper.<sup>92</sup> Jurisdiction exists to review the Initial Order and to enter the final agency order.<sup>93</sup>

2. ALJs and Review Judges must first apply the regulations adopted in the Washington Administrative Code (WAC). If no WAC provision applies, the ALJ or Review

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<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> Exhibit 32.

<sup>87</sup> Exhibit 32, page 5.

<sup>88</sup> Exhibit 32, page 2.

<sup>89</sup> *Id.*

<sup>90</sup> Exhibit 32, page 3.

<sup>91</sup> *Id.*

<sup>92</sup> WAC 388-02-0560 through -0585.

<sup>93</sup> WAC 388-02-0215, -0530(2), and -0570.

Judge must decide the issue according to the best legal authority and reasoning available, including federal and Washington State constitutions, statutes, regulations, and court decisions.<sup>94</sup>

3. In an adjudicative proceeding involving eligibility for ABDA benefits, the undersigned Review Judge has the same decision-making authority as the ALJ to decide and enter the *Final Order*, in the same way as if the undersigned had presided over the hearing.<sup>95</sup> This includes the authority to make credibility determinations and to weigh the evidence. Because the ALJ is directed to decide the issues *de novo* (as new), the undersigned has also decided the issues *de novo*. In reviewing the Findings of Fact, the undersigned has given due regard to the ALJ's opportunity to observe the witnesses if applicable, but has otherwise independently decided the case.<sup>96</sup> The undersigned reviewing officer does not have the same relationship to the presiding officer as an Appellate Court Judge has to a Trial Court Judge; and the case law addressing that judicial relationship does not apply in the administrative hearings forum.

4. It may help to explain briefly at the outset the unique characteristics and specific limitations of the administrative hearing process. An administrative hearing is held under the auspices of the executive branch of government and neither the ALJ nor the Review Judge enjoys the broad equitable authority of a Superior Court Judge within the judicial branch of government. It is well settled that administrative agencies, such as the OAH and the BOA, are creatures of statute, without inherent or common law powers, and, consequently, they may exercise only those powers expressly granted in enabling statutes or necessarily implied therein.<sup>97</sup> It is also

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<sup>94</sup> WAC 388-02-0220.

<sup>95</sup> WAC 388-02-0217(3).

<sup>96</sup> WAC 388-02-0600, effective March 3, 2011.

<sup>97</sup> *Skagit Surveyors & Eng'rs, L.L.C. v. Friends of Skagit County*, 135 Wn.2d 542, 558 (1998), and *Taylor v. Morris*, 88 Wn.2d 586, 588 (1977). See also WAC 388-02-0216 (stating that "[t]he authority of the ALJ and the review judge is limited to those powers conferred (granted) by statute or rule... [t]he ALJ and the review judge do not have any inherent or common law powers").



well settled that an ALJ's or a Review Judge's authority to render a decision in an administrative hearing is limited to that which is specifically provided for in the authorizing statute(s) or Washington Administrative Code (WAC) provision(s).<sup>98</sup> "The power of an administrative tribunal to fashion a remedy is strictly limited by statute."<sup>99</sup> Again, the only discretionary authority afforded to ALJs and Review Judges is that which is set forth, either explicitly or implicitly, in statute or agency regulation.<sup>100</sup> As a result, the ALJ and the undersigned have extremely limited authority to grant equitable relief in this administrative forum.<sup>101</sup> Equity within the administrative hearing process generally comes from equal application of the law to the supported facts for all who appear before the tribunal. ALJs and Review Judges do not have the same opportunity as Superior Court Judges to fashion an equitable remedy.

5. The ALJ had jurisdiction to hear and determine the issue of whether the Department had properly terminated the Appellant's ABDA cash benefits.<sup>102</sup>

#### *Applicable Law*

6. To be eligible for ABDA benefits, an applicant must be "disabled" as defined in relevant statutes and regulations. The relevant statute provides:

**RCW 74.62.030**  
**Assistance programs – Eligibility criteria**

(1)(a) Effective November 1, 2011, the aged, blind, or disabled assistance program shall provide financial grants to persons in need who:

...

(ii) Meet the eligibility requirements of subsection (3) of this section; and

(iii) Are aged, blind, or disabled. For purposes of determining eligibility for assistance

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<sup>98</sup> *Id.*

<sup>99</sup> *Skagit Surveyors*, 135 Wn.2d at 558.

<sup>100</sup> WAC 388-02-0216. *But see* WAC 388-02-0220(2) (stating that if there is no WAC provision that addresses a specific issue then the ALJ and the Review Judge must refer to "...the best legal authority and reasoning available").

<sup>101</sup> WAC 388-02-0495 (setting forth the only explicit equitable remedy of which the undersigned is aware in administrative hearings applying the Department's WAC provisions).

<sup>102</sup> RCW 74.08.080, Chapter 34.12 RCW, WAC 388-472-0005, and Chapter 388-02 WAC.

for the aged, blind, or disabled assistance program, the following definitions apply:

...

(C) "Disabled" means likely to meet the federal supplemental security income disability standard. . . .

(b) The following persons are not eligible for the aged, blind, or disabled assistance program:

...

(ii) Persons for whom there has been a final determination of ineligibility for federal supplemental security income benefits.

7. Regulations relevant to this case provide:

**WAC 388-449-0200**

**Am I eligible for cash assistance for aged, blind, or disabled (ABD) while waiting for supplemental security income (SSI)?**

(1) You may receive ABD benefits while you are waiting to receive supplemental security income (SSI) benefits only when you:

(a) Have filed your SSI application with the Social Security Administration (SSA), follow through with SSA directions and requirements to process your application including keeping all interview and consultative examination appointments, and do not withdraw your application;

...

(d) Meet disability criteria listed in WAC [388-449-0001](#).

**WAC 388-449-0001**

**What are the disability requirements for the aged, blind, or disabled (ABD) program?**

...

(6) We determine you are not likely to meet SSI disability criteria if SSA denied your application for SSI or Social Security Disability Insurance (SSDI) based on disability in the last twelve months unless:

...

(c) You give us medical evidence of a potentially disabling condition that SSA did not consider or medical evidence confirming your condition has deteriorated.

**WAC 388-449-0150**

**When does my eligibility for aged, blind, or disabled (ABD) case benefits end?**

...  
(3) We stop your benefits after the final decision on your application for SSI/SSA benefits . . .

8. Under the cited regulations, the Department had the authority to terminate the Appellant's ABDA cash benefits once the Appellant's application for SSI/SSA benefits had been finally denied. However, under the same applicable regulations, the Appellant has the right to refute such a termination by one of two methods. The Appellant can provide the Department with medical evidence of a potentially disabling condition that the SSA had not considered in making the final SSI/SSA denial **or** the Appellant can provide the Department with medical evidence confirming his condition has deteriorated. The use of the disjunctive term "**or**" in the regulation allows the Appellant to defend against the termination in either one of the two methods cited in the rule. There is a question as to whether the ALJ needed to, or even had the authority, to complete a new sequential evaluation process (SEP) based on the more recent medical evidence of a *potentially* disabling condition not considered by the SSA. One may argue that since the Department had already approved the Appellant for ABDA cash, the issue in this case was simply whether the termination was correct in light of the submission of the new medical evidence, rather than an issue of re-determining eligibility under the SEP evaluation based on that new evidence. On the other hand, one could argue that to determine whether new medical evidence constitutes evidence of a *potentially* disabling condition, a new SEP analysis under that new medical evidence must be completed. However, such an interpretation requiring a re-assessment under the SEP leaves WAC 388-449-001(6)(c) somewhat meaningless as the Appellant can always reapply for ABDA benefits under new circumstances or conditions. In the petition for review, the Department did not specifically challenge the SEP analysis completed by the ALJ in the *Initial Order*, and this analysis supports the position that the Appellant has provided the Department with medical evidence of a *potentially* disabling

condition which was not considered by the SSA in its denial of benefits.

9. Notwithstanding this argument, the regulation allows the Appellant a separate method for refuting the Department's termination by providing medical evidence confirming his condition has deteriorated. There were five Psychological/Psychiatric Evaluations entered into the hearing record; Exhibits 4, 5, 6, 11, and 28. The hearing record supports the finding that the SSA only considered medical evidence entered through May 22, 2012, which would have only included the Psychological/Psychiatric Evaluations entered as Exhibits 4, 5, and 6, and would not have included the evaluations entered as Exhibits 11 and 28. The most recent Psychological/Psychiatric Evaluation completed on October 3, 2013, (Exhibit 28) reflects more "severe" (4) and "marked" (3) ratings on basic work activity than any of the evaluations considered by the SSA. This more recent evaluation has a lower GAF (40) than any of the evaluations considered by the SSA. And finally, the most recent evaluation has an impairment duration (24 months), double that of any of the evaluations considered by the SSA. The evidence in the hearing record supports both findings that the Appellant provided medical evidence of a potentially disabling condition that SSA did not consider in the last SSI denial and evidence that his condition has deteriorated since the time he was last approved for ABDA as well as from the time of the SSA denial. Under WAC 388-449-0001(6)(c), the Department was incorrect in terminating the Appellant's ABDA cash benefits, at least until such time there is another Department ABDA eligibility review or a SSA denial based on the most recent medical information. Nothing in this decision relieves the Appellant of the obligation to pursue his SSI application with the SSA, nor precludes the Department from reassessing ABDA eligibility under WAC 388-449-0001(2).

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#### IV. DECISION AND ORDER

Based on the conclusions entered above, the *Initial Order*, as amended and supplemented above, is **affirmed**. The Department incorrectly terminated the Appellant's cash benefits under the Aged, Blind, and Disabled Assistance program.

*Mailed on the 5<sup>th</sup> day of March, 2014.*

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JAMES CONANT  
Review Judge/Board of Appeals

Attached: Reconsideration/Judicial Review Information

Copies have been sent to: [APPELLANT'S NAME], Appellant  
Sara Robbins, Appellant's Representative  
Evonne Zook, Appellant's Representative  
John Emmerson, Department's Representative, MS: N47-01  
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